KEY INSIGHTS

Managing Import and Tariff Risks During a Trade War

FOLEY.COM

FOLEY

FOLEY & LARDNER LLP

FOLEY
FOLEY & LARDNER LLP

CONTENTS

Authors & Contributors

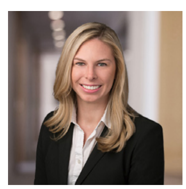
Foley & Larder LLP attorneys in our International Trade & National Security and Manufacturing – Supply Chain practices are monitoring all changes to the international trading environment and are well positioned to help importers navigate the turbulence of these unprecedented changes to the international trading environment. Please feel free to reach out to the authors of this white paper, or to your Foley relationship attorney, if you have particular international trade or supply chain issues that you would like to discuss in detail.

Gregory Husisian
Partner; Chair, Foley International Trade & National Security Practice
Washington D.C.
ghusisian@foley.com
202.945.6149

Vanessa L. Miller
Partner
Detroit
vmiller@foley.com
313.234.7130

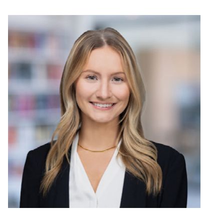
Kathleen E. Wegrzyn
Partner
Milwaukee
kwegrzyn@foley.com
414.297.5778

John E. Turlais
Of Counsel
Milwaukee
jturlais@foley.com
414.297.5584



Ashley A. Gifford
Associate
Washington, D.C.
agifford@foley.com
202.672.5523

Ki Lee Kilgore
Associate
Detroit
kkilgore@foley.com
313.234.2737



Lindsey Zirkle
Associate
Washington, D.C.
lzirkle@foley.com
202.295.4182

Introduction

The focus on tariffs by the Trump administration presents significant risks for frequent importers. Determining the best strategy to deal with tariff uncertainties is complicated because President Trump has made differing proposals, ranging from targeting China with 10-percent tariffs, Canada and Mexico with 25-percent tariffs, aluminum and steel imports with additional 25% tariffs, and an announcement of "reciprocal tariffs." The last proposal would likely have the largest impact on U.S. tariffs because it proposes varying tariff levels by country to raise U.S. tariffs (which tend to be among the lowest worldwide) to the same levels that foreign countries impose on comparable products. Because the proposal would require that U.S. tariffs be set high enough to encompass not only higher foreign tariffs but also barriers to U.S. export competitiveness — such as the rebate of Value Added Taxes to foreign companies, subsidies received by foreign competitors, and even non-tariff barriers — the likely result will be sharp increases in U.S. tariff levels.

So higher tariffs *are* coming, the increase in tariffs likely will be large, and the longstanding principle of U.S. international trade — that all WTO signatories (i.e., most of the world) have comparable and low tariff levels — will be eliminated from U.S. law. This means that importers have three tariff-related problems:

- Managing the risk of higher tariffs, which can sharply change production cost structures.
- Ensuring importers can nimbly respond to rapid shifts in importing from planned suppliers, even if it means entirely changing longstanding supply chains.
- Coping with ongoing efforts of U.S. Customs & Border Protection (CBP) to emphasize supply chain integrity issues relating to forced labor, human trafficking, and the importing of goods that potentially violate the Uyghur Forced Labor Prevention Act (UFLPA).

To address these risks, importers need to identify their import-related risks, add flexibility within their supply chains, address tariff-related risks in both their buy- and sell-side contracts, and ensure their Customs and supply chain integrity compliance is in good working order. To help them do so, we have put together this white paper, which outlines six practical steps that importers can take to identify and manage their import-related risks. As detailed below, these are:

1

Risk Identification | Understanding Your Company's Importing Patterns and How They Impact Your Company's Importing Risk Profile

The first step involves importers gathering full information on historic and planned import patterns to understand the full scope of potential supply chain disruptions and higher tariffs on importing costs.

2

Risk Planning | Understanding How to Add Flexibility To Your Supply Chain To Address Your Company's Import-Related Risk

The Trump administration likely will announce tariff rates that target certain countries, including not just China, Canada, and Mexico but also Europe and developing-world countries that have generally higher tariff levels. President Trump also has announced that he will move beyond the product-specific special tariffs on aluminum and steel, looking next to the far larger automotive sector. The second step accordingly involves risk planning and identification of areas where importers can build in supply chain flexibility to ensure they can quickly pivot import patterns if needed, to respond to a rapidly changing tariff environment.

3

Contractual Risk Management | Identifying Ways to Increase Your Company's Contractual Ability to Adapt to Unexpected Changes in the Importing Environment

The third step involves gathering and examining your company's contractual provisions, on both the buy and sell sides, to determine how they address tariff-related risks. The goal is to ensure all contractual arrangements incorporate supply, sales, and pricing flexibility to deal with unanticipated tariff changes.

