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The U.S. Tariff Turmoil: Navigating the Potential Sources of Risk

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Introduction

Since January 2025, the Trump administration's far-reaching tariff announcements and policies have precipitated seismic changes in global trade. The country-specific and product-specific tariffs, including on copper, aluminum, steel and automobiles, are leaving few companies untouched. Not to mention the announced tariff-related investigations—including into pharmaceuticals, semiconductors and lumber—which signal the likelihood that more product-specific tariffs are forthcoming.

Companies across industries have begun experiencing the commercial effects. They have projected increased costs and lower earnings, pulled earnings forecasts altogether, warned of potential supply disruptions or of buyers reneging on purchase commitments and even declared *force majeure*.

Commercial contracts—the bedrock of business relationships—will play a major role in how these effects and their associated costs are ultimately allocated. They may be used as a sword (to seek compensation for nonperformance, uneconomic price increases, third-party liability or defective goods and services) and also as a shield (to excuse nonperformance, including on the basis of *force majeure*, impossibility or impracticability, or mitigate loss through liquidated damages, renegotiation, mediation or termination). Investment treaties may provide additional protections for companies' business interests that may be affected by new tariffs. Understanding one's contractual and treaty-based rights and obligations will be key to effectively managing and mitigating any tariff-related dispute risks.

In this client alert, we: (i) provide an overview of the prevailing U.S. tariff policies, including the various factors that may affect how they evolve; (ii) examine potential friction points arising out of common contractual provisions; and (iii) consider how the evolving tariff landscape may give rise to investment disputes.

The Tariff Landscape

The tariff landscape is constantly evolving. Frequent policy changes, ongoing domestic legal proceedings, issued or threatened retaliatory tariffs and bilateral trade talks all contribute to the unpredictability of what tomorrow will bring. For purposes of understanding their impact and scope, however, it is useful to understand the Trump administration's tariffs in two broad categories—country-specific and product-specific.

Country-Specific Tariffs

The Trump administration has imposed blanket tariffs on products from several major U.S. trading partners under the International Emergency Economic Powers Act of 1977 (the "IEEPA"). The IEEPA grants the president the power to regulate importation to "deal with an unusual and extraordinary threat with respect to which a national emergency has been declared." Beginning in February this year, after declaring multiple national emergencies due to the flow of criminal activity and illegal drugs across U.S. borders, the Trump administration initially imposed a 25% tariff on all products from Canada and Mexico,[1] a 10% tariff on Canadian energy resources and a 20% tariff on all products from China.

In April, citing the IEEPA again, the Trump administration ordered a 10% "reciprocal" tariff on all other countries, except for certain products explicitly exempted (e.g., pharmaceuticals and semiconductors). China's total tariff rate was also ultimately set at 30%—combining the 20% all products tariff with a 10% reciprocal tariff—after a series of larger reciprocal tariff increases.[2] The 10% reciprocal tariff rate was due to increase on August 12 but was extended for an additional 90 days to allow the Trump administration more time to negotiate a trade deal with China.

Also faced with the threat of higher reciprocal tariffs beginning on August 1, several countries have reached trade deals with the United States since April. For instance, on July 27, the Trump administration announced that it reached a trade deal with the European Union that would set a 15% base tariff rate on most EU exports to the United States and eliminate tariffs on certain products, including aircraft, certain pharmaceutical products and ingredients and certain agricultural products. The announcement also stated that the European Union had agreed to a $600 billion increase in its investment in the United States and to purchase $750 billion worth of American energy. The Trump administration also announced several similar deals prior to August 1, including with Japan (15% base tariff + a $550 billion investment), South

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1 Products covered under the United States-Mexico-Canada Agreement are exempt.

2 The Trump administration increased China's reciprocal tariff rate dramatically in April in response to Chinese retaliatory tariffs. It was initially set at 34% on April 2, then raised to 84% on April 8, then to 125% on April 9 before being reduced down to 10% on May 12, where it has remained.

Korea (15% base tariff + a $350 billion investment and $100 billion worth of liquefied natural gas purchases), Indonesia (19% base tariff + $19.5 billion worth of energy and agricultural product purchases) and Vietnam (20% base tariff + duty-free entry for U.S.). For some countries that failed to negotiate trade deals, their reciprocal tariff rates increased to as much as 41% on August 7, 2025 pursuant to the Trump administration's July 31, 2025 executive order. Canada, as well as Brazil and India, also saw their tariff rates increase to 35% and 50% respectively pursuant to separate executive orders.

The viability of these country-specific tariffs, however, is uncertain. On May 28, 2025, the U.S. Court of International Trade (the "CIT") held that these tariffs exceed the president's authority under IEEPA and must be vacated. The CIT's ruling has been appealed to the U.S. Court of Appeals for the Federal Circuit, which is allowing the tariffs to remain in place and effective pending the appeal. On July 31, 2025, the Federal Circuit held an expedited *en banc* hearing before the full 11-judge Federal Circuit panel. A decision may still take several months to issue. Even if this or other challenges to the country-specific tariffs under IEEPA succeed, however, there are other statutes the Trump administration may rely upon. For instance, Section 122 of the Trade Act of 1974 allows the president to impose tariffs on countries, including to remedy "large and serious United States balance-of-payments deficits," and Section 338 of the Tariff Act of 1930 allows the president to impose tariffs on countries that "discriminat[e] against the commerce of the United States."

