

# Intelligence MEMOS



From: Lawrence Herman  
To: Canadians Concerned About Trade  
Date: September 5, 2024  
Re: NAVIGATING CANADA'S TOUGH NEW TRADE STANCE WITH CHINA

---

The Trudeau government's 100-percent tariff surcharges on Chinese electric vehicles march in step with the United States, Mexico and the European Union. As well as hitting EVs, Canada will be applying 25-percent import surcharges on Chinese aluminum and steel also following what the Americans have done.

The tool used to impose these surcharges is an almost-never-used provision in Canadian law – section 53 of the *Customs Tariff Act*. That provision gives the government broad powers to apply these kinds of import surcharges on the joint recommendation of the ministers of finance and international trade. While that recommendation must be soundly justified, section 53 in some respects is potentially more powerful than similar trade laws south of the border.

These measures come as no surprise. With the integration of Canadian economic and commercial interests with manufacturing counterparts in the United States, there was little doubt that the consultations the feds initiated six weeks ago were really a cover for these eventual surcharges.

Coordinating surcharges on Chinese imports with the Americans could help get some needed credit in Washington, whatever the makeup of the new White House and Congress later this year.

China will certainly retaliate against Canadian exports – it announced an anti-dumping investigation into our multi-billion canola sales this week – something the government is presumed to be prepared for. China will also challenge Canada at the World Trade Organization.

To the extent Canada needs some WTO cover in keeping with the country's long-standing commitments to the multilateral rules-based order, there are arguments that can be mustered.

One argument Canada can use is that exceptional tariffs – such as these section 53 surcharges – are allowed under the WTO Agreement, permitting members to depart from binding obligations when their essential security interests are threatened because of war or “other emergency in international relations.”

Until Donald Trump came around, little attention was given to this WTO “exception.” While a WTO panel eventually found against the Trump tariffs in 2019, that decision involved aluminum and steel exported into the US, a situation the panel said did not amount to an international emergency. The economic threats posed by massively subsidized exports of Chinese EVs, as well as strategically critical steel and aluminum, however, are much different. China's aggressive policy of exporting excess capacity in these key strategic sectors to become the dominant global supplier meets the threshold of an international emergency.

The second argument would be that China's export flood of subsidized EVs, as well as of steel and aluminum, is egregiously in breach of WTO rules in itself, seriously distorting international trade and “nullifying and impairing” the benefits Canada has a right to expect under the agreement.

While a “nullification and impairment” case requires a WTO panel adjudication before counteraction can be taken, the paralysis of its dispute settlement system – frozen since the Trump years – makes the adjudication requirement meaningless, leaving Canada with every justification to act unilaterally.

The point to emerge from this is that these multilateral rules – first in the 1947 General Agreement on Tariffs and Trade (GATT) and expanded under the 1994 WTO agreement – were drawn up in a different era. Even though they have served the international community well for decades, given cataclysmic changes in today's world and the shattering of the global trading order, governments will be moving to protect national interests more than ever through unilateral trade measures in circumstances totally unforeseen in the Bretton Woods era. This is admittedly an assault on the global rules-based order, but it is the reality in today's environment.

The other equally fundamental point is that Chinese state capitalism can be considered inherently incompatible with the rules of liberalized trade under the WTO agreement, leaving governments little choice when subsidized Chinese exports imperil their national interests, whether security or economic.

This puts medium-sized countries such as Canada in a quandary – how to maintain a long-standing commitment to multilateralism and a rules-based order while at the same time responding to threats to the national economic interest when WTO rules do not provide an effective means of response.

In this instance, the Trudeau government opted for unprecedented unilateral action in dealing with injurious Chinese imports. The grounds in this case are compelling. The feds are considering whether to enlarge the scope of these surcharges. It will be important to see whether this continues what looks like a more aggressive national interest focus in Canadian trade policy.

*Lawrence Herman is an international lawyer with Herman & Associates and senior fellow at the C.D. Howe Institute.*

*To send a comment or leave feedback, email us at [blog@cdhowe.org](mailto:blog@cdhowe.org).*

*The views expressed here are those of the author. The C.D. Howe Institute does not take corporate positions on policy matters.*

*A version of this Memo first [appeared](#) in The Globe and Mail.*