ISSUE BRIEFS

NATIONAL TAXPAYERS UNION

U.S. Trade Policy Should Protect the Interests of All Americans

NTU Issue Brief #187
By Bryan Riley
March 12, 2018

Introduction

President Trump recently used Section 232 of the Trade Expansion Act of 1962, which allows the President to restrict imports for "national security" reasons, to unilaterally impose taxes of 25 percent and 10 percent on imported steel and aluminum, respectively.

Earlier this year, the Trump Administration used Section 201 of the Trade Act of 1974 to restrict imports of solar modules and washing machines. Section 201 allows the government to impose trade barriers if a U.S. industry is threatened by a surge of imports.

These laws each suffer from major flaws that undermine U.S. interests abroad and make it harder to create and maintain good jobs here at home. By focusing only on an import restriction's impact to a particular industry, and not on consumers and the economy as a whole, our current rules enshrine a strong bias toward protectionism. Fortunately, Congress can easily fix those flaws by simply changing a few words in current U.S. statutes.

Section 232

Section 232 of the Trade Expansion Act allows the President to restrict imports for purported national security reasons. However, the definition of "national security" is largely left up to the President. As a result, protectionist action is not limited to, say, ensuring a ready supply of steel and aluminum for our planes, ships, and tanks. Even if the United States produces plenty of domestic metal to meet our national defense needs, a President can claim a vague threat to economic security as justification for new tariffs.

Almost anything can be twisted in a way to allege so-called threats to national security. For example, until President Trump ended the practice, government officials often cited climate change as a threat to national security. Of course, the inverse -- that import restrictions can *harm* national security -- can also be true, but Section 232's language doesn't readily acknowledge that.

A recent letter from oil and gas industries explained how import restrictions would weaken U.S. national security:

> National security requires pipelines to deliver the energy America needs, and pipelines require specialty steel products not always available in sufficient quantities and specifications from domestic manufacturers. Pipeline projects create construction jobs, bring affordable energy to millions of American consumers, and support American energy production. These projects may

not go forward if a steel tariff makes pipeline steel unavailable on a reasonable timeline and at a competitive price.

One possible improvement to Section 232 would be to more strictly define "national security. " This would help prevent the statute from being used as a protectionist tool to restrict imports for reasons unrelated to legitimate U.S. defense needs. Congress could clarify that the law is intended to protect America's ability to provide for a robust military defense, and not as a catch-all to deal with issues like climate change or as an excuse for trade barriers whose justification is unrelated to military and foreign policy objectives.
This improvement could be achieved in two ways. The first would be to use the term "national defense" instead of "national security." The term "national defense" is narrower, focused on our ability to resist hostile action from those who wish America harm, whereas "national security" is a broader term that is often construed to include non-military matters like environmental issues. Ideally, Congress should clearly define exactly what criteria should be used to determine whether imports threaten U.S. national defense needs.

The second beneficial change would be to designate the Department of Defense as the lead agency in Section 232 investigations, instead of the Department of Commerce as under current law. The Department of Defense is naturally better situated to understand America's military needs and is a more appropriate agency in which to vest responsibility.

Current statutory language can be found in Appendix 1, and specific illustrative language for changes described here are included in Appendix 2.

Section 201, Anti-Dumping, and Countervailing Duty Restrictions

In contrast to Section 232, which is overly broad, other U.S. trade laws are too narrow and don't allow for sufficient discretion in considering the impact of imports on the United States as a whole.

For example, current law dealing with "dumped" or subsidized imports prohibits the U.S. International Trade Commission (ITC) from considering the overall impact of imports and tariffs on Americans. It is limited to analyzing the impacts of imports on industries claiming injury. As a result, the ITC is actually three times more likely to find "injury" in its trade investigations than not.[1] An injury determination by the ITC enables the imposition of new protective tariffs.

Under existing law, dating back to the 1930 Smoot-Hawley Tariff Act, if a U.S. industry believes it is being harmed by low-priced or subsidized imports, it can ask the government to impose protective tariffs on imports.

That request goes through a two-step process: first, the Department of Commerce determines whether foreign suppliers are selling "dumped" or subsidized goods. Then the ITC determines whether the industry seeking protection actually is being injured by imports. If so, anti-dumping

[1] An analysis of ITC cases resulting in either a positive or negative injury determination since 2010 shows that the agency found injury (or threat of injury) to a U.S. industry 76 percent of the time.

duties (for "dumped" goods) or countervailing duties (for subsidized goods) are imposed on the imports.

Unfortunately, current law is unfair to the vast majority of Americans because the ITC can only consider the impact of imports on the industry seeking protection, and not the rest of us.