Product-Specific Tariffs

The Trump administration has also issued product-specific tariffs applicable without regard to the country of origin pursuant to the president's authority under Section 232 of the Trade Expansion Act of 1962. Section 232, as well as certain other legal bases for tariffs—including Sections 201 and 301 of the Trade Act of 1974—requires a government agency investigation before the president may impose such tariffs. Because these tariffs are supposed to be preceded by a formal investigation and findings, they may take longer to enact, but they are also more likely to survive judicial review.

The Trump administration executed an executive order on July 30, 2025 imposing a 50% tariff on copper and derivative product imports in response to a Section 232 investigation showing that copper imports are entering the United States in quantities and under circumstances that threaten to impair national security. To the extent that a bilateral trade deal has not been reached to lower or eliminate tariffs, as with the United Kingdom, a 25% tariff also remains in effect for all aluminum, steel, automobile and auto part imports, with some limited exceptions.

These and other tariffs issued under the Trade Expansion Act or the Trade Act are not impacted by the CIT litigation, which applies only to the tariffs issued under IEEPA.

Several more product-specific tariffs are anticipated in the coming months as ongoing investigations into those products and sectors conclude. For instance, the Trump administration ordered the Commerce Department to conduct formal investigations into whether imports of timber and lumber, pharmaceuticals and critical mineral products (e.g., semiconductors) threaten U.S. national security and should be subject to tariffs, quotas or other import restrictions. The results of these investigations are expected between October and December of this year. The Trump administration has, however, recently threatened tariffs as high as 250% on pharmaceuticals and 100% on semiconductor imports to be applied to any importer that does not commit to increase U.S.-based semiconductor manufacturing.

Potential Friction Points in Commercial Contracts

While every commercial contract contains unique language and a distinct governing law framework, there are certain common clauses that are likely to give rise to a handful of dispute scenarios—each of which we consider in this section.

Fixed Obligations

Tariffs may cause delays and increase costs along a company's supply chain. This may affect the ability of companies to meet contractual delivery, payment or timing obligations.

To assess risks in this scenario, companies should identify any price, delivery, timing or payment obligations in their contracts that may expressly allocate tariff risks to any given party. Some contracts, for example, may provide that the purchase price is inclusive of all applicable tariffs, whether existing or imposed during the term of the contract, thereby allocating tariff risks to the seller. Other contracts may establish procedures for determining which party bears the risk of any material change in specific circumstances, including tariff increases. For example, the seller may be given an opportunity to propose an adjusted price to reflect an increase in tariffs, after which the parties are to negotiate an equitable adjustment in good faith.

But not all fixed-price, delivery or timing clauses will account for tariff risk. In many cases, the clauses will impose hard deadlines and firm prices with clear consequences if an obligation is not met. Fixed delivery or "time is of the essence" provisions, for example, could allow the buyer to cancel the order, seek liquidated damages or claim nonperformance for any late deliveries regardless of the cause. Some contracts may account for such risks in other types of clauses, which we describe below. However, where there is any ambiguity in the contract's accounting of such risk, parties should expect dispute vulnerability to increase.

Indemnity & Pass-Through

If not in fixed obligations clauses, parties may have expressly allocated tariff risk in indemnity or pass-through clauses. A particular clause may, for example, either hold the seller responsible for, or require the buyer to indemnify the seller against, future applicable tariffs.

Even where such clauses do not explicitly cover tariffs, broad terms may be argued to encompass such costs. This may include, for example, a general pass-through clause allowing the seller to adjust pricing in the event of regulatory changes or significant increases in the cost of materials, or an indemnity clause requiring one party to hold the other harmless for legal compliance costs arising out of the commercial relationship. Companies should also be aware of potential complications that may arise from passing on the costs of tariffs that are later retroactively invalidated. Depending on whether the party to whom that cost was passed is entitled to a government refund, they may seek compensation from the counterparty instead, which may lead to a dispute.

If relying on indemnity or pass-through clauses, parties should also take care to understand and comply with any notice or other formal procedural requirements, any liability caps, or any indemnitor rights to control the defense or seek settlement where third-party claims are involved.

Force Majeure & Excuses for Nonperformance

Most contracts contain force majeure clauses that excuse nonperformance upon the occurrence of certain unforeseeable events. However, they do not usually expressly account for tariff risk and should be carefully analyzed to determine whether the text may arguably encompass tariff-related events. For instance, change-in-law clauses included in a *force majeure* provision may provide a strong basis to argue that tariffs are *force majeure* events, but these clauses are uncommon. The governing law of the contract is also an important component of this analysis. Some jurisdictions may construe these provisions narrowly and exclude economic hardship, thus potentially excluding any tariff-related impacts.

