

Trump tariffs: the U.S. first strike and Canada's retaliation

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Update as of February 3, 2025, at 5:00 p.m. ET: The tariffs proposed by the U.S. and Canada's retaliation described in this article are now paused for 30 days. The below describes the tariffs and retaliation as proposed immediately prior to the agreement to pause implementation.

On February 1, 2025, U.S. President Trump, invoking his authority under the *International Emergency Economic Powers Act* (IEEPA) and the *National Emergencies Act* (NEA), issued an Executive Order (EO) imposing 25% tariffs on all "products of Canada", excluding energy resources, which will face 10% tariffs instead. The tariffs come into force February 4, 2025, at 12:01 a.m. Eastern time. President Trump issued concurrent EOs imposing 25% and 10% tariffs on goods of Mexico and China respectively though, as of the date of publication, the U.S. tariffs on Mexico have been paused for thirty days.

In response to the tariffs, Canada released its own retaliatory tariff package, beginning with 25% surtaxes on select U.S. goods representing \$30 billion in annual imports, also effective February 4, 2025.

This Update explains

- how, when and to which goods the U.S. tariffs apply
- how Canada is retaliating and which goods are affected
- the likelihood of legal challenges to the U.S. tariffs and the limitations of those challenges under the WTO Agreement and the CUSMA/USMCA

Osler's International Trade Group will be analyzing and addressing new developments regarding the U.S. and Canadian tariffs on an ongoing basis. This is an evolving issue. This article is current to the date and time of publication.

Executive summary

- While the U.S. tariffs apply comprehensively to "products of Canada", the scope of that term is unclear and is expected to be established by a subsequent Federal Register notice.
- No duty drawbacks or *de minimis* exceptions will apply to tariffs levied under the order.

Goods that were loaded onto a vessel, or in transit to the U.S. prior to February 1, will not be subject to the U.S. tariffs.

- Canada has announced the imposition of a 25% tariff (which Canada refers to as a “surtax”) on an aggregate \$155 billion of U.S. products imported into Canada. Canada’s surtaxes will be implemented in two phases.
- Phase one consists of a 25% surtax, effective February 4, 2025, on 1,256 Harmonized System tariff items representing \$30 billion in annual imports of products from the U.S. (Refer to Osler’s [“Tariff Tracker”](#) for full details of the products affected, at the Harmonized System tariff code level.)
- Phase two will include 25% surtaxes on additional products, representing a further \$125 billion in annual imports from the U.S. The full list of goods that will be targeted in phase two is not yet settled, but is anticipated to include vehicles, steel, food and other products. The phase two list will be subject to a 21-day public consultation period during which the public can provide comments to the Department of Finance (Finance Canada). The timing of phase two implementation is yet to be announced.
- Canada’s surtaxes apply to “goods that originate in the United States”, which are “goods that are eligible to be marked as goods of the United States in accordance with the *Determination of Country of Origin for the Purpose of Marking Goods (CUSMA Countries) Regulations*” (CUSMA Marking Regulations). The use of the CUSMA Marking Regulations raises several important and unanswered questions about what goods are, in fact, U.S.-origin goods and subject to surtaxes.
- Canada has indicated it may take additional non-tariff measures, including measures affecting critical minerals, energy, procurement and “other partnerships”, details of which have not yet been announced. The precise nature and timing of these non-tariff measures are also unclear.
- Various avenues to challenge the legality of the EO exist, including through the WTO and CUSMA/USMCA, though are likely impractical. There is also a high likelihood the tariffs will be challenged under U.S. law. Statements from Canadian officials indicate that a WTO challenge can be expected.

1. The executive order – what you need to know

What products do the tariffs cover?

- **With the exception of “energy resources,” 25% tariffs will be levied on all imported goods that are “products of Canada”.** The definition of “products of Canada” is as yet unclear and is expected to be provided in a subsequent Federal Register notice. Until the notice is published, or there is further guidance from U.S. Customs Border Protection (CBP), it is unclear if the tariff applies to all products being imported *from* Canada, including products produced in third countries, or whether rules of origin, marking and labelling rules, or some other rules will determine which products are “products of Canada”.
- **10% tariffs will be applied to all Canadian energy resources.** Energy resources are defined in reference to section 8 of the U.S. [Executive Order 14156 of January 20, 2025](#),

and include crude oil, natural gas, lease condensates, natural gas liquids, refined petroleum products, uranium, coal, biofuels, geothermal heat, the kinetic movement of flowing water and critical minerals. It is unclear whether this definition includes electricity. When will the tariffs take effect?

