Forbes

A Questionable Trade Policy Narrative Deserves Meaningful Debate

Dan Ikenson

January 31, 2018

Trade policy is complex and nuanced, which makes it fertile ground for spinning narratives. Since the beginning of the Trump administration, the establishment trade policy narrative has been shaped considerably by the words and opinions of a Peterson Institute scholar named Chad Bown. Mr. Bown is an economist and former college professor, who has studied and written extensively about U.S. trade laws. He also served on President Obama's Council of Economic Advisers.

Since the 2016 election, Mr. Bown—like myself, my Cato colleagues, and many other trade policy analysts—has taken exception to the Trump administration's "America First" rhetoric, explaining why their diagnoses are wrong and how operationalizing their protectionist solutions would be bad for the U.S. economy and America's standing in the world.

But, somewhere along the way, Bown's objections to Trump's trade views seem to have morphed into a pseudo-religious mission to scapegoat the president for everything that is wrong, has ever been wrong, or could possibly go wrong with U.S. trade policy. Putting Trump at the center of everything that is aggressive or contentious about U.S. trade policy may feed a narrative the media grasps and embraces (and Trump likely welcomes), but it obscures the real source of the problems.

The U.S. trade remedy laws, which predate Trump by a century, are the problem. How the laws are written; how the regulations are administered; how the status quo is defended are all at the root of the problem. But Bown's narrative implies that once Trump is gone, U.S. trade policy will reclaim its exalted international status as a beacon of fairness and humility, treading lightly and rocking no boats. Please, Chad.

Consider this Bown piece, published yesterday on the *Washington Post*'s "Monkey Cage." Ostensibly, the article is about the Canadian government's submission to the World Trade

Organization of a "request for consultations" with the U.S. government over various U.S. trade law practices that Canada believes violate U.S. WTO obligations.

There was nothing especially noteworthy about the Canadian government's complaint, except that it came at a particularly testy time in bilateral trade relations—less than two weeks before the struggling NAFTA negotiations were to resume. The complaint focuses on several very technical U.S. trade law procedures having to do with the calculation and application of duty rates in antidumping and countervailing duty cases, and it takes aim at the U.S. rules by which domestic industries are found to be "materially injured" or "threatened" with material injury (a necessary finding for duties to be imposed) by dumped or subsidized imports.

Even though the *New York Times*, citing Bown, characterized Canada's case as "sweeping" and akin to "lobbing a diplomatic grenade at the Trump administration's 'America First' approach amid an increasingly embattled trade relationship between the longstanding North American allies," the complaint was rather standard, technical, wonky, boilerplate stuff (except, perhaps, for the timing). After all, Canada's complaint was the 536th case brought to the WTO since 1995 and the 134th launched against the United States. Violations of the WTO Antidumping Agreement (ADA) or the WTO Agreement on Subsidies and Countervailing Measures (ASCM) have been alleged in 140 of the 536 cases. In the 134 cases against the United States, the ADA and ASCM were cited 92 times. Complaints are lodged against the United States more than any other member and, in most cases, U.S. trade remedies practices are being challenged. So, the case for screaming that this complaint is evidence of a falling sky is pretty weak.

But Bown considers the case a watershed and an indictment on Trump:

Canada filed a formal World Trade Organization dispute in December that seeks to protect billions of dollars of its exports to America that are **suddenly under threat, in part because of President Trump's NAFTA renegotiation** (my emphasis).

That is an odd take, indeed. Which of Canada's exports are "suddenly" under threat and why is that threat partially attributable to Trump? One can only assume Bown means that, if the NAFTA talks collapse and the United States withdraws, then Canadian exports will no longer receive preferential tariff treatment. But how does filing a WTO complaint about U.S. trade remedy procedures in any way mitigate the potential loss of preferential access? The trade remedy laws apply to NAFTA and non-NAFTA members equally.

