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## **Legal Challenges to Trump are Futile – But Canada Needs to Mount Them Anyway**

*Donald Trump doesn't give a fig for international law, but Canada and other responsible, respectful members of the global community do*

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Canada is challenging U.S. President Donald Trump's tariff measures at the World Trade Organization (WTO) and under the Canada-United States-Mexico Agreement (CUSMA). Even if both those agreements are, as some people might say, on life support, Canada is doing the right thing.

Despite the 30-day postponement of tariffs, Mr. Trump still holds the cards, his tariff sword ready to come down on a whim if he doesn't like what's happening at the border with Canada's so-called fentanyl czar. It's a shameful way for a close neighbour, trading partner and long-stranding ally to behave, but there we are.

The problem with legal challenges is that these trade cases are hugely complex, require dispute settlement panels to be appointed and, even after that, take months to reach conclusion. While all this is happening, tariffs would be in force, wreaking economic havoc on both sides of the border.

More to the point, if Canada won in either forum, it's inconceivable that the Trump administration would respect the result. But even if this lamentable use of the American tariff threat is about raw political power, Canada, as a long-time supporter of global rules and respect for treaty obligations, is right to mount these challenges.

While the challenges would run on separate tracks under different treaties, the central issue under the WTO Agreement and CUSMA is whether the U.S. can rely

on the carve-outs – or exceptions – for matters of “national security.” That concept differs under each agreement, making for an important comparison. Under the WTO Agreement, a member is allowed to depart from its trade obligations and implement national security measures “in time of war or other emergency in international relations.” China challenged the U.S. for using this exemption under the first Trump administration in 2018 and the WTO dispute panel found against the U.S., ruling that there had to be an objective international emergency, not a self-defined one.

The issue died there, with the U.S. refusing to comply. The panel finding has been in limbo. But it still serves as a precedent for defining the permissible scope of unilateral tariff actions under WTO rules.

As a regional deal, CUSMA also contains a set of national security exceptions, but much broader than the WTO provision, with Article 32.2 of CUSMA saying that nothing in the agreement shall “ . . . preclude a Party from applying measures that it considers necessary for the . . . the protection of its own essential security interests.”

That language was the result of a demand by Robert Lighthizer, the U.S. Trade Representative during the North American Free Trade Agreement renegotiations, to extend the WTO-style exemption to the U.S. advantage. But would those arguments in the case of Mr. Trump’s threatened tariffs hold water? Probably not.

For weeks, Mr. Trump ranted on and on about how his tariff threats were based on all kinds of things, everything from trade imbalances, allegations of Canada taking advantage of American generosity, exchange rate issues, Canadian subsidies – all sorts of things that, while raising Mr. Trump’s ire, are not tied to essential American security interests. When put to legal scrutiny, Mr. Trump’s scattergun bombast provides solid arguments that even under the lower CUSMA standard, the essential security threshold hasn’t been met.

There’s something else here. At its core, the CUSMA is an international treaty, approved by the U.S. Congress and then signed and ratified by the U.S. in solemn fashion. It says in its preamble that the U.S., together with Canada and Mexico, are resolved – yes, “resolved” – to, “strengthen anew the long-standing friendship between them and their peoples, and the strong economic co-operation that has developed through trade and investment . . . and to further strengthen their close economic relationship.”

Imagine that. A statement of resolve that means, by any rational interpretation, that good faith efforts must be made by the parties to further these objectives and to resolve differences amicably. Or so one would reasonably think. While Mr. Trump

may have no ethics in this regard, an international tribunal would find this statement of legal significance.

There's another thing in the annals of customary international law, centuries-old, not often cited, but of paramount importance. It's a fundamental international legal rule that treaty obligations are to be complied with "in good faith." Mr. Trump doesn't give a fig for these things, but Canada and other responsible, respectful members of the global community do.

That's why, even if the WTO Agreement and CUSMA are under duress, and even if Mr. Trump's tariff threats can only be resolved at the political level, Canada is doing the right thing in mounting these challenges.

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