4

Risk Minimization | Ensuring Your Company's Customs Compliance is in Order

In a high-tariff environment, tariff underpayments accumulate much more quickly, as do potential penalties. The fourth step accordingly involves an examination of import-related compliance to ensure your company is exercising reasonable care in import operations and not underpaying customs tariffs.

5

Opportunity Identification | Ensuring Your Company is Maximizing Tariff Savings

In a high-tariff environment, it also is more important to identify potential tariff-saving opportunities. The fifth step accordingly involves examining your company's historic and planned import patterns to identify available tariff-saving opportunities, including potential ways to minimize tariffs if USMCA disappears, is substantially modified, or if additional tariffs are imposed on Canada or Mexico or other major sources of imports.

6

Minimizing Supply Chain Integrity Risks | Understanding Your Supply Chain and Mitigating Supply Chain Integrity Risk, Right Down to the Last Sub-Supplier

Finally, CBP has detained a record number of goods for supply chain integrity issues, especially for UFLPA violations. The sixth step accordingly involves the consideration of whether your company has put in place measures to help ensure it is ethically sourcing goods from abroad, including the need to quickly vet secondary or alternative suppliers brought on board to expand supply chain flexibility.

This white paper outlines the Trump administration's international trade and tariff priorities and then works through how companies can implement these six steps to manage import risks, including in the related area of supply chain integrity. Readers wanting more detailed coverage of this last topic should consult our companion white paper on "Managing Supply Chain Integrity Risks."

Part I. Understanding the Trump Administration's Priorities: The "America First" Trade Memorandum and Reciprocal Tariffs

Understanding the Trump administration's trade priorities is an essential component of identifying a company's risks and planning an appropriate response. On January 20, 2025, President Trump issued an America First Trade Memorandum directing that multiple federal agencies report back to him by April 1, 2025, on a number of potential measures designed to help implement "a robust and reinvigorated trade." In addition, President Trump separately has tasked multiple U.S. agencies to implement the concept of "reciprocal tariffs," which involves identifying instances where U.S. trading partners have higher tariffs and other barriers on U.S. products than the United States charges when importing comparable goods. Our expectation is that this concept, which is more targeted than the concept of imposing a universal tariff and has a certain economic logic, will be a basis for tariff discussions going forward. We also anticipate that the reciprocal tariff concept will be the vehicle to implement many of the America First Trade Memorandum pronouncements.

To reflect these points, Part I(A) analyzes the implications of the America First Trade Memorandum and the reciprocal tariff announcement, while Part I(B) summarizes the risks and opportunities raised, to provide the guideposts for moving to the risk-planning stage.

A. The Key Provisions of the America First Trade Memorandum

Understanding the Trump administration's trade priorities should help importers understand the current trade landscape and identify import-related risks. The main import-related areas include the following:

- The memorandum directs an assessment of the "best methods for designing, building, and implementing an External Revenue Service to collect tariffs, duties, and other foreign trade-related revenues." In our view, this request at least in part expresses dissatisfaction with CBP oversight of the use of Chinese parts and components for third-country assembly, which many trade experts view as an end-run around the Section 301 tariffs. Importers accordingly should focus on ensuring they are reflecting the correct country of origin for goods manufactured using parts and components from a third country, especially if from China.
- The memorandum directs early preparations for the trilateral United States-Mexico-Canada Agreement (USMCA) review. With President Trump initiating 25-percent duties on Canada and Mexico[1] as retaliation for a perceived lack of urgency regarding immigration and fentanyl exports to the United States, there is a strong possibility that changes could upend trade within the USMCA region on a far quicker timeframe.

1 At the time of this writing, implementation of 25-percent duties on Canada and Mexico are paused to allow the countries to negotiate potential solutions to various issues raised by the Trump administration. Given that USMCA is up for a required review in 2026 (which we anticipated will come early), we view trade between the USMCA countries as being potentially subject to heightened tariffs and other trade-related risks through at least that time period.

- The memorandum directs an investigation of exchange rate policies of trading partners. This proposal was picked up in the reciprocal tariff announcement, which explicitly stated that when setting reciprocal tariff rates the U.S. government would include currency manipulation as a basis for higher tariffs. It also could mark the end of the longstanding "strong dollar" informal trade policy of the United States. The result would be higher prices for imports, which would exacerbate the cost increases caused by tariffs.
- The memorandum directs a review of all current free trade agreements as well as countries "with which the United States can negotiate agreements on a bilateral or sector-specific basis to obtain export market access." In other words, importers need to be concerned that imports from *all* free trade countries, such as South Korea, could see the kinds of upheaval that importers are seeing with Canada and Mexico. It is unclear at this point how the reciprocal tariff concept will interface with this review, in that it directs an assessment not only of the level of tariffs (which are generally low among free trade agreement countries) but also items such as currency exchange rates and non-tariff barriers. Thus, even free trade agreement countries could see sharp increases in tariffs.

