POLICY MAGAZINE
Canadian Politics & Public Policy

Updating Canada's Trade Laws to Meet (Legitimate) National Security Threats

By Lawrence Herman

May 19, 2026

National security — an elastic legal concept — has become associated with international trade thanks to Donald Trump, who has been using it as an excuse to apply wide-ranging tariffs under his administration's trade policy. While largely a subsidiary trade issue for decades, national security is now top-tier in global trade relations at several levels.

First, there is the scope of the term under international law – that is, under the WTO Agreement as well as Canada's bilateral agreements, particularly the CUSMA. Second, there is the matter of Canada's own trade law system and whether the tools exist for the government to ensure that Canada's own national security is properly protected.

The International Law Dimension

Every country has the right to protect its own sovereignty on national security grounds, a fundamental principle of international law. But it is not an absolute right. A country cannot use national security to subvert rules of international humanitarian law under the Geneva Conventions, the UN

Charter, the *International Covenant on Civil and Political Rights*, or other internationally recognized obligations. In time of war, countries are expected to follow well-recognized rules, even if not universally respected and often obnoxiously breached (e.g., the Russian war against Ukraine), there are well-established legal limits to the use of force under the guise of national security.

On the multilateral trade front, there are, likewise, restraints on using national security to circumvent trade obligations. For example, while the *General Agreement on Tariffs and Trade* (part of the WTO Agreement) allows "national security exceptions" to override trade commitments, this is permitted only under carefully defined circumstances. Article XXI says that a WTO member can take action "which it considers necessary for the protection of its essential security interests" but — and this is critical — "taken in time of war or other emergency in international relations".

The first Trump administration aggressively used these GATT security exceptions as the underpinning of its tariff policy, arguing that the phrase "which it considers necessary" in Article XXI meant that the decision to opt out of WTO obligations is self-judging, that each WTO member can decide for itself when it needs to take trade action and that such action is impervious to challenge.

This interpretation was overruled by a WTO panel in a 2022 case brought by several countries challenging the Section 232 tariffs used by the first Trump administration under the 1962 *Trade Expansion Act*. The panel concluded that the US could not unilaterally invoke national security to avoid WTO obligations, that an "emergency in international relations" under Article XXI required a serious, objective situation of high gravity, such as armed conflict. It was not up to a WTO

member to decide for itself that an emergency existed to justify breaching its binding trade obligations.

The Trump administration has ignored this ruling. Given the paralysis of the WTO Appellate Body caused by the U.S. blocking of judicial appointments, the panel decision remains in limbo. Even without a final legal outcome within the WTO system, however, the better view among trade experts is that the panel decision was correct.

The American Dimension

In February, the U.S. Supreme Court invalidated Trump's use of the *International Emergency Economic Powers Act* (IEEPA) to impose broad tariffs, including those imposed on Canada starting in March 2025 and the so-called "Liberation Day" tariffs imposed on other countries in April 2025.

Notwithstanding the court's ruling, the president has tariff tools he can use under other laws, even if less immediate, narrower in scope, and more complicated to apply than under IEEPA.

The current tariffs on Canadian autos, steel, aluminum, copper, forest products, and other exports, for example, are applied under the old and almost never used Section 232 of the 1962 *Trade Expansion Act*. Even if procedurally more complicated by first requiring a report by the Commerce Department before the president can act, Section 232 is very much in play today, with Commerce currently investigating national security risks of imports of jet engines, wind turbines, pharmaceutical goods, among others.

And there are other weapons Trump has resurrected, such as section 122 of the 1974 *Trade Act* to apply temporary tariffs for balance-of-payments reasons, orders that are currently under serious legal challenges as well.

The CUSMA Dimension

This raises the thorny issue of Article 32.2 of the CUSMA, inserted at the insistence of the U.S. to overcome the above-noted GATT-type limitations. It provides that each CUSMA party can make its own decision on whether its national security has been threatened. Thus, Article 32.2 says that nothing in the CUSMA, "shall preclude a Party from applying measures that it considers necessary for the…protection of its own essential security interests."

Given the obvious risks to bilateral trade that such a self-determined exemption entails, Canada needs to get the Article contained in some way, defining the term so it is not simply one-sided and totally open-ended without guardrails. This will be opposed by the U.S. for sure, but unless the Article 32.2 exemption is somehow fenced-in, it means that any updated trade commitments will be hostage to unilateral decisions in the White House. It needs to be one of Canada's top-tier items when the parties sit down at the CUSMA negotiating table in a few weeks.

Gaps in Canadian Law

Without gainsaying the importance of defining limits to the national security off-ramp under Canada's trade agreements, there is a need to look at Canadian domestic law to see how the term is used and whether Canada's legislative tools are adequate in today's environment, regardless of how they might be used in specific cases. It seems that there are some gaps here.

Unlike the broad national security measures in the U.S. (such as section 232 of the 1974 *Trade Act*, referred to above), the closest thing Canada has is section 53 of the *Customs Tariff Act*. Section 53 allows federal measures to enforce Canada's rights under international trade agreements where foreign actions

"adversely affect Canadian trade in goods or services". Section 53 does not allow measures when foreign actions "adversely affect" Canadian national security, whether it be economic, military or other aspects. This is a glaring omission.

There is also an absence of reference to national security in Canada's economic sanctions laws under several statutes: the *Justice for Victims of Corrupt Foreign Officials Act* (JVCFOA); the *United Nations Act*; and, notably, the *Special Economic Measures Act* (SEMA), the key statute authorizing economic sanctions. While each of these allows for sanctions (by Order in Council) to counter threats to "international" peace and security, none allows sanctions related to Canada's own domestic national security.

Without prejudice to the need to better define national security exemptions in our trade agreements, there is a need for Canada's trade laws to be reviewed to see where changes could be made to allow the government to take appropriate steps where Canada's national security is placed at risk by foreign actions, by governments, or by other malign players.

The Road Ahead

There is consensus among legal experts the that the WTO section 232 panel – and other WTO panels that have recently examined the issue – was correct. The GATT/WTO Agreement does not allow a self-determined national security exemption. However, there is virtually no possibility of getting a definitive decision on the issue, given the paralysis of the WTO dispute settlement system. It is unlikely the U.S. will change its views on Article XXI, whether under Donald Trump or any successor administration.

That said, in the impending CUSMA review, the Canadian team should take the position that, quite apart from the WTO

aspects, greater precision is required under CUSMA Article 32.2, for all the reasons outlined above. Without serious guardrails, any U.S. trade obligation under the agreement will be hostage to unilateral action by the White House, virtually without restraint.

At the same time – whatever restraints might be place on the national security off-ramp under Canada's trade agreements – there is a need to review Canadian trade laws to see whether Canada has the right legislative tools at its disposal when national security interests are threatened.

This issue should be taken up in Parliament, either by the House of Commons or the Senate in their respective trade committees. Either could recommend statutory changes and would be performing a needed service in this critical area.

***

Policy contributor Lawrence Herman is an international lawyer with Herman & Associates, a senior fellow at the C.D. Howe Institute in Toronto and a member of the Expert Group on Canada-U.S. Relations. He is a former foreign service officer, having served in Canada's Permanent Mission to the United Nations and the GATT.