Noncontractual excuses for nonperformance, such as commercial impracticability, impossibility or frustration of purpose, may also be available. The availability and scope of such noncontractual excuses will depend on the governing law of the contract, including any transnational legal principles or treaties, such as the United Nations Convention on Contracts for the Sale of International Goods (the "CISG").

Liquidated Damages

Some contracts may contain liquidated damages clauses that explicitly provide for payment in the event of contractual nonperformance. Companies should look for these types of provisions in their contract to assess whether they may be liable for, or may be entitled to receive, liquidated damages resulting from tariff-related delays or nonperformance. Companies should also pay close attention to any exceptions provided in liquidated damages clauses, which may be interpreted to excuse delays or nonperformance.

A party facing the prospect of liquidated damages should assess that amount against the costs of performing. If the former is lower, it may be cost-efficient to breach the contract by not performing. However, this will be a fact-specific inquiry that must also take into account the complicated interplay of contractual obligations and potential liabilities—both financial and strategic—outside the liquidated damages clause itself, including the nature of the commercial relationship between the parties.

Contract Termination & Renegotiation

A party may attempt to terminate or renegotiate a contract as a result of tariff-related events. Whether this tactic may be properly deployed either offensively or defensively will depend, in large part, on the relevant preconditions and any cost and liability implications.

Some contracts may expressly allow termination in the event of a change in law, such as tariffs, but many do not. Instead, a party would typically only be allowed to terminate a contract after giving written notice, after a stipulated period of time and upon the occurrence of a particular event—for instance, if the counterparty breaches the agreement and fails to cure the breach. Given the fast-moving and volatile nature of these tariffs, notice and cure periods may result in significant ongoing costs and unduly delay a resolution to the dispute.

Termination may also have material cost implications, such as penalties, liquidated damages or the costs of replacing the goods or services the breaching party was obligated to provide under the contract. These costs should be taken into account in determining whether termination can help mitigate tariff risk.

Renegotiation clauses are less common than termination clauses but where present also typically require the same kind of notice, timing and substantive preconditions. Some contracts may provide for periodic and regular renegotiation, which may provide opportunities to mitigate anticipated tariff risk. Companies should be aware of and look for these options in their contracts, while ensuring compliance with timing and notice requirements.

Companies may also consider renegotiating the terms of their commercial relationships outside of the formal contractually prescribed process, such as through meditation. Especially if companies expect to be on both the buy- and sell-side of transactions, mediation allows for multiple parties in a supply chain to collectively find a fair and reasonable way of allocating tariff costs, aided by a neutral third party. This could increase predictability, improve outcomes in appropriate scenarios and help maintain important trading relationships.

Investment Treaty Disputes

Tariffs may lead to treaty-based disputes between foreign companies and host governments if they violate investment protections guaranteed under bilateral investment treaties ("BITs") or free trade agreements ("FTAs"). Depending on a company's nationality and other qualifying investment characteristics, a company may have claims against the government where it conducts business. For example, BITs and FTAs may protect against sudden or retroactive regulatory impositions that violate foreign investors' legitimate expectations, proscribe discriminatory or arbitrary treatment of foreign companies and prohibit government policies that may amount to an expropriation of the foreign company's investment. Foreign companies whose operations are affected by tariffs should seek to understand whether their investments qualify for protection under any BITs or FTAs, how any parallel contractual claims may affect their treaty claims and whether it is in their long-term strategic interest to pursue claims against a host government.

Conclusion

More likely than not, the interpretation of and interplay between the above types of contractual and treaty provisions will not be straightforward, and there will be significant ambiguity in their applicability to a tariff-related breakdown in commercial or bilateral relationships. Such ambiguities and breakdowns may lead to disputes, including international commercial or investment arbitration where the relevant contracts or governing treaties include arbitration clauses. As always in high-risk dispute scenarios, these are situations that must be navigated strategically, taking into account all legal options, commercial goals and long-term business considerations. As the tariff landscape continues to shift, companies must be prepared to defend against breach claims and respond to changing circumstances in contractual and treaty-based relationships.

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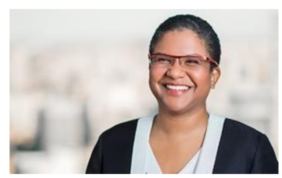

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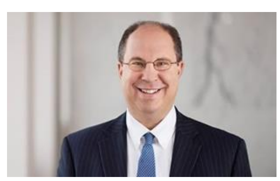

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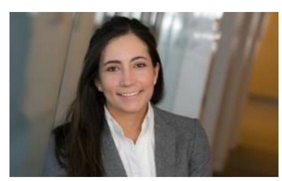

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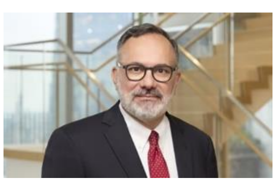

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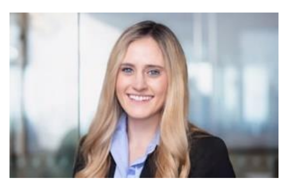

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