

Report on Supply Chain Compliance Volume 2, Number 23. December 12, 2019 US reliance on Section 232 tariffs threatens international trade system

By Sascha Matuszak

United States President Donald Trump tweeted in the early morning of December 2 that he would “restore the Tariffs on all Steel & Aluminum that is shipped into the U.S. from [Brazil and Argentina].”^[1] The tariffs he referred to are imposed through Section 232 of the Trade Expansion Act of 1962, which allows the president to impose sanctions following an investigation that finds that a certain product “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.”^[2]

Brazil and Argentina voluntarily agreed to lower quotas of steel and aluminum imports in 2018. It is not yet clear what drove the president’s tweet, but the threat of Section 232 tariffs has caused a stir around the world, as the U.S. makes use of the tool to skirt international trade obligations and norms in order to impose penalties on trading partners. Several members of the World Trade Organization (WTO) argue that the Trump administration’s reliance on Section 232 — and a broad definition of what constitutes national security — threatens to destabilize the international trading system.

The Trump administration’s trade policies have already disrupted global supply chains. Companies have been forced to:

- Reevaluate Harmonized Tariff Schedule codes of all their products.
- Determine Country of Origin for extensive lists of tariffed products.
- Reshore supply chains to avoid extra costs or maintain compliance with new trade policies.
- Reevaluate who their suppliers and vendors should be in order to minimize the impact of tariffs and duties.
- Keep track of a chaotic and fast-moving trade policy that is often dictated by tweets.

Section 232 and the WTO

The US tariffs on steel and aluminum are the focus of a dispute at the WTO that pits the European Union, India, Russia and China against the United States. The U.S. claims that the WTO has no right to judge whether Section 232 tariffs are truly in response to a national security matter, asserting instead that each nation has the right to define what does and does not constitute a threat to national security.^[3]

The other parties, however, claim that Article XXI of the General Agreement on Tariffs and Trade (the precursor to the WTO), grants the WTO discretion to judge whether a national security risk is really at hand. The WTO national security exception is also found in the General Agreement on Trade in Services (GATS) Article XIV bis, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) Article 73. GATT Article XXI states that:

Nothing in this Agreement shall be construed:

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
- (i) relating to fissionable materials or the materials from which they are derived;
- (ii) relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.^[4]

The U.S. has made use of Section 232 tariffs several times during the Trump administration, upsetting many decades of protocol between members of the WTO. The question of whether Article XXI is “self-judging” or not (i.e., whether a nation judges the merit of its national security claim, or whether the WTO has the right to review such claims) is at the heart of the dispute between the U.S. and the EU, Russia, India, Norway and China.

A gentlemen’s agreement

In a landmark decision involving a dispute between Russia and Ukraine, the WTO ruled in April that Article XXI is not self-judging and that the situation between Russia and Ukraine rose to the level of “war or other emergency in international relations.” The trade restrictions imposed by Russia were therefore deemed appropriate.^[5]

The ruling upheld long-standing protocol between WTO members that kept the use of the national security exception to a minimum and allowed for review of the conditions to determine if they met the requirements of Article XXI. The U.S. has long held the view that the WTO has no right to review a sovereign nation’s assertion that the import of a certain product threatens national security. That view was tempered by a corresponding position, held by the U.S. and many others, that abuse of the security exception was a real danger. According to discussions held in 1947, drafters of the original Draft Charter stated that, “We cannot make [the security exception] too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.”^[6]

Members also stated that “the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses of this kind.”^[7]

The result was a “gentlemen’s agreement” not to abuse the national security exception. That agreement has been upended by the Trump administration’s broad definition of what constitutes national security and willingness to wield Section 232 of the Trade Expansion Act as a club in international trade negotiations.

The dispute over steel and aluminum tariffs is currently under review by the WTO; a decision is not expected until late 2020.

Takeaways

1. The United States trade policy, specifically the use of the national security exception to impose tariffs on imports of certain goods, is disrupting the international trade system, causing disputes at the WTO, and undermining the authority of the WTO itself.^[8]
2. The dismantling of the traditional international trade system has widespread effects on supply chains and supply chain compliance. Companies could face more regulatory complexity, fractured markets, disrupted supply chains and rising costs.

¹ Donald J. Trump (@realDonaldTrump). 2019. "Brazil and Argentina have been presiding ..." Twitter, December 2, 2019, 2:59am. .

² Trade Expansion Act of 1962, Pub. Law 87-784 (October 11, 1962) (codified as amended at 19 U.S.C. § 1862) .

³ "United States – Certain Measures on Steel and Aluminum Products (DS556), U.S. Oral Opening Statement," *Office of the United States Trade Representative*, November 2, 2019, .

⁴ General Agreement on Tariffs and Trade, "GATT-AI-2012-Art21, Article XXI: Security Exceptions," *World Trade Organization*, .

⁵ William Alan Reinsch and Jack Caporal, "The WTO's First Ruling on National Security: What Does It Mean for the United States?" *Center for Strategic & International Studies*, April 5, 2019, .

⁶ World Trade Organization, "GATT-AI-2012-Art21, Article XXI: Security Exceptions."

⁷ World Trade Organization, "GATT-AI-2012-Art21, Article XXI: Security Exceptions."

⁸ Sascha Matuszak, "Trade tariffs make for uncertain future for role of US in World Trade Organization," *Report on Supply Chain Compliance*, vol. 1, no. 10 (August 24, 2018), .

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