The return of the President: What can we learn from the 2018 U.S. tariffs to prepare for February 1?

January 24, 2025

Introduction

President Trump is back. And so are his tariff threats.

The new Administration has not yet declared what level of tariffs it intends to impose on which Canadian goods; in his latest press conference, President Trump indicated that his current “thinking” is to impose the 25 per cent tariff on February 1.

As Yogi Berra said, it’s déjà vu all over again.

Lest we forget, we have indeed already seen this in 2018. Lest we forget, back then President Trump imposed a 25 per cent and 10 per cent tariff respectively on certain steel and aluminum imports from Canada. Back then, the object was not the border, fentanyl, or immigration. It was to force Canada to renegotiate the North American Free Trade Agreement.

Canada proceeded to implement its own retaliatory measures; Canada and Mexico agreed to renegotiate the long-standing trade agreement; and President Trump changed the name of the agreement to the United States-Mexico-Canada Agreement (USMCA) and lifted the tariffs.

It’s a little known fact that while the tariffs lasted for a year, not all was lost. This is because, as is normal in these circumstances, mechanisms were put in place to permit affected businesses apply for a **tariff exemptions**: the U.S. *exclusion* process, and the Canadian *remission* framework.

It remains unclear whether such relief will be implemented for the potentially newly imposed (retaliatory) tariffs; it’s worthwhile examining what was put into place to best prepare for what may come.

The 2018 tariffs

The U.S. targets Canadian imports of steel and aluminum

On March 8, 2018, President Trump issued two Proclamations imposing a 25 per cent and 10 per cent tariff respectively on certain steel and aluminum imports from all countries with exemptions for imports from Canada and Mexico. These were imposed pursuant to Section 232 of the *Trade Expansion Act*, which allows the president to impose tariffs on imports deemed a threat to national security.

Because tariffs do not always limit imports, subsequent Proclamations set *quantitative limitations* on the importation of steel and aluminum from certain countries.

Canada's tariff exemption however was short-lived, as the Trump administration revoked it on May 31, 2018. That is, the President of the United States made Canadian steel and aluminum imports into the U.S. more expensive for U.S. consumers on the grounds of "national security".

All of these measures were eventually challenged in the WTO. The United States justified its trade-restrictive measures under the "security exception" of the trade agreement.

The exclusion process

The same Proclamations that imposed the 2018 tariffs on imports of aluminum and steel also authorized the U.S. Secretary of Commerce to grant **exclusions** from the duties:

- if they determined that the steel or aluminium article for which the exclusion is granted is not "produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality"; or
- "based upon specific national security considerations."

As a result, individuals or organizations using steel articles or aluminium articles identified in the Proclamations and engaged in business activities in the U.S. were permitted to submit **exclusion requests**.

The procedure further allowed an individual or organization in the U.S. to file objections to the exclusion requests. Exclusion requesters in turn could rebut the objection, to which objectors could file a surrebuttal. It's as if trade lawyers were driving the "national security" tariff/exclusion ambulance.

Exclusion requests are typically managed through a portal. The requester is required to complete questions concerning:

- the requesting organization;
- the product in question; and
- whether the product
    - is manufactured in the U.S.,
    - can be supplied in sufficient quantities, and
    - can be produced by domestic manufacturers in a timely manner.

If granted, the exclusion requests typically last one year.

Completed exclusion requests are typically posted for public review. To date, more than 435,000 exclusion requests have been published. Exclusion requests for products imported (including from Canada) have been granted based on findings that the product reference in the exclusion request is "not produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality" and the fact that there are "no overriding national security concerns" that would require the exclusion request be denied.

Canada's response

On the same day the U.S. announced tariffs on imports of Canadian steel and aluminum, the Government of Canada announced its intention to apply surtaxes on imports of steel, aluminum, and other goods from the United States, effective as of July 1, 2018.

The government also announced a remission framework to provide relief to Canadian businesses negatively impacted by the retaliatory surtaxes. The Government considered requests for remission of surtaxes only in the following instances:

1. To address situations of short supply in the domestic market, either on a national or regional basis.
2. Where there are contractual requirements, existing prior to May 31, 2018, for Canadian businesses to use U.S. steel or aluminum in their products or projects.
3. To address, on a case-by-case basis, other exceptional circumstances that could have severe adverse impacts on the Canadian economy.

Remission requests were to be submitted by email, and were required to include the information set out in the "template for submissions". Similarly to the U.S. exclusion process, the requestor was required to include:

- information on the company's operations,
- a detailed description of the goods on which remission was sought, and
- evidence demonstrating the inability to source the product or substitutes from Canadian or non-U.S. suppliers.

Unlike the U.S. tariff exclusion process, which required public posting of exclusion requests, objections and comments, Canada's remission framework operated more discreetly, focusing solely on the merits of individual requests based on the set criteria. The requests were reviewed internally, without a public comment or review period, and were not posted publicly.

Tariffs to the right of them, Tariffs to the left of them…

On May 17, 2019, Canada and the United States reached an understanding through a joint statement to remove the U.S. tariffs and Canadian surtaxes. The Canadian surtaxes and U.S. tariffs were removed on May 19, 2019.[1] President Trump signed on to a newly negotiated USMCA. And there the matter lay until November 25, 2024, when President-elect Trump announced his intention to impose of 25 per cent tariffs on goods from Canada and Mexico because of alleged concerns about drugs and migrants.

Musing the evening after his inauguration, he indicated the new Administration would impose the tariffs on Canada (and Mexico) as soon as February 1.

Should the threatened tariffs materialise, the Government of Canada has indicated they will levy immediate tariffs on $37 billion worth of American goods in response—rising to $110 billion if the president doesn't back down. If those efforts don't succeed, the Government has indicated they are prepared to enact more severe measures, including a possible oil export ban.

Theirs not to reason why

Tariffs are coming. Whether on February 1 or some other date; whether 25 per cent or some other rate; on some or all goods, that is our fate.

Businesses must therefore prepare for the worst.

An early and prudent course of action for Canadian businesses engaged in cross-border trade is to familiarize themselves with the exemption procedures, and prepare accordingly:

1. **Gathering and analyzing data**: Start collecting comprehensive information about your products, supply chains, and sales data to demonstrate the unique value of your goods, including why they may not be easily sourced elsewhere in the U.S. or Canada.
2. **Market preparation and analysis**: Research the availability of similar products within the market and determine if equivalent goods are produced by domestic manufacturers and whether they can adequately meet your current clients' needs.
3. **Identify advocates**: If pursuing tariff exemptions through the U.S. exclusion process, proactively communicate with your U.S.-based clients to outline the potential impact of tariffs and secure their support in submitting an exclusion request if needed.

In the face of considerable uncertainty, it's never too early to explore potential strategies to reduce the impact of the proposed tariffs. Please reach out to any of the authors or key contacts below with any questions or to learn more about tariff strategies.

Footnotes

[1] President Trump reimposed 10% tariffs on some Canadian aluminum products in August 2020, as allowed under the Joint Statement, but were lifted again in September 2020. See Office of the United States Trade Representative, USTR Statement on Canadian Aluminum | United States Trade Representative (15 September 2020).

By

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