By all informed accounts, including Canadian Foreign Affairs Minister Christina Freeland's, the purpose of Canada's bringing the case was to secure some additional leverage in the ongoing, tangential negotiations with the United States aimed at reaching an agreement over softwood lumber trade. The Softwood Lumber Dispute has been a fixture in the bilateral relationship for over 35 years. During that period, U.S. lumber producers filed a series of unsuccessful and then successful petitions for relief under the antidumping and countervailing duty laws. The duty orders that were put into place were eventually superseded by two long-standing managed trade agreements, interspersed with a slew of litigation before U.S. courts, NAFTA panels, and the WTO Dispute Settlement Body. The U.S. government behaved poorly at various points under various presidential administrations, including by refusing to implement NAFTA panel

determinations and extorting $1 billion in duties collected that should have been refunded to importers of Canadian lumber.

The last Softwood Lumber Agreement was borne of that extortion and was in effect for nine years, ending in 2015. Since then the two governments have been unable to reach terms for a new agreement. Those who find merit in managed trade agreements should note that the Obama administration had plenty of time to strike a new deal with the Canadians, but agreeable terms were never reached.

So, in the absence of an agreement, the U.S. industry filed new antidumping and countervailing duty cases and Canadian exporters are once again subject to duties under those laws. And Trump had nothing to do with it.

Bown continues:

Canada mostly wants the threat of new American tariffs on its exports of lumber, paper, steel pipe and other products to stop.

Well, sure. Governments generally don't want their exporters subject to tariffs in foreign markets. But Canada, the United States, and all other members of the WTO, unfortunately, grant governments wide latitude in using their trade remedy laws to redress dumping or subsidization that is found to be injurious to domestic industries. So Canada's complaint will do nothing to end the threat of American tariffs under these laws. What Bown doesn't share is that antidumping and countervailing duty measures against lumber and paper are already in place and that five of the six U.S. AD/CVD measures against Canada were initiated during the Obama administration (the 6th was brought during the Reagan administration!).

Bown goes on:

U.S.-Canada trade throughout the NAFTA period has been mostly harmonious. Canada's exporters have rarely faced attack under the sort of American "unfair" trade policies — anti-dumping and countervailing duties — that Ottawa is fighting with this formal dispute.

What? This is pure dissembling. What "rarely-faced attacks" under what "sort of American 'unfair' trade policies" is he describing? Bown seems to be suggesting that the Trump administration is doing something especially aggressive or nefarious here. But it's doing nothing. These are the trade laws and they are on statutory autopilot. Every single claim in the Canadian complaint, and 167 of the 188 AD/CVD cases cited in the appendices to support those claims, concerns U.S. measures that predate Trump. So when Bown writes that Canada has "rarely faced attack under the sort of American 'unfair' trade policies…that Ottawa is now fighting with this formal dispute" – a complaint that identifies these very policies on a case by case basis going back *19 years* – one can't avoid concluding that he's spinning a narrative.

More Bown:

As late as 2017, only about 1 percent of Canada's exports to the United States were caught up in these policies. But that may be changing. Pending U.S. tariffs could suddenly shut down billions of dollars of Canadian exports of products such as lumber, paper and steel pipe.

Yes, trade remedy actions have a way of squelching bilateral trade in the targeted products. The U.S. government—and all other WTO member governments—are afforded a great deal of deference when it comes to using these laws. The U.S. laws enable a U.S. agency, which is ideologically committed to protecting domestic industry at all costs, to act as judge, jury, and executioner in these cases. The results, which hurt foreign exporters and U.S. import-consuming industries and consumers, can be commercially crippling. BUT. THIS. IS. NOTHING. NEW. And, contrary to a theme Bown has been peddling for more than a year, this is not a problem created or exacerbated by Trump. The problem is with the laws and their administration and Bown's partisan scapegoating takes the focus away from the appropriate target.

Bown continues:

Until Trump came into office, Ottawa wasn't particularly concerned about frequent U.S. abuse of these policies because China — and not Canada — had been Washington's primary target.

I'm sorry, but this is just make believe. First of all, but for one exception in 35 years, "Washington" doesn't target other countries' exporters under the trade remedy laws. Domestic industry brings the cases when their lawyers advise them that there is sufficient evidence to support an affirmative finding. Presidents don't get involved. Bown is heavily vested in the hypothesis that Trump being in the White House explains the steep increase in AD/CVD cases in 2017. But the president's influence over AD/CVD outcomes is limited, as the Boeing-Bombardier outcome reinforces. Sure, the president or Commerce Secretary can tell the Enforcement and Compliance division (DOC's trade remedy overlords) to push their discretionary limits to generate the highest possible dumping or countervailing duty margins, but they don't need the coaxing. They're reliable. They find dumping in 93 percent of cases. Meanwhile, there is a court system keeping a watchful eye, which has not been shy about remanding over-zealous decisions and calculations back to the agencies.