For example, during a recent dispute between Boeing and Bombardier, the ITC was only able to consider the potential costs inflicted on Boeing by imported Bombardier aircraft, and not the overall U.S. economic impact. The ITC's process regards as irrelevant the effect of imports on aircraft-importing companies like Delta Airlines, which called proposed tariffs an "anticompetitive attempt to deny U.S. airlines and the U.S. traveling public access to the state-of-the-art ... aircraft."[2]

Former ITC Chairman Daniel J. Pearson observed:

> One of the great conundrums facing a market-oriented ITC commissioner who has an understanding of economics is that he or she has sworn to uphold the highly flawed trade-remedy statutes by applying them faithfully to the facts of each antidumping/countervailing duty case. The statutes require the Commission to consider only the possible injury to the domestic industry that petitioned for new import duties. No weight at all can be given to the damage that import restrictions may cause to industries that use the imported product for further manufacturing, or to the effects on final consumers.
>
> In my career at the ITC, I often was greatly troubled by the legal requirement that I vote in the affirmative (in favor of protection) even when it was clear that the damage to users would be far greater than any possible benefit that would accrue to the petitioners. The statute was requiring me to vote to do harm to the broad U.S. economy – a most unpleasant situation.
>
> The more rational policy approach would be to implement trade restrictions only when doing so would improve the economic welfare of the United States. I would strongly favor amending the statute to incorporate such a requirement. It makes no sense to implement policies that have the effect of making America a poorer country.

Section 201 of the Trade Act of 1974 allows for restrictions of imports that may injure an American industry, without respect to whether the imports result from any "unfair" trade practice. The ITC must consider petitions for protection and if injury is found, recommend possible relief measures to the President, who makes the final determination on what action to take. Section 201 was recently used to justify new tariffs on washing machines and solar components.

As with antidumping and countervailing duty law, Section 201 forbids the ITC from considering the impact of imports on America as a whole. For washing machines, the ITC could consider the impact of imports on U.S.-based washing machine *producer* Whirlpool, but not on U.S.-based washing machine *seller* Sears, which testified: "The draconian tariffs proposed in this case are a real threat to the iconic Kenmore brand. They also threaten our employees and local communities throughout the country."

[2] In this case, the ITC determined that Boeing would not be injured by imports of Bombardier aircraft.

An easy improvement would be to change statutory language to allow the ITC to consider the impact of imports on the overall U.S. economy. This could be achieved by adding a phrase empowering ITC to impose duties if it determines that doing so would be "in the national economic interest." The language could be modified by excising language that speaks to injury to "an industry" in the United States in favor of language referring to injury to "the economy" of the United States. Current statutory language can be found in Appendix 2, and illustrative examples of potential language changes can be found in Appendix 2.

The ultimate goal is to allow the ITC to consider the overall impact of imports on import-dependent industries, on individual consumers of imports, and on the American economy as a whole.

In addition, World Trade Organization rules require that injury due to an increase in imports must be due to "unforeseen circumstances." Adding that requirement would make Section 201 consistent with international guidelines.

Congressional Oversight

One additional option for proposed Section 201 and Section 232 tariffs would be to give Congress the ability to approve or disapprove of new tariffs. For example, last year Sen. Mike Lee (R-UT) introduced the Global Trade Accountability Act, which would require the President to secure a joint resolution approved by both houses of Congress before any "unilateral trade action" could take effect. This would have the effect of restoring a balance between the two branches relating to trade policy, after decades of Congress ceding control to the executive branch.

Conclusion

Current trade laws are flawed because they put the interests of the few above the interests of the many. Policymakers may wish to quibble over a particular word or two, but the premise as well as the need for improving these laws are clear. Some relatively simple changes to statutory language could allow for a more balanced approach to help ensure that American trade policy advances the interests of all Americans and not just connected special interests.

About the Author

Bryan Riley is Director of the National Taxpayer Union's Free Trade Initiative.

Appendix 1: Current U.S. Law

Section 232

> "Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the 'Secretary') shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion."

Section 201

> "If the United States International Trade Commission (hereinafter referred to in this chapter as the 'Commission') determines under section 202(b) that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this chapter, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."

Antidumping and Countervailing Duty Investigations

> "If the Commission (ITC) determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty (or a countervailing duty for subsidized imports)."

Appendix 2: Illustrative Examples of Alternatives to Current Law

(Proposed changes in bold)

Section 232:

> "Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of ~~**Commerce**~~ ***Defense*** (hereafter in this section referred to as the 'Secretary') shall immediately initiate an appropriate investigation to determine the effects on the national ~~**security**~~ ***defense*** of imports of the article which is the subject of such request, application, or motion."

Section 201:

> "If the United States International Trade Commission (hereinafter referred to in this chapter as the 'Commission') determines under section 202(b) that, as a result of unforeseen developments, an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the ~~**domestic industry producing an article like or directly competitive with the imported article**~~ ***economic welfare of the United States,*** the President, in accordance with this chapter, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."

Antidumping and Countervailing Duty Investigations:

> "If the Commission (ITC) determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, ***and it determines a duty would increase the economic welfare of the United States*** then there shall be imposed upon such merchandise an antidumping duty (or a countervailing duty for subsidized imports)."