



## Trade & a Crisis of Unilateralism: Where Is Congress?

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Every American is primed to believe that the American Congress balances policy changes initiated by the Executive branch of government, with its legislative powers and oversight authority. But on June 1st, 2018 the heftiest trade tariffs the U.S. has imposed on allies since before World War II, take effect, and may trigger the end of that supposed balance and multi-lateralism in trade.

### **Countries feel the impact**

Nations that have long been America's business partners, like Brazil (second biggest steel exporter to the U.S. after Canada), China and Japan, are already paying the tariffs. [China knew what was coming](#) before U.S. President Trump's Asia tour in November last year, and warned back in September 2017 that any unilateral trade action, would have to be met "in-kind." We should all be wondering "where is Congress?"

## Republicans concerned

Despite all the political grandstanding of the Republican-controlled Congress, from House Speaker Paul Ryan (R-WI), to his colleague Orrin Hatch (R-UT), [voicing their criticism](#) of the current Administration's tariff actions, none of them are doing anything to reign in the protectionist trade actions of the 45th U.S. President. Democrats, for their part, have denounced the tariffs as "[the wrong approach](#)", but haven't pursued all the options available to entice the President to change course.

Although the U.S. President could veto legislative action taken to limit his broad executive authority on trade and tariffs, we must not be fooled into believing that Congress cannot act. There is already legislation in place to circumvent the President's unilateral actions. The only question is whether Congress will take action to enforce them.

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## Authority for unilateral tariffs

Article I, Section 8, Clause 3 of the U.S. Constitution grants the U.S. Congress the power "To regulate commerce with foreign Nations..." Congress passed the [Trade Expansion Act 1962](#) (codified in 19 U.S.C. 1862) under President John F. Kennedy to delegate some of its authority through the Act to the U.S. President. The Act also created the role of U.S. Trade Representative, which later became a Cabinet post. The idea was to grant more latitude to the Executive branch to negotiate trade deals with foreign nations, cut tariffs and defeat protectionism in a world where [trade liberalization was the new norm](#). But, it had an "escape clause". In its Section 232, the Act permitted the U.S. President to impose tariffs and restrict imports, if an investigation by the Commerce Secretary revealed an import threat to national security.

The current [U.S. President requested such an investigation](#) by his Commerce Secretary, [Wilbur Ross](#), in early 2017. The results of the [Commerce investigation](#) are what led to the full force of tariff impositions which Europe, Canada, and Mexico are seeing today.

## Applicability of the rule of law

There are already domestic and international law regimes that Congress could pursue, among other [resources](#) (e.g., holding Congressional Hearings and demanding oversight on any further Section 232 investigations), to prevent

excessive, and some would argue "punitive", unilateral trade action in the name of "national security."

First, there is precedence established through the U.S. Supreme Court for Congress to review the potential basis for the national security claim and associated Presidential action. In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976), *quoting* 104 Cong. Rec. 10542-43 (1958) (remarks of Representative Mills), the Court said that the emphasized language in Section 232(b) of the Trade Expansion Act, authorizing the President to impose tariffs if a given article is being imported "in such quantities or *under such circumstances* as to threaten to impair the national security" meant that Congress wanted the President to consider the use, availability, and character of the imports being restricted as the basis for import restrictive action.

The [U.S. President's recent comments](#) on his steel tariff measures, demonstrate that his considerations were not about the circumstances surrounding steel imports such as their use, availability, and character to purportedly pose a danger to U.S. national security, but rather about securing the viability of a domestic industry that is in decline. The tariff remedy applies to all countries of the investigation (even countries like Costa Rica, despite its [request that it be excluded](#)) and all steel products (not restrained to certain types of steel production). Yet, Secretary Ross's [key findings](#) from his investigation point out that: "World steelmaking capacity... is up 127% since 2000, while steel demand grew at a slower rate".

Second, [Congress ratified](#) and implemented the Marrakesh Agreement creating the World Trade Organization (WTO) in 1994, through legislation binding the U.S. on the rules governing international trade (formerly [GATT rules](#)). It can support that legislation by requesting the President use the WTO rules-based, multi-lateral system to pursue trade grievances, rather than implementing high tariffs based on the national security assertions. It's unlikely Congress would pursue this route, but that doesn't mean it shouldn't.

After arguing the merits of free trade for years, the U.S. about-face is brutal! When the U.S. supported the creation of the WTO, business was supposed to be good for everyone and free trade would supposedly bring about tickle down economics. Over the last two decades, the results of free trade have been mixed.

The WTO remains the only global forum for countries to work collaboratively to develop trade engagement rules, and offers established and viable procedures for managing trade disputes between its members. The U.S., like other members, committed itself to conforming its domestic laws, regulations, and procedures with the obligations in the treaty establishing the Geneva-based Organization.

Any disputes brought by a member through the Organization's Dispute Settlement Body, would be evaluated by a dispute panel, and countries faced with a negative decision against them would either change the action that led to the dispute or face permissible retaliation by the member(s) bringing the dispute. The Dispute Settlement Body cannot change the domestic rules that are deemed unfair, but it can permit other countries to retaliate against the action that negatively impacts them.

The U.S. trade tariffs imposed will no doubt see WTO members, who believe the [U.S. has sidelined the WTO](#), press ahead for retaliatory action for a perceived violation of WTO treatment rules. Those same members will likely also pursue unilateral or regional bloc action to sanction the U.S. for its own unilateral tariff impositions.

Finally, Congress may also amend an existing law to pre-empt the U.S. President's ability to act unilaterally in foreign trade matters. Here, there is also precedent. In 1980, when Congress was displeased with President Jimmy Carter's decision to raise fees and establish quotas on petroleum products to reduce U.S. dependence on foreign oil, [Congress acted](#) to nullify Carter's Executive Order. Both Houses of Congress came together to pass a joint resolution disapproving of the then President's Petroleum Import Adjustment Program of April 1980. Congress amended the Trade Expansion Act restricting the President's ability to take unilateral trade action on petroleum products as per Paragraph (f) of the Act. It's noteworthy to mention that President Carter was [sued](#) by the Independent Gasoline Marketers Council to enjoin him from implementing the Act, and the plaintiffs won.

Today, Democrats and Republicans in Congress do not work as collaboratively as they once did. Nonetheless, it's still part of their job to balance competing national interests with the nation's international commitments.

The markets aren't the only ones nervous about President Trump escalating a trade war and spooking investors. The American people are nervous too. And we are watching every move Congress and the President make.

#### **ABOUT THE AUTHOR: Magda Theodate, JD, LL.M**

*Magda Theodate is a senior international lawyer and development professional with over 10 years of experience advising on international trade, procurement, and governance. She has successfully facilitated dozens of projects in low- and middle-income countries, working with agencies such as the Inter-American Development Bank, the World Bank, and UNDP.*

*She is a strong advocate for the effective use of international development investments to promote trade, good governance and local economic development.*

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