The fact is that the antidumping and countervailing duty laws were revised in 2015 in legislation passed along with Trade Promotion Authority. Those changes lowered the evidentiary thresholds for demonstrating material injury and made it easier for Commerce to use estimates of prices and costs that are adverse to the foreign respondents. Those changes are more likely to explain the spike in cases during 2017.

And there's more from Bown:

After a lull between 2008 and 2015, Ottawa has brought four new disputes since 2016 — filing three of these after Trump came into office. All four challenge the same sort of U.S. unfair trade actions.

You tell me: Does Bown want his readers to infer that Trump is the reason for Canada's WTO complaints? The fact is that each of the complaints is about U.S. policies and practices that predate Trump. They are longstanding U.S. practices. They have nothing to do with Trump specifically. But blaming Trump for all that ails U.S. trade policy has been Bown's mission. My interest in making these points is not to defend Trump, but to draw attention to the fact that Bown's tactics make resolution of the real problem more difficult. The problem is the ease of

access to trade remedy laws designed for a much different economy at a much earlier stage of development.

Bown has more:

To make its WTO case, Ottawa must show that current U.S. targeting of Canadian exporters of lumber, paper and steel pipe products is part of a longer pattern of bad behavior. But because Canada hasn't been the target of earlier tariffs, it had to draw from U.S. actions against other countries, including China.

Wrong. Canada need not demonstrate any longer patterns of bad behavior. It needs to demonstrate that U.S. policies, procedures, rules, laws, or actions are inconsistent with U.S. obligations under the various WTO agreements referenced in the complaint. It just so happens that Canada has identified several "as such" infractions (meaning, essentially, the violations are endemic—woven into the fabric of U.S. policy). Associating those longstanding policies with a particular president is a misguided stretch.

Bown goes on:

NAFTA itself is another reason Canadian companies haven't been a major target of these tariffs historically. NAFTA courts can be used to resolve U.S.-Canada disputes, including a special provision — known as Chapter 19 — that discourages especially frivolous claims under unfair trade laws. Ottawa also recently filed a dispute challenging potential U.S. lumber tariffs under Chapter 19. Trump has repeatedly threatened to terminate NAFTA. But even if it remains, the Trump administration has also prioritized ending these NAFTA legal protections.

I understand the importance of simplifying concepts for an audience that might be unfamiliar with the topic, but this explanation of NAFTA Chapter 19 is insufficient and its assertions are questionable. Under U.S. law, executive branch agencies can be taken to court over the decisions they render by aggrieved parties. The U.S. International Trade Commission and the Department of Commerce are the agencies with jurisdiction over the antidumping and countervailing duty laws. If the domestic petitioner or a foreign respondent or another party to an antidumping case believes that the Commerce Department overstepped its discretion and failed to administer the law properly, it can file claims at the U.S. Court of International Trade. This is the channel for adjudicating matters related to trade remedies.

However, under the terms of NAFTA, as an alternative to the domestic courts, the parties can choose a Chapter 19 panel to adjudicate. Essentially, the domestic courts can be cut out of the appeals process. That raises a lot of legitimate questions about constitutionality and sovereignty among lawyers and legal scholars, and the Trump administration's position in the NAFTA talks is to get rid of these special panels and restore oversight to the domestic courts. For reasons not entirely clear to me, the Canadians want to retain Chapter 19. Presumably, they believe they get a better outcome from the NAFTA panels than they do from the courts. There is a perception that the U.S. courts are unfair to foreign entities in these proceedings, but that is not reflected in the data we've examined at Cato.

A review of the 18 months of data on CIT case decisions through June 2017 indicates that the court agrees with the plaintiff (the party challenging the agency's actions) on 46 percent of the issues raised. When the plaintiff is the U.S. industry (objecting to DOC or ITC decisions in the underlying AD or CVD case), the CIT agrees on 43.2 percent of the issues. When the plaintiff is the foreign interest (foreign producer or exporter), the CIT agrees on 47.2 percent of the issues.

