wiley

ARTICLE

US Trading Partners Defy The Rules They Claim To Support

Law360
June 20, 2018

On March 8, 2018, President Donald Trump imposed tariffs of 25 percent on steel imports[1] and 10 percent on aluminum imports[2] pursuant to Section 232 of the Trade Expansion Act of 1962, which authorizes him to adjust imports in the interests of national security.[3] Over the next two months, the president granted temporary exemptions to various trading partners, including the European Union, Canada and Mexico, as possible alternative forms of relief were negotiated.[4]

Even as these negotiations were in progress, the EU took a confrontational approach asserting that it could unilaterally declare Trump's actions to be a safeguard, entitling them to immediate retaliation.[5] On May 31, 2018, the president signed two additional proclamations.[6] In both, he announced that the tariffs would apply to Canada, Mexico and the EU, and that Australia was exempt. With respect to steel, he announced that quotas would be provided to Argentina, Brazil and Korea. With respect to aluminum, he announced that the imports from Argentina would be subject to a quota.

Following the imposition of tariffs, the EU was quick to claim the U.S. measures were disguised "safeguards."[7] Ultimately, the Chinese agreed, and were first to challenge the Section 232 relief on that basis.[8] The EU and others claimed that the U.S. action to impose Section 232 relief on aluminum and steel imports for national security reasons would undermine the rules-based global trading order. Given their own previous statements, however, it is clear that the EU's and others' unilateral acts of retaliation are outside the rules, and represent the true threats to the global trading order.

Authors

Robert E. DeFrancesco, III
Partner
202.719.7473
rdefrancesco@wiley.law

Alan H. Price
Partner
202.719.3375
aprice@wiley.law

Practice Areas

International Trade

Only by unilaterally reinterpreting the U.S. government's Section 232 investigation and the subsequent relief can the EU and others attempt to justify their retaliation under the existing World Trade Organization rules.[10] This rationale is unsupported by the facts, and anathema to the very WTO rules they claim to champion.

In fact, in its third-party submission in the Russia-Ukraine dispute regarding "Traffic in Transit (DS 512)" before the WTO, in response to Russia's defense that the national security provision of Article XXI prevents any review by a dispute settlement panel, the EU states expressly that Article 23 of the Dispute Settlement Understanding, or DSU,

Prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to the dispute settlement in accordance with the DSU. ... In other words, a WTO Member, rather than the WTO dispute settlement bodies, would be deciding unilaterally the outcome of a dispute. This would run against the objectives of the DSU enshrined in Article 23 of the DSU.[11]

Notwithstanding the EU's statement that WTO members do not have the authority to unilaterally determine whether a particular member's measures are in violation of its WTO obligations, that is precisely what the EU, Canada and others have done in justifying their unilateral retaliation against the United States' Section 232 aluminum and steel relief. Apparently, the rules-based trading system that the EU and others champion is only supposed to apply to other countries and not them.

The EU knows it is not supposed to unilaterally determine whether the U.S. 232 relief is a violation of its obligations without review by a dispute settlement panel, yet that is precisely what the EU and others have done by moving straight to the retaliation. By immediately retaliating, they offer the U.S. government very little incentive for cooperating in the proceedings or attempting to comply with a panel determination.

When the U.S. enforced its rights against the EU in the aircraft dispute, it did not unilaterally find the EU subsidies to be a violation, and move straight to the retaliation, before there was even a determination by a dispute settlement panel.[12] Yet the EU's actions in this dispute suggest that that is precisely what the United States should have done to preserve its rights under the agreement rather than waiting for the dispute settlement process to take its course.

The Section 232 investigation was initiated by President Trump, the investigation was conducted, findings were made, relief recommendations were proposed and ultimately imports were adjusted under the statutory authority granted by the president to protect the national security of the United States. Article XXI of the General Agreement on Tariffs and Trade, or GATT, expressly allows members to suspend concessions for national security reasons.

The EU and others may not like the result, but there is a system in place — one they claim to champion — for

them to challenge that result. Instead, the EU and others have chosen to move straight to retaliation without any findings by a dispute settlement body. This action undermines the continued existence of the dispute settlement system that the EU and others claim is "a central element in providing security and predictability to the multilateral trading system."[13]

Only by unilaterally declaring Trump's action to have been a safeguard in disguise can the EU even attempt to justify that it is entitled to compensation (i.e., retaliation) under the WTO Safeguards Agreement. The EU has claimed that it can use the Safeguards Agreement to "retaliate" within 90 days against the United States.[14] But the steel and aluminum tariffs are not safeguards.

The U.S. ambassador to the WTO, Dennis Shea, has rejected this assertion.[15] The United States has taken these measures pursuant to the national security provision under the Trade Expansion Act of 1962. This is a wholly separate statute from that setting out the safeguards procedure. And, as the EU itself admitted in the Russian-Ukraine dispute, only a WTO dispute settlement panel has the authority to determine whether the Section 232 relief is a safeguard in disguise.

Nothing in the WTO agreement permits the EU to take any such action without a dispute settlement panel finding. Indeed, Article 11(1)(c) of the Safeguards Agreement itself states that it does not apply to actions taken under any other provision of the suite of WTO agreements. There is an express national security exemption under the WTO agreement. Therefore, according to the plain text of the Safeguards Agreement, the EU cannot take action thereunder.

