WHEN TRADE WARS MEET THE RULE OF LAW

BEYOND POLITICAL HEADLINES, CANADA-US TARIFF LITIGATION TESTS WHETHER COURTS CAN HOLD THE EXECUTIVE TO THE LAW

"A GOVERNMENT OF LAWS, AND NOT OF MEN"

John Adams
CONSTITUTION OF MASSACHUSETTS (1780)

THIS DISTINCTION, drawn nearly 250 years ago, remains at the heart of modern trade disputes. Although tariffs often appear to derive from executive fiat, their longevity ultimately depends on law. Few recent conflicts have tested that proposition more visibly than the escalating tariff dispute between Canada and the US. Public attention largely focuses on political dynamics and economic consequences, but a struggle at least as important is unfolding before courts, specialized agencies, and dispute-settlement bodies charged with determining the legality of these measures. At a moment when it is tempting to conclude the centre cannot hold, the rules-based trading system has not yet yielded entirely to power politics. Litigation emerges as a principal battleground of the modern trade war.

The architecture of tariff law

Tariffs are not imposed in a legal vacuum: they rest on a layered architecture of constitutional, statutory, and treaty-based authority. In the US, art. 1, s. 8 of the Constitution grants Congress power to impose duties and regulate foreign commerce. Congress delegates tariff authority through various statutes, including the Tariff Act of 1930, the Trade Expansion Act of 1962, and the Trade Act of 1974. In Canada, Parliament's authority derives principally from ss. 91(2) and 91(3) of the Constitution Act, 1867 and is implemented through the Customs Tariff, the Customs Act, and the Special Import Measures Act.

Tariffs take numerous forms, including trade remedies (unfair trade practices remedies and safeguard measures) and exceptional measures (authorized national-security or retaliatory measures). Most of the tariffs imposed between the US and Canada in recent history have taken the form of the former, namely (a) antidumping duties, which address imports sold at less than "normal value," and (b) countervailing duties, which offset foreign government subsidies.

In the US, the Department of Commerce investigates dumping and subsidization, while the US International Trade Commission determines injury. In Canada, those functions are performed by the Canada Border Services Agency and the Canadian International Trade Tribunal, respectively. Final determinations are subject to judicial review, and where goods of another CUSMA party are involved, binational panels may take the place of domestic courts.

Outside these categories, international trade agreements constrain the imposition of new tariffs. Since 1947, the General Agreement on Tariffs and Trade (GATT) and, since 1995, the WTO framework have prohibited discriminatory duties through the most-favoured-nation principle (GATT art. 1) and duties exceeding negotiated tariff commitments (GATT art. 2). Similar principles are reflected in CUSMA, including art. 2.4, which generally prohibits new duties on originating goods. The central question in most modern trade disputes is, therefore, whether a measure falls within an authorized exception, such as an unfair trade practice remedy, safeguard, national-security, or retaliatory measure. If interpreted too broadly, however, the exception risks swallowing the rule.

Judicial battlegrounds for the trade conflict

The current Canada-US conflict has featured

repeated attempts to push or reinterpret these constraints. The result is an escalating series of judicial battles over statutory and treaty-based limits on economic protectionism.

- **The first wave: the IEEPA tariffs**
  The first wave began in February 2025, when the Oval Office invoked the International Emergency Economic Powers Act (IEEPA) to impose 25 percent tariffs on most Canadian and Mexican imports, purportedly in response to the fentanyl crisis, before imposing broader reciprocal tariffs aimed at trade deficits. Although IEEPA authorizes regulation of certain foreign property and transactions during a national emergency, no president previously invoked it to impose tariffs.

  The measures reached the US Supreme Court in *Learning Resources, Inc. v. Trump*.[1] By a 6–3 majority, the Court held that IEEPA does not authorize the presidential imposition of tariffs. Article 1 assigns Congress the powers to impose duties and regulate foreign commerce, and Congress must speak clearly when delegating them. IEEPA's authority to regulate importation could not reasonably bear an effectively unlimited power to tax imports. The decision reaffirmed that executive action remains bounded by the scope of statutory authority.

- **Searching for new statutory authority**
  The administration next relied on s. 122 of the Trade Act of 1974, which authorizes temporary import surcharges to address large and serious balance-of-payments deficits, to impose a 10 percent global surcharge. In May 2026, the US Court of International Trade held in *Oregon v. United States*[2] that the administration had exceeded that authority. The court entered a permanent injunction for the State of Washington and two importer plaintiffs, while dismissing other state plaintiffs for lack of standing. The government appealed, and the US Court of Appeals for the Federal Circuit stayed the injunction pending its decision.

  The administration then turned to s. 301, which permits retaliation against foreign acts that are unreasonable or discriminatory and burden US commerce. Following forced-labour investigations concerning 60 trading partners, the US Trade Representative imposed tariffs of 10 to 12.5 percent on most products from those markets, including Canada. The measures are being challenged before the Court of International Trade,[3] which is called upon to determine how far targeted trade remedies can stretch into worldwide tariffs before exceeding the authority Congress conferred.

- **Reviving the Tariff Act of 1930**
  The latest chapter concerns s. 338 of the Tariff Act of 1930, which authorizes additional duties when a foreign country discriminates against US commerce. In July 2026, the US administration proclaimed additional 50 percent duties on specified Canadian goods; after a brief suspension, the duties took effect on August 22. Canada valued affected trade at approximately $27.6 billion.

  On October 20, US food importer Gellert Global Group filed a complaint before the US Court of International Trade challenging the new tariffs and seeking relief on behalf of similarly affected importers. Unlike IEEPA, s. 338 expressly authorizes tariffs. The dispute will no longer concern whether the president may impose tariffs, but instead whether the finding that Canadian policies constitute discrimination is legally sufficient, or merely convenient.

- **Canada's response: retaliation and its limits**
  Acting under s. 53(2) of the Customs Tariff, Canada announced on August 25, 2026, that it would impose dollar-for-dollar countermeasures on approximately $27.6 billion of US imports. The counter-tariffs, at rates of 15, 25, and 50 percent, took effect on September 8.

  Although Parliament authorized such measures domestically, they remain vulnerable to challenge under international trade law. GATT arts. 1 and 2 restrict discriminatory tariffs and duties exceeding negotiated commitments, while CUSMA art. 2.4 generally prohibits new duties on originating goods. Both regimes ordinarily contemplate retaliation only after prescribed dispute-settlement procedures.

  Future disputes may therefore concern not only whether the US acted unlawfully but also whether Canada's response complied with WTO and CUSMA requirements. As commentators from the Montreal Economic Institute cautioned,[4] the counter-tariffs were promptly invoked under s. 338: on the very day they took effect, the president proclaimed import bans and expanded duties on Canadian goods, reinforcing the cycle of retaliation those agreements were designed to prevent.

What next?

The next phase of the trade war will likely produce three overlapping forms of litigation. First, importers and states will continue challenging executive tariffs before domestic courts. Second, governments may increasingly resort to international dispute-settlement mechanisms, notably CUSMA Chapter 31 panels for state-to-state claims that new duties breach the agreement's tariff commitments. Third, tariffs frequently generate demands for governmental support. When Ottawa announced $1.2 billion in aid for the softwood lumber industry in August 2025, US producers promptly denounced it as an unfair subsidy. Such measures can, in turn, prompt countervailing duty proceedings and, with them, new tariffs.

What begins as a tariff dispute can therefore acquire a distinctly Sisyphean quality, with each attempted solution creating conditions for the next boulder of litigation to be pushed up the mountain. Whatever course governments choose, the courts will be waiting to test whether political discretion remains within the boundaries of law.



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