Those results suggest that foreign industry plaintiffs have a slightly higher success rate than U.S. industry plaintiffs, which may reflect the fact that agency discretion is more often exercised in a way that is adverse to the foreign interests. An examination (published in a 2006 Cato paper) of the 18-month period between January 2004 and June 2005 found that the CIT remanded 19 cases to the Commerce Department with instructions to revisit its decisions or recalculate its antidumping results. In 14 of those 19 cases, the recalculated dumping margins were smaller, suggesting a higher incidence at Commerce of exercising its discretion to the detriment of the foreign or importing interests, as well as the court doing its job.

The U.S. courts are not the problem. The problem is with the laws' administration at Commerce (and to a lesser extent at the U.S. International Trade Commission), which is given way too much discretion for an agency with an overtly protectionist agenda. Thus, Chapter 19 is a solution in search of a problem.

But Bown suggests that the Trump administration's preference for terminating Chapter 19 is an affront to good judgment and an act of aggression that will be deeply consequential to Canada. His presumed preference for the status quo may also have something to do with his curious claim that Chapter 19 deters "especially frivolous claims" under unfair trade laws. Say what? Considering that the standard of review accepted by these panels is supposed to be identical to that of the domestic courts, there should be no difference between the outcomes reached by the panels and the courts. If there is, that would seem to bolster the argument that Chapter 19 is unconstitutional.

Bown mentions Canada's recent Chapter 19 review request—perhaps to illustrate that Trump's plan to snuff it out would be a real hardship for Canadians. But the fact is that the United States doesn't have a great record complying with NAFTA panel decisions. Neither Commerce nor the ITC enjoys getting cases remanded to them. When the body doing the remaining is not a U.S. court, but an international panel, the agencies drag their feet and invoke sovereignty and constitutionality claims, knowing those arguments appeal to many Americans. That's exactly what happened during the last round of lumber litigation in 2005, which enabled the Bush administration to buy enough time to extract $1 billion of illegally collected duties, which should have been refunded.

Bown has more:

The institutional uncertainty over NAFTA has forced Canada to turn to the WTO, even though addressing this dispute "privately" under NAFTA might have less impact on China's trade to the U.S. market and thereby alleviate Lighthizer's concerns.

This is another head-scratcher. It's unclear to me how Canada could have turned to NAFTA, instead of the WTO, for adjudication of claims concerning U.S. violations of GATT/WTO commitments. By substituting for domestic courts, Chapter 19 deals with matters of domestic law, not international agreement. And NAFTA's general dispute settlement procedures cannot speak to whether U.S. practices are GATT/WTO consistent. So, yeah.

Bown goes on:

Canada's WTO dispute could have outsized repercussions — for all parties. If Trump decided to end NAFTA and slap special tariffs on billions of dollars of Canadian exports, Ottawa's worst fears would be affirmed.

Chad? What are you talking about? What does anything in this statement have to do with anything else in this statement? Trump ending NAFTA is a possibility. Commerce and the ITC affirming AD/CVD duties on various Canadian exports is (and always has been) a possibility. But one has nothing to do with the other. And neither has anything to do with Canada's WTO dispute. Again, this seems like subterfuge.

More Bown:

President Trump's solar and washer tariffs may have now opened the floodgates of protectionism

Oh, out of the blue comes this assertion. Why? What does it have to do with rest of the article? Is it just to remind that Trump has authorized discretionary trade restrictions? Ok. Got it. But if anything comes through the floodgates, remember that there are constraints—legal, procedural, economic, and political—on the president.

Bown concludes:

Canada's legal act of self-protection chiefly serves to clarify the costs to this U.S. administration continuing a mostly antagonistic trade policy toward its northern neighbor. And it may prove another crack in the already fractious NAFTA renegotiation.

You're stretching, man. Really stretching.

Dan Ikenson is director of Cato's Herbert A. Stiefel Center for Trade Policy Studies, where he coordinates and conducts research on all manner of international trade and investment policy.