

Intelligence MEMOS



From: Jon Johnson

To: The US Congress

cc: Global Affairs Canada and Secretaría de Comercio y Fomento Industrial

Date: January 10, 2025

Re: **DOES A US PRESIDENT HAVE THE POWER TO UNILATERALLY IMPOSE TARIFFS?**

Donald Trump has said he will sign an executive order on his first day in office, charging US importers of goods from Mexico and Canada a 25-percent tariff on all products entering the United States.

Section 8 of Article 1 of the US Constitution states that Congress has the power to impose taxes including duties. Article 2 of the US Constitution, which sets out the powers of the president, does not include the power to impose any sort of taxation. Thus, the constitutional authority to impose duties clearly rests with Congress and not the president.

The Canada-United States-Mexico Trade Agreement (CUSMA) currently governs trade among the three nations and eliminates most tariffs between them. The CUSMA parties are “Government of the United States of America,” the “Government of Canada” and the “Government of Mexico.”

CUSMA Article 32 provides that nothing in CUSMA precludes a party from adopting measures it considers necessary for its essential security interests. The United States implemented CUSMA by the *United States-Mexico-Canada Agreement Implementation Act*, which assigns certain functions to the president.

Each of these functions is narrow and specific and none empowers a president to unilaterally impose duties, except in cases where the International Trade Commission, upon receipt of a request to investigate a surge in imports, concludes that this surge causes or threatens injury to a US industry, a finding which then allows the President, under the *Trade Act of 1974*, to raise tariffs to provide temporary relief from foreign competition in that industry. As provided under the NAFTA implementing legislation carried over into the USMCA implementing legislation, these duties would apply to Mexico or Canada only if imports from these countries constitute a substantial part of the overall import surge.

The 25-percent tariffs proposed by the President-elect, if applied, would violate the CUSMA tariff-elimination provisions.

However, Congress has delegated the power to the president to impose duties under prescribed circumstances. These include:

Section 232 of the *Trade Expansion Act of 1962* provides that the Secretary of Commerce can investigate to determine the effects on national security of importation of a particular article, and give a president the power to take action. This provision was invoked against steel and aluminum imports.

Section 338(a) of the *Tariff Act of 1930* permits the president to proclaim new or additional duties on articles of any foreign country that discriminates against articles that wholly or in part affect the growth or product of the United States.

The International Emergency Economic Powers Act empowers the president to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

None of these provisions supersedes the provisions of the CUSMA implementing legislation limiting presidential powers respecting CUSMA.

Section 301 of the *Trade Act of 1974* authorizes the US Trade Representative to exercise the powers of the president if US rights under a trade agreement are being denied or if an act of a foreign entity violates or denies benefits to the US under a trade agreement.

Section 301 also authorizes the president (through the Trade Representative) to take a broad range of actions “if an act, policy or practice of a foreign country is unjustifiable or restricts United States commerce.”

Unlike the other provisions referred to above, Section 301 deals specifically with trade agreements. The CUSMA implementing legislation confers limited and specifically defined powers on the president while Section 301 confers broad powers. Perhaps the inconsistency is answered by treating Section 301 as a general provision that is superseded by the CUSMA implementing legislation in the specific case of CUSMA, indicating that Congress intended that, notwithstanding Section 301, the president have only limited powers respecting CUSMA rather than the broad Section 301 powers. However, this result is by no means certain.

There are arguments to the effect that the broad authority granted to the president and the Trade Representative under Section 301 is contrary to a fundamental principle of US constitutional law, namely that the legislative power of Congress cannot be delegated. In 1935, US Supreme Court Chief Justice Charles Evans Hughes, on behalf of the Court, declared that “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.” These arguments may well be resurfaced from those negatively affected by the tariffs.

However, Canadians and Mexicans should not hold their breath about any constitutional challenge which may take years to be resolved, or even about the existence of CUSMA which, despite Mr. Trump’s historical enthusiasm for it, is a thin shield subject to potentially constant renegotiations or even abrogation. They can hope but should not count on Congress – constitutionally the ultimate authority on tariff matters – to find the will to resist the damage that will be caused by this policy direction.

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