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A Call for More Surgical Use of Existing Trade Laws

by Lawrence Herman

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POLICY PERSPECTIVE

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Canada-U.S. trade tensions will not go away soon. Even with the Democrats in office, the spectre of American protectionism will always be in the background. Canadians have become sensitized to these U.S. actions over the last number of years, often referred to via a particular section in various trade statutes, to wit, section 232 (surcharges), section 201 (safeguards) and, recently, section 301 (import restrictions on intellectual property and technology).

A prime example, of course, was Donald Trump's infamous national security restrictions on imports, colloquially identified as "section 232 tariffs." Press reports have also been talking about "section 301" as well, where the USTR has been beating the drum, especially when it comes to China. Canada continues to be caught up in section 232 and 301 actions, among other U.S. measures.

Because of the wide-ranging authority in matters of tariffs that Congress gave the executive branch, each section has a particular significance in terms of its effect on the international market. Under the Trump administration, there was regular use – or as Canada knows, threat of use – of these provisions to restrict imports by way of unilaterally selective import surcharges.

Section 232 was, in fact, a rarely used and rather obscure provision in the *Trade Expansion Act* until dusted off by U.S. Trade Representative Robert Lighthizer. Enacted in 1962 during the depths of the Cold War, section 232 gives the president the executive authority to apply tariff surcharges or other restrictions for national security reasons in times of genuine international emergency. The main rationale of the *Trade Expansion Act*, as its title suggests, is quite different – to enable the president to open markets in the context of multilateral negotiating rounds by reducing tariffs. Trump has used section 232 against imports from China, the EU and, of course, Canada, for the opposite end.

Section 301 is a provision in the U.S. *Trade Act* of 1974 (the U.S. has literally dozens of trade-related statutes) that likewise is directed to liberalizing markets. It looks outward, with central provisions aimed at eliminating foreign trade barriers that impede U.S. business abroad. The act authorizes the president to take appropriate action, including tariff and non-tariff forms of retaliation, to remove any act, policy or practice of a foreign government that violates an international trade agreement or is "unjustified, unreasonable, or discriminatory, and that burdens or restricts U.S. commerce."

As a market opening tool, section 301 allows the USTR to self-initiate an investigation involving certain foreign trade barriers or to start one as the result of a petition filed by a firm or industry group. If a 301 investigation is started, it becomes leverage for getting a settlement with the targeted foreign country in the form of compensation or elimination of the trade barrier. If that is not achieved, the statute authorizes the president to impose unilateral sanctions, such as the ones

applied to Chinese goods in 2018 after an investigation into China's intellectual property laws and policies.[1]

In the last few months, the USTR's office has resorted to section 301 to investigate digital services taxes being considered or implemented by several European countries. It recently launched a 301 investigation into exchange rates in Vietnam, breaking new ground by using the measure to examine foreign monetary policies. These actions are used for political effect, to turn the spotlight on a target country, to apply leverage for a change in its laws and policies as the price for avoiding U.S. trade sanctions.

In the Canadian context, it is often overlooked that, while not as detailed as these U.S. laws, Canada has an equally robust set of ammunition that can be used in like fashion to leverage trade settlements with foreign governments whose actions impede Canadian trade, meaning without prior authorization from the WTO or any dispute settlement mechanism under regional or bilateral treaties.

The weapon is section 53 of the Customs Tariff, a provision that can be applied by the federal cabinet almost without restriction in response to a foreign country's actions, including breaches of trade agreements that injure Canadian economic and trade interests. All it takes is the political will to do so.

Section 53 says:

> *Notwithstanding this Act or any other Act of Parliament, the Governor in Council may, on the recommendation of the Minister and of the Minister of Foreign Affairs, by order, for the purpose of enforcing Canada's rights under a trade agreement in relation to a country or of responding to acts, policies or practices of the government of a country that adversely affect, or lead directly or indirectly to adverse effects on, trade in goods or services of Canada,*

do either of the following:

- *suspend or withdraw rights or privileges granted by Canada to any country under a trade agreement or Act of Parliament,*

or

- *make goods that originate in any country . . . or a class of such goods . . . subject to a surtax in an amount, in addition to the customs duty provided in this Act and the duties imposed under any Act of Parliament or in any regulation or order made under any Act of Parliament, for those goods or that class of goods;*

Analogous to sections 232 and 301 in the American statutes, Canada's section 53 is also a powerful tool, conferring virtually unlimited executive authority on the federal cabinet. It has two

[1] "Enforcing U.S. Trade Laws: Section 301 and China," Congressional Research Service, June 16, 2019.

important features. First, it authorizes countermeasures through cabinet action alone without any need for parliamentary approval or WTO or other dispute settlement panel authorization. It simply requires a recommendation of the ministers of Finance and Foreign Affairs, followed by a cabinet order. Second, its deployment is not restricted to cases where one of Canada's trading partners breaches a trade agreement. It allows responsive measures for virtually any reason where a foreign government's actions or policies are deemed to be inimical to Canadian trade interests, whether under a trade agreement or otherwise.

Because of Canada's long-standing commitment to international dispute settlement mechanisms, section 53 has almost never been used in the absence of a favourable WTO panel decision or similar international authorization. This reservation was set aside in the recent acrimonious trade battle with the U.S. following the section 232 tariffs applied by the Trump administration on Canadian steel and aluminum in 2018. In response, an order under section 53 was issued in an exceptional policy departure.[2]

After reciting the background and context, including the economic importance of Canada's steel and aluminum industry, the regulatory impact analysis accompanying the order says:

"The objective of these countermeasures is to encourage a prompt end to U.S. tariffs on Canadian steel and aluminum exports to the U.S., which significantly impact Canada's steel and aluminum industries and threaten to undermine the integrity of the global trading system."