- **Tariffs under the EO take effect February 4, 2025, at 12:01 a.m. Eastern time.** Specifically, the tariffs will apply to all goods “entered for consumption” (i.e., imported into the U.S. and released to the importer for use, whether commercial, business or personal) or withdrawn from a bonded warehouse for consumption, on or after 12:01 a.m. on **February 4, 2025**, Eastern time.
- **Foreign trade zones:** Goods that are admitted into a U.S. “foreign trade zone” on or after February 4, 2025, 12:01 a.m. Eastern time, must be admitted as “privileged foreign status”. The EO sets out further specific rules that apply to FTZs.

Are there any exceptions to the tariffs?

- **There is an exception for goods in transit to the U.S., prior to February 1.** The EO states that the tariffs will not apply to goods that were loaded onto a vessel at the port of loading, or in transit on the final mode of transport, prior to entry into the U.S. before 12:01 a.m. **February 1, 2025**, Eastern time. To make use of this exception, the importer must follow the CPB’s certification process to be set out in a Federal Register notice.
- **There will be no duty drawbacks** available for tariffs paid pursuant to the EO. This means, for example, that if an importer pays tariffs pursuant to the EO on goods it imports into the U.S. from Canada, and subsequently exports those goods, the importer would not be able to obtain a refund of those duties.
- **De minimis treatment is not available for IEEPA tariffs.** Under U.S. laws, commercial shipments valued at \$800 or less are typically eligible for a duty-free *de minimis* exemption. There will be no such exemption for goods subject to the EO.

The legal basis for the tariffs

The IEEPA grants the President broad discretionary authority to, among other things, regulate foreign trade. When the President has declared a national emergency under the NEA, the IEEPA permits the President to address “unusual and extraordinary threats” to national security, foreign policy or the economy which originate — in whole or in part — outside the U.S. The EO declares a national emergency relating to the flow of illegal immigration and illicit drugs from Canada into the U.S. via the Canada/U.S. border.

2. Canada’s phased approach to retaliation

In response to the EO, Canada announced that it will impose a 25% surtax on products representing an aggregate \$155 billion in annual imports from the U.S. Canada’s response will proceed in two phases, with the possibility of Canada imposing further tariff and non-tariff measures after or concurrently with phase two.

Canada’s phase one surtaxes were set out in an Order-in-Council entitled the *United States Surtax Order (2025)* (Canada’s Order), issued February 1. Canada’s Order was made pursuant to the authority in Canada’s *Customs Tariff*, which allows Canada to impose surtaxes on imported goods for the purpose 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.”

Phase one: 25% surtaxes on \$30 billion in U.S. imports

In keeping with Canada’s clear indications that it would respond to any tariffs imposed by the U.S., Finance Canada announced on Saturday evening phase one of that response: a 25% *ad valorem* surtax on approximately \$30 billion of U.S. goods, effective February 4, 2025. The surtax is primarily aimed at consumer goods, such as fresh and prepared foods, apparel and consumer durables.

The surtaxes are payable by the importer. They are imposed on the “value for duty” of the imported goods, which, generally, is the purchase price paid or payable, subject to certain additions or deductions. The surtax will not apply to goods that are in transit to Canada on or before February 4, 2025.

Finance Canada has published a list of 1,256 Harmonized System tariff items targeted in phase one of Canada’s response, representing \$30 billion in annual imports of products from the U.S., including

- orange juice
- peanut butter
- wine, beer, and spirits
- coffee
- appliances
- apparel
- footwear
- motorcycles
- cosmetics
- pulp and paper^[1]

To assist the business community in identifying whether their U.S. goods may be subject to Canadian tariffs, Osler has prepared the “[Canadian Tariffs Tracker](#),” a searchable tracker of the affected tariff items. Osler’s Canadian Tariffs Tracker will be updated as more details are released regarding Canada’s response.