The Safeguard Agreement itself precludes the EU from undertaking this course of action. Article 11.1(c) specifically states that the Safeguard Agreement does not apply to measures sought, taken or maintained pursuant to other GATT or WTO provisions. As noted above, the United States has made it clear that this action is not being taken pursuant to the Safeguard Agreement. The action is being taken pursuant to national security, which is covered by GATT Article XXI.

Furthermore, the U.S. and others have taken the position that actions taken for national security reasons under Article XXI of the GATT are nonreviewable by the WTO. While the EU may disagree with this interpretation of Article XXI of the GATT, the EU recognizes that Article 23(2)(a) of the DSU prohibits members from unilaterally declaring that another member has breached its obligations. Only the WTO can do that, pursuant to dispute settlement procedures.

Nevertheless, even if the steel and aluminum 232 tariffs were considered "safeguards," the EU's assertion that it could retaliate within 90 days was wrong for two reasons. First, assuming the Safeguards Agreement can be invoked, Article 8. 3 of the agreement states that retaliation is available after three years when the increase in imports in question is absolute, rather than relative.

For both steel and aluminum, the United States experienced absolute increases in imports. In an apparent

recognition of this requirement, the EU has separated its retaliation list into two groups of products: one group for which they claim there is no absolute increase (mostly steel products), and where retaliation is therefore permitted immediately, and another group for which retaliation must be delayed three years. For that second group of products, where the EU attempts to justify immediate retaliation, it can only do so by selectively interpreting the period examined and the group of imports it considers.

While the agreement does not define what period is to be used when considering the increase for retaliation purposes, it is reasonable to use the same period the administering authority uses. The U.S. normally uses a five-year period in its safeguards cases. For both steel and aluminum, in its 232 investigation, the U.S. Department of Commerce used the five-year period from 2013 to 2017. Over that period there is an absolute increase of steel and aluminum imports.

The only way the EU could justify retaliation was to cherry-pick the import data, relying only on imports from European countries using self-selected smaller periods. If the measure is a "safeguard" in disguise, as the EU claims, then the imports must be examined globally. A member does not get to selectively examine the relative import surge of only a few members when retaliating. The Section 232 relief is either a "safeguard" in disguise, or it is not.

Second, the EU has argued that it is not subject to the three-year waiting period because Article 8.3 only provides that grace period if the underlying safeguard measure is consistent with Safeguard Agreement rules.[16] Having declared that the U.S. action is not consistent with Safeguard Agreement rules, the EU thus considers itself entitled to proceed directly to retaliation. This of course assumes that the Section 232 relief is a safeguard, which it is not.

The EU's reckless course of action is now leading multiple WTO members to follow suit and breach their obligations. Nothing confines the EU's tactics to this one dispute. Nothing stops any other WTO member from declaring that another member's policy is a safeguard and retaliating accordingly. The United States, for example, could consider the EU's retaliation to be a safeguard and develop its own retaliation strategy, perhaps targeting sensitive EU products, such as those covered by geographical indications.

If the EU considers the United States to have breached its WTO obligations, the appropriate course of action is to challenge the action before the Dispute Settlement Body, not to violate the plain language of the Safeguard Agreement and the DSU. This ill-conceived approach is the real threat to the WTO. The EU holds no moral high ground in this dispute. Rather than upholding the rules-based system, the EU, by its actions, may ultimately undo the system.

[1] Proclamation 9705.

[2] Proclamation 9704.

[3] 19 U.S.C. 1862.

[4] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states-3/; https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-3/.

[5] https://www.reuters.com/article/us-usa-trade-eu-explainer/europes-response-to-u-s-import-tariffs-idUSKCN1GS2CH.

[6] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-4/; https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states-4/.

[7] https://www.platts.com/latest-news/metals/london/eu-requests-wto-consultations-with-us-over-section-26940993.

[8] https://insidetrade.com/trade/china-claims-us-232-tariffs-are-safeguards-requests-wto-consultations.

[9] "The Charlevoix G7 Summit Communique," (June 9, 2018), https://www.reuters.com/article/us-g7-summit-communique-text/the-charlevoix-g7-summit-communique-idUSKCN1J5107.

[10] The following does not address whether the proposed retaliation is consistent under the NAFTA rules.

[11] European Union Third Party Written Submission, Russia — Measures Concerning Traffic in Transit (DS 512), at 5 (Nov. 8, 2017).

[12] European Union — Measures Affecting Trade in Large Civil Aircraft, DS 316 (May 28, 2018), Appellate Body Article 21.5 Report, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm.

[13] European Union Third Party Written Submission, Russia — Measures Concerning Traffic in Transit (DS 512), at 5 (Nov. 8, 2017) (quoting Art. 3(2) of the DSU).

[14] https://www.reuters.com/article/us-usa-trade-eu-explainer/europes-response-to-u-s-import-tariffs-idUSKCN1GS2CH.

[15] "China files trade case at WTO over Trump's steel and aluminum tariffs," The Hill, by Vicki Needham (April 10, 2018) (quoting letter from Ambassador Shea: "These actions are not safeguard measures and, therefore, there is no basis to conduct consultations under the Agreement on Safeguards with respect to these measures").

[16] https://www.reuters.com/article/usa-trade-eu/update-2-eu-to-respond-to-u-s-tariffs-within-90-days-if-not-exempt-idUSL5N1QR1OQ.