

# IN U.S. ACTIONS, THE WORRY OF GLOBAL TRADE LAWLESSNESS

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'This will only embolden other countries to brazenly pursue unilateralism and economic nationalism' | Photo Credit: Getty Images/iStockphoto

In a significant development in international trade law, four separate World Trade Organization (WTO) Panel reports have ruled that the tariffs of 25% and 10% on steel and aluminium, respectively, that the United States (U.S.) had imposed during the presidency of Donald Trump are inconsistent with WTO law. The cases were brought by China, Norway, Switzerland, and Turkey.

The WTO panellists held that these tariff rates breached the U.S.'s obligations under Article II.1 of the General Agreement on Tariffs and Trade (GATT), which obligates countries not to impose tariffs beyond bound rates. Further, these tariffs breached Article I of GATT because they discriminated between some foreign producers of steel and aluminium over others.

Importantly, the U.S. tried to justify its tariff hikes under Article XXI of GATT which allows countries to deviate from their trade obligations on grounds of national security. Specifically, Article XXI(b)(iii) of GATT allows a country to take any action 'which it considers' necessary for the protection of its essential security interests taken in time of war or other 'emergency in international relations'. Contrary to the U.S.'s flaccid assertion, the panel held that the national security rule in Article XXI is not entirely 'self-judging'. A panel can review the action of a state taken purportedly to protect its national security. The Panel's decision on this point is consistent with previous WTO jurisprudence laid down in the *Russia-Transit* and the *Saudi Arabia- IPR* cases.

The Panel rejected the U.S.'s argument that it increased the tariff rates due to global excess capacity, which could lead to excessive imports of these two commodities used in defence production, thus compromising the U.S.'s national security. The Panel held that the situation the U.S. referred to does not constitute an 'emergency in international relations' under Article XXI(b)(iii) because it lacked severity.

For a deeper understanding, one needs to appreciate the larger political context in which this dispute arose. Anthea Roberts, Henrique Choer Moraes, and Victor Ferguson argue that the international economic order today is moving away from the post-Cold War neoliberal order toward a new geoeconomic order. In the neoliberal order, arguably, economic and security

interests are relatively independent tracks. Neoliberalism is based on principles such as non-discrimination in international economic relations and a peaceful settlement of disputes through neutral international courts. It champions interdependence. These principles are achieved by legalising the neoliberal order through the creation of global institutions such as the WTO and a plethora of free trade and investment treaties. When the neoliberal order reigned supreme, the U.S. as the undisputed hegemon, supported free trade because it did not fear the growth of its strategic rivals such as China.

Although the neoliberal order is not dead, the avowedly independent economic and security tracks have started to converge, thus heralding the geoeconomic order. As the difference between the size of the Chinese and American economies began to shrink at a rapid pace, the U.S. seems to be giving up on championing free trade and swiftly embracing protectionism. The Trumpian tariffs wrapped in the cloth of national security, which the Joe Biden administration also backed, is a classic example of an American consensus on the geoeconomic order. The increasing use of the national security legalese to justify such economic nationalism is an attempt to blunt the possibility of international courts reviewing state action. This partly explains the U.S.'s erroneous argument that the national security defence is 'self-judging' and 'non justiciable'.

The geoeconomic order will inevitably lead to what James Bacchus calls 'international trade lawlessness'. The Biden administration has rejected the WTO Panel's ruling calling it 'flawed'. Consequently, the U.S. will not remove the illegal tariff rates. Regrettably, the U.S. is using this ruling to double down on its unsound agenda of asking for reforms in the WTO's dispute settlement mechanism, which has been a shining star in the otherwise dull sky of international dispute settlement. The fear of being called out for economic nationalism by the WTO's dispute settlement mechanism has led the U.S. to block the appointment of judges to the Appellate Body — the highest court in the WTO — for the last several years.

The U.S. which always lectures countries such as Russia and China to steadfastly follow international law is turning its back to the rule-based order. This will only embolden other countries to brazenly pursue unilateralism and economic nationalism. In many ways, this unilateralism is reminiscent of the economic nationalism of the dark decades of the first part of the 20th century that led to the Great Depression and the Second World War. The days ahead will be trying times for the post-war liberal trade order because its most important chieftain seems to have lost interest in it.

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