Canada’s measures apply to ‘goods that originate in the United States’

Canada’s Order applies to “goods that originate in the United States” which means goods that are “eligible” to be marked as goods of the United States in accordance with the CUSMA Marking Regulations. The use of the CUSMA Marking Regulations raises several important and unanswered questions as to which goods are, in fact, U.S.-origin goods for the purposes of Canada’s Order.

For goods that are already required to be marked under the CUSMA Marking Regulations, the determination of origin for marking will proceed in the normal course pursuant to the origin rules set out in the regulation. However, for goods that are not required to be marked, which are the majority of goods imported into Canada, it is unclear what obligations an importer will have to assess whether imported goods meet any of the origin rules and are therefore potentially “eligible” to be marked as U.S.-origin goods. Moreover, for food products regulated by the *Safe Food for Canadians Act* still different marking and labelling rules may apply.

Lastly, it is unclear how Canada's Order will apply to certain goods imported by couriers under Canada's existing Courier Low Value Shipment program. Under this program, couriers are permitted to import certain goods without the use of detailed tariff classifications and may instead use simplified classifications. However, Canada's Order applies only to specific goods as identified by their tariff item number. Because the simplified classifications were not included in Canada's Order, certain goods imported by courier may not be subject to Canada's retaliatory measures for operational and administrative reasons.

Phase two: 25% surtaxes on \$125 billion in U.S. imports

Phase two of Canada's response is a surtax on goods representing further \$125 billion in annual U.S.-origin imports. The full list of U.S. goods to be targeted in phase two is yet to be determined but is expected to include

- vehicles (including passenger and recreational vehicles, trucks, and buses including electric vehicles)
- steel and aluminum products
- certain fruits and vegetables
- aerospace products
- recreational boats
- beef and pork
- dairy products^[2]

Finance Canada has stated that it will make the list of proposed phase two goods available for a 21-day public consultation period prior to implementation.

Finance Canada has not said whether further surtaxes will follow immediately after the public consultation ends nor whether goods may be removed from or added to the proposed list.

Osler's International Trade group will continue to provide updates regarding such developments as information becomes available. Osler's [Tariff Tracker](#) will also be updated once the list of proposed tariff items is released by Finance Canada, and again when implementation dates are provided.

Potential phase three: non-tariff measures

A potential third phase, though Canada has not called it that, could include non-tariff measures. Prime Minister Trudeau indicated that such non-tariff measures may be focused on critical minerals, energy, procurement and "other partnerships", details for which have not yet been announced. The non-tariff measures are yet to be announced but could include export restrictions or procurement policy changes such as the prohibition of U.S. goods or U.S. vendors from participation in government-related procurement processes, including at sub-national government levels.

In addition to Canada's federal response, Canadian provinces have already responded to the U.S. tariffs. All provinces and territories have indicated that they are prepared to take measures to respond to the U.S. tariffs.^[3] For instance, several provinces have announced that they will halt the sale of U.S. liquor products within their borders.^[4] Early on February 3, Ontario announced a ban on American companies from provincial contracts.^[5] Provinces are using their procurement powers and directing state-owned enterprises, so far with respect to liquor purchases and procurement, but potentially in other sectors, as well.

Remission process available for Canadian businesses

Finance Canada on Sunday also announced a process for businesses to request remission of surtaxes that apply to U.S.-origin imported goods. The remission process will apply to both phase one and phase two goods.

There are two circumstances where Canada will consider requests for the remission of surtaxes on U.S.-origin goods:

- where goods used as inputs, or potentially substitutes for those goods, cannot be sourced, either domestically or reasonably from non-U.S. sources
- other exceptional circumstances, on a case-by-case basis, that could have significant adverse impacts on the Canadian economy

Notably, and in contrast to the remission process available for the surtaxes imposed last year on Chinese electric vehicles, steel, and aluminum, the circumstances do not include pre-existing contractual commitments. This suggests that the existence of long-term contracts for U.S.-origin goods will not be a sufficient basis to receive remission.