The political need for strong responsive action to Trump's unilateralism compelled the use of section 53 measures. As a result, reciprocal tariffs on each country's steel and aluminum lasted almost a full year, all the time having a deleterious impact on bilateral trade. After intense negotiations, both countries' duties were removed in May 2019 pursuant to an exchange of letters between the two trade ministers.

To Canada's surprise, the Trump administration then reimposed section 232 duties on Canadian aluminum a year later, in June 2020, once again ostensibly for national security reasons. And once again, using section 53, the Canadian government threatened to reimpose tariff surcharges on a whole range of U.S. aluminum imports.[3] The threat was withdrawn when the Trump administration removed its section 232 duties on Sept. 15, 2020, the day before the Canadian measures were to take effect.[4]

These steel and aluminum battles are an unfortunate chapter in what has traditionally been a reasonably healthy and respectful bilateral relationship. Sound and stable trade policy argues against the unbridled use of these kinds of measures. The problem was that their deployment by the Trump administration left Canada with little option but to respond in kind. As a basic principle, however, Canadian trade policy eschews unilateral action and has been steadfast in

[2] United States Surtax Order (Steel and Aluminum): SOR/2018-152, P.C. 2018-961, June 28, 2018.
[3] "Notice of Intent to Apply Countermeasures," Department of Finance, Canada, Aug. 18, 2020. https://www.canada.ca/en/department-finance/programs/consultations/2020/notice-intent-impose-countermeasures-action-against-united-states-response-tariffs-canadian-aluminum-products.html).
[4] The United States Surtax Order (Aluminum 2020), SOR 2020-199, was to take effect on Sept. 16, 2020 but was repealed once the U.S. duties were withdrawn.

supporting international trade dispute settlement bodies, whether in the WTO or in regional trade agreements such as NAFTA/CUSMA.

It would seem that in today's global trade environment, where nationalist trade-restrictive measures are proliferating, there may be instances where Canada could legitimately use section 53, surgically and proactively, not as a protectionist device but as a means of responding to foreign actions that adversely affect Canadian interests, whether by breaches of trade agreements or more generally. As explained below, the objective would be to forestall a trade war before matters reached the stage of retaliatory responses.

Taking a leaf from the U.S.'s section 232 book, one option would be to open a public investigation into identified foreign government actions inimical to Canadian trade interests on receipt of a complaint filed by a Canadian industry group. While some administrative guidelines may be needed (possibly short of formal regulations), no legislative change to the Customs Tariff or any other statute would be required.

To ensure against a flood of complaints being submitted – although history shows this would be unlikely – there would need to be criteria on the kind of evidence and supporting factual material needed. Should such a complaint be properly documented and sufficiently substantial, an investigation could be initiated – presumably by the Department of International Trade in Global Affairs – followed by a full report to the minister. This model would follow the approach the U.S. government used under both section 232 and section 301 of the *Trade Act* of 1974.

Short of applying duties or surcharges, a section 53 report would turn the spotlight on unacceptable foreign trade actions, describe how those measures are in breach of international agreements and, hopefully, act as a lever in having the offending measures rolled back and eliminated by the government concerned before deployment of trade measures. Securing elimination of an offending trade restriction, should efforts by Canada succeed, would benefit all countries under most-favoured-nation principles.

The federal government used to collect and publish information annually on foreign trade barriers to Canadian companies.[5] This was a valuable tool that is regrettably no longer available. The Global Affairs department ceased this publication for unknown reasons some years back. As part of the surgical use of section 53, as this brief advocates, Global Affairs should resurrect publication of this annual compilation, much like the practice in Australia, New Zealand and the United States.[6] This would be a boon to the private sector, providing a useful source of foreign trade measures inimical to Canadian economic interest.

[5] While an annual report on the state of Canada's trade performance is issued by Global Affairs (https://www.international.gc.ca/gac-amc/publications/economist-economiste/state-of-trade-commerce-international-2020.aspx?lang=eng), there is no longer a separate report listing foreign trade barriers faced by Canadian exporters of goods and services. The Trade Commissioner Service has a facility allowing Canadian exporters to register trade barriers but there is no comprehensive public disclosure of those obstacles.

[6] In a presentation to law students at Queen's University in February 2019 (unpublished but made available to the author), John Weekes, former Canadian ambassador to the WTO, made the point that, unlike Canada, the U.S., Australia and New Zealand issue regular bulletins on foreign trade barriers to their countries' goods and services.

For Canada to use section 53 in this way may be criticized in some quarters as a denigration of multilateralism through taking unilateral action, an undercutting of the WTO and its institutions. That is not the case. For one thing, Parliament enacted the provision, and it should serve its intended purpose rather than fall into disuse, especially given the reality of today's global trading environment.

Moreover, as a limited, but proactive approach, it recognizes the present worrying state of the WTO as an effective dispute settlement body, with the Trump administration having blocked the system's operation by refusing to agree to appellate body appointments. Whether that will change over the next few years is hard to say.

Until there is a return to the healthy and effective operation of the WTO panel system, and even if there's a cure, the proposals offered in this short brief should be considered. It would be a step in using Canadian trade laws more surgically and more effectively for the benefit of Canadian exporters, discouraging treaty breaches by Canada's trading partners and, in the end, enhancing international trade by publicizing and then addressing foreign measures that inhibit Canadian trade.

About the Author

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