- The memorandum directs a review of policies and regulations regarding the application of antidumping and countervailing duty laws. The United States already maintains a record inventory of antidumping and countervailing duty orders (well more than 600), with Trump administration officials stating they will be encouraging the filing of more cases. Changes designed to increase calculated margins could encourage more industries to file new antidumping and countervailing duty petitions, particularly against China (the most frequent target of such actions by far).
- The memorandum directs an assessment of the "loss of tariff revenues and the risks from importing counterfeit products and contraband drugs" that result from the current implementation of the de minimis exemption, which allows duty-free and lowered inspections of imports valued at less than $800. Separate announcements already are sharply cutting back the availability of the de minimis exception.

- The memorandum directs an examination of potential additional modifications to the Section 301 tariffs on China, particularly with respect to industrial supply chains and circumvention through third countries. It is likely this review will be used as a basis for further increasing the Section 301 tariffs on many Chinese products while also resulting in closer scrutiny by CBP (or the future External Revenue Service) on the use of Chinese parts and components in third-country assembly.
- The memorandum directs an investigation into other acts, policies, and practices by China that may be unreasonable or discriminatory and may burden or restrict U.S. commerce, as well as legislative proposals relating to China and the tariffs it pays. In addition to telegraphing a desire to permanently enshrine restrictions on trade with China into U.S. law (which would be much more difficult for a future administration to reverse), these efforts could reach related trade issues such as further restrictions on trade with China based on the treatment of the Uyghur people and their role in producing products intended for sale in the United States.

B. Risks and Opportunities Inherent in the Administration's Priorities

In short, the America First Trade Memorandum and the reciprocal tariff proposal lay the groundwork for the administration's implantation of an "America First" international trade agenda. This raises the following risks and opportunities for most importers:

1. Tariff-Related Concerns

1

- **Risks Arising from Potentially Rising Tariffs:** Rising tariffs on imports from key trade partners can disrupt supply chains, increase costs, and force companies to reconsider their import practices. Importers need to evaluate closely the financial impact of threatened (and other) potential tariff increases to prepare mitigation plans.

2

- **Risks Arising from Increasing Antidumping and Countervailing Duty Orders:** Antidumping and countervailing duty orders can impose very high special duties. The environment for U.S. industries to bring such actions has never been more receptive. Monitoring the filing of new petitions is essential, as is risk planning how to handle such actions. At the same time, U.S. manufacturers who feel they are victims of unfair trade should seriously consider examining whether it makes sense for them to explore filing petitions on their own key products.

3

- **Risks Arising from USMCA Exposure:** The USMCA introduced complex rules of origin, content, and other requirements. Monitoring claims for preferential tariff treatment under the USMCA already is an enforcement priority for CBP; we anticipate heightened focus on potential violations of the USMCA rules. Importers should evaluate their USMCA exposure and their compliance with the rules, including through potentially conducting USMCA-focused compliance audits.

4

- **Risks Arising from USMCA Renegotiations:** Under the terms of the USMCA, the three parties are required to review and reauthorize the Agreement in 2026. Proper risk planning needs to take USMCA uncertainties and potential USMCA changes for all these areas into account. The quick announcement and then suspension of potential 25 percent tariffs on products from Canada and Mexico also throw the future state of the USMCA into limbo. Importers should stay abreast of future developments, as everything is on the table, including substantial alterations to the USMCA, reaching a separate U.S.-Canada Free Trade Agreement, or the entire elimination of the USMCA.

5

- **Risks Arising from CBP Data Mining:** All importers are now required to provide full electronic information for each entry using the Automated Commercial Environment (ACE) portal. CBP has full access to this ACE data and uses sophisticated data mining algorithms to identify anomalies and potential duty underpayments. Part of import risk planning is to review such data in advance of CBP, such as through risk-based customs audits.

6

- **Risks Arising from Customs Non-Compliance:** Non-compliance with customs regulations can lead to penalties, audits, and shipment delays. These risks multiply in a high-tariff environment, where errors lead to much greater underpayments of tariffs. Importers that do not have robust compliance programs, do not regularly perform post-entry checks, and generally just "leave Customs compliance to the customs broker" need to reconsider how they manage their imports.

2. Risks Arising from Supply Chain Concerns

7

- **Risks Arising from Supply Chain Integrity Concerns:** The increased enforcement of regulations targeting forced labor, including the UFLPA, raises risks for companies with opaque supply chains. Such enforcement is likely to continue to be strong in the Trump administration, particularly because UFLPA concerns are aimed at China (always a popular target for international trade hawks). Importers should consider implementing supply chain best practices such as mapping supply chains, implementing thorough know-your-supplier due diligence, updating their terms and conditions to implement supply chain integrity measures, adopting traceability tools, and conducting supply chain audits to ensure compliance.

8

- **Risks Arising from