Remission may be granted with or without conditions, in respect of the whole or any portion of the surtaxes. Importantly, remission may be granted regardless of whether any liability to pay the duties has arisen. This means that remission may be granted not only in respect of surtaxes already paid by an importer but also prospectively before any surtaxes are, in fact, levied and paid.

In recent remission processes, Finance Canada advised that decisions would be made in tranches, with requests made by certain dates receiving expedited review. In the absence of further guidance from Finance Canada, remission requests should be made quickly to ensure priority review.

3. Legal challenges possible

Challenges under U.S. domestic law

Imposing tariffs under IEEPA is unprecedented and the national security justification for the tariffs is dubious, to say the least. Swift legal action to challenge the tariffs under U.S. law — including a potential stay of implementation — can be expected.

Challenges under trade agreements – WTO and CUSMA

Canadian officials have been cited as saying that the Canadian government “clearly considers these tariffs to be a violation of trade commitments that the U.S. has taken”. These imply that Canada intends to challenge the tariffs at the WTO and/or under the USMCA/CUSMA. Those challenges would likely succeed, particularly at the WTO, where the jurisprudence on the use of the exception for national security measures, on which the United States would rely, will be helpful to the complainants.

Regardless, though, those challenges would largely be symbolic. First, they will take many months to run their course, while the Trump tariffs remain in place and the economic damage is done. Second, in the case of a WTO challenge, because the Appellate Body is not functioning, the U.S. could (and, based on previous actions,^[6] likely would) appeal any WTO panel decision “into the void”, blocking the decision from taking effect. Third and most important, the result of a successful complaint, whether at the WTO or under the CUSMA, would be that the United States would be required to remove the tariffs, failing which

Canada could retaliate by suspending “benefits” or “concessions”, which ordinarily means imposing tariffs on U.S. goods. However, Canada has announced that it already intends to retaliate with its own tariffs. Therefore, success in dispute settlement might eventually provide legal cover for retaliatory tariffs but nothing more.

A more fundamental problem is that dispute settlement mechanisms in trade agreements are not designed to address wholesale abrogations of those agreements, which is effectively what the Trump tariffs are. Binding commitments to reduce or eliminate tariffs are at the heart of most trade agreements and often their *raison d’être*. The Trump tariffs therefore undermine a basic premise of trade agreements with the U.S.: that it will abide by those commitments. In these circumstances, dispute settlement under the agreements themselves will necessarily be inadequate.

[1] Department of Finance Canada, [“Canada announces \\$155B tariff package in response to unjustified U.S. tariffs”](#) (1 February 2025), online: Government of Canada.

[2] Department of Finance Canada, [“Canada announces \\$155B tariff package in response to unjustified U.S. tariffs”](#) (1 February 2025), online: Government of Canada.

[3] CBC News, [“Here are all the ways Canada is striking back against Trump’s tariffs”](#) (2 February 2025), online.

[4] For example, Ontario Premier Doug Ford indicated in a statement that the Liquor Control Board of Ontario was directed to indefinitely halt the sale of U.S. alcohol products in its stores and online, and the sale of wholesale U.S. products to restaurants, bars, grocery stores and retailers. British Columbia (B.C.) Premier David Eby directed the B.C. Liquor Distribution Branch to stop the purchase of U.S. liquor products from Republican “red states”.

[5] *The Toronto Star* (3 February 2025), online:
<https://www.thestar.com/politics/federal/donald-trump-tariffs-canada-responds/article_2b6b2f68-e230-11ef-b18e-f33fde2a2aeb.html>.

[6] For example, the U.S. adopted this strategy with respect to WTO panel findings in a series of reports relating to the U.S. steel and aluminum tariffs imposed by the first Trump administration in 2018 under section 232 of the *Trade Expansion Act of 1962*, Pub. L. 87-794, Oct. 11, 1962, 76 Stat. For more information, see, e.g.: Emilie Kerstens and William Alan Reinsch, “The WTO Panel Report on Chinese Tariffs: Consequences of a Broken Appellate Body”, Center for Strategic & International Studies, (25 August 2023), online.