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**From:** Lawrence Herman  
**To:** Trade Observers  
**Re:** ANY CUSMA EXTENSION SHOULD CLOSE THAT NATIONAL SECURITY LOOPHOLE

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The future of North America's free trade deal is uncertain after Donald Trump's musings last week about not renewing the agreement, indicating that he might terminate the deal because the United States needs nothing from Canada (or Mexico) anyway.

Still, it remains likely that Canada and the United States will get down to some form of negotiation in the weeks to come. Assuming these take place, one issue at the top of Canada's agenda should be to change the so-called "national security exemption" in CUSMA, a provision Trump used – almost as soon as taking office – to apply punitive tariffs against Canadian products, doing an end-run around otherwise binding obligations under the deal.

This is a gaping loophole and unless it is closed, Canada will continue to be at risk of unilateral Oval Office decisions, seriously devaluing any deal that emerges.

There is a challenge here. Tariffs are the underpinning of Trump's trade policy and every possible avenue will be used to keep them going. Even though the US Supreme Court struck down tariffs under the *International Economic Emergency Powers Act* (IEEPA), another law has been dusted off – section 232 of the 1962 *Trade Expansion Act* – to support his tariff campaigns. While more complicated to apply than under IEEPA, section 232 tariffs have been levied against Canadian autos, steel, aluminum, copper and other products, with more Canadian exports currently under threat.

Existing global rules recognize that a country's security interests can be grounds for temporarily departing from normal trade obligations. But this so-called GATT "exception" was circumscribed to prevent evasion of those obligations, particularly a nation's **bound tariff** rates. The GATT provision says that a WTO member can take actions "which it considers necessary" to protect essential security interests but only in time of war "or other emergency in international relations."

The first Trump administration used this exception in its global trade wars, arguing that the phrase "which it considers necessary" in the WTO Agreement meant that the decision to opt out of trade obligations was self-judging, that the United States could impose national security measures in an international "emergency" that it alone had determined to exist and that such action was impervious to foreign challenge.

That argument was overruled by a WTO panel in 2022, which concluded that the United States could not unilaterally invoke national security to avoid WTO trade obligations by simply declaring that an international emergency existed. Most experts consider the panel decision to be legally correct. However, the Trump administration has ignored it, in fact taking the national security override to a new level, beyond anything before in the annals of modern trade relations.

In the negotiations with Canada and Mexico in 2018, the United States strong-armed the two countries into removing the constraining words used in the WTO Agreement by saying, in CUSMA Article 32.2, that "nothing in this Agreement . . . shall preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests."

If this exclusion continues unchecked in any new or revised CUSMA, Canada will be continually hostage to one-sided actions by the White House.

Putting discipline on this national security off-ramp must therefore be one of Canada's main objectives in these negotiations. Assuming US agreement to continue the deal, this would involve Canada proposing new wording that defines a national security emergency as a truly extraordinary circumstance, setting out objective standards before any exceptional trade action can be taken. In addition, when it comes to North American trade,

- Any security measures should require prior notification and consultations with Canada and Mexico, aimed at removing or moderating the US concerns.
- There should be verifiably objective facts that prove that the other partners (say, either Canada or Mexico) were significant contributors to the circumstances causing a national security problem.
- If such measures were ultimately applied, their scope should be subject to some kind of third-party review. That would still leave the United States the right to act but would allow either Canada or Mexico to challenge their reach.

These ideas are adapted from provisions that are fairly standard in regional and bilateral trade agreements in resolving irritants in a range of subjects. Because the CUSMA is a preferential agreement, any restrictions under new wording would not prevent the United States from applying emergency tariffs against the rest of the world, whether under section 232 or any other law (whatever the WTO might say).

We have seen the extensive commercial damage – on both sides of the border – in the past year and a half of MAGA trade policy and its unrestricted use of these tariffs. If the blanket, one-sided national security override remains, it will limit the value of the agreement as a framework for stable business dealings.