



The EU's Legal Justification for Steel and Aluminum Retaliation Is Completely Ungrounded*

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On March 8, 2018, President Trump imposed tariffs of 25% on steel imports¹ and 10% on aluminum imports² pursuant Section 232 of the Trade Expansion Act of 1962, which authorizes him to adjust imports in the interests of national security.³ At the time, he granted temporary exemptions to Canada and Mexico. On March 22, he expanded the list of temporarily exempted countries to include Argentina, Australia, Brazil, Korea, and the European Union.⁴ In paragraph four of each proclamation granting the additional exemptions, the President explained that he was doing so because of “continuing discussions ... on satisfactory alternative means to address the threatened impairment to the national security”

These exemptions were temporary, granted through May 1, 2018. On April 30, 2018, the President signed two additional proclamations.⁵ These proclamations reflect an agreement with Korea and an agreement in principle with Argentina, Australia, and Brazil, and grant Canada, Mexico, and the EU an exemption for an additional 30 days.

Korea has agreed to a voluntary restraint agreement⁶ and reports indicate that Argentina⁷ and Brazil⁸ have worked out a solution with the United States that involves voluntary export restraints. The European Union, by contrast, has taken a more confrontational approach. The EU asserted that it could unilaterally declare the President's action to have been a safeguard.⁹ In so doing, the Europeans have argued that as such, they are entitled, under the World Trade Organization (WTO) Safeguards Agreement,

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¹ Proclamation 9705.

² Proclamation 9704.

³ 19 U.S.C. 1862.

⁴ Proclamations 9710 and 9711.

⁵ <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/>

⁶ <https://insidetrade.com/inside-us-trade/navarro-says-countries-exempt-section-232-tariffs-will-have-quotas>

⁷ <https://insidetrade.com/daily-news/argentina-agrees-cap-steel-135-percent-three-year-average>

⁸ <https://insidetrade.com/daily-news/sources-brazil-face-aluminum-tariff-agrees-steel-quotas>

⁹ <https://www.reuters.com/article/us-usa-trade-eu-explainer/europes-response-to-u-s-import-tariffs-idUSKCN1GS2CH>

to compensation. The EU claims that it can use the Safeguards Agreement to “retaliate” within 90 days against the United States.

The steel and aluminum tariffs are not safeguards. The U.S. Ambassador to the WTO, Dennis Shea, has rejected the assertion that the tariffs are a safeguard.¹⁰ The United States has taken this measure pursuant to the national security provision under the Trade Expansion Act of 1962. This is a wholly separate provision of the U.S. statute from the Safeguards provision of the statute.

Nothing in the WTO Agreement permits the EU to take any such action. 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. Furthermore, the EU is not permitted to unilaterally reinterpret the U.S. statute and how it operates.

Even if the steel and aluminum 232 tariffs were considered “safeguards,” the EU is wrong for two reasons. First, even 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. Any contention that the EU does not have to wait the three years because there is no absolute increase in imports is simply wrong. 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, Commerce also used a five-year period from 2013 to 2017. Over that period there is an absolute increase of imports. In fact, there is even an absolute increase in the most recent period from 2016 to 2017. The only way the EU could justify retaliation in steel is to cherry-pick the import data to rely on self-selected periods.

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 Safeguards Agreement rules.¹¹ 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.

However, Article 23(2)(a) of the WTO's Dispute Settlement Understanding prohibits members from unilaterally declaring that another Member has breached its obligations. Only the WTO can do that, pursuant to dispute settlement procedures. Therefore, the EU is not only flouting WTO rules by unilaterally declaring the President's actions to be a safeguard, but the EU is also flouting WTO rules by unilaterally declaring that this so-called “safeguard” was done in breach of U.S. WTO obligations.

¹⁰ “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, “{t}hese actions are not safeguard measures and, therefore, there is no basis to conduct consultations under the Agreement on Safeguards with respect to these measures.”).

¹¹ <https://www.reuters.com/article/usa-trade-eu/update-2-eu-to-respond-to-u-s-tariffs-within-90-days-if-not-exempt-idUSL5N1QR1OQ>

The EU initially refrained from pursuing this course of action. However, the Chinese adopted the idea and filed consultation requests accordingly.¹² The EU then followed suit.¹³

Initially, EU claimed that the WTO agreement prevented it from negotiating voluntary restraint agreements on steel and aluminum.¹⁴ Recently, however, in what appears to be a recognition of the ungrounded claims of retaliation, certain political elements within the EU now appear to be considering accepting quotas.¹⁵ Notwithstanding the inconsistent and unjustified position EU appears to have taken, it is clearly willing to selectively interpret the WTO agreement when it suits its ends by declaring the President's actions to be a safeguard and again by declaring it to be a safeguard that is not compliant with WTO rules.

The EU's approach, both unnecessarily confrontational and self-servingly selective, may leave European steel and aluminum producers subject to duties that could have been avoided if Brussels had followed trading partners like Korea, Argentina, and Brazil, rather than China.

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¹² <https://insidetrade.com/trade/china-claims-us-232-tariffs-are-safeguards-requests-wto-consultations>

¹³ <https://www.platts.com/latest-news/metals/london/eu-requests-wto-consultations-with-us-over-section-26940993>

¹⁴ <https://insidetrade.com/daily-news/commission-official-eu-will-not-agree-voluntary-export-restraints>

¹⁵ https://www.bloomberg.com/amp/news/articles/2018-05-04/eu-said-to-mull-settling-row-over-u-s-metal-levies-with-quotas-jgs558wr?__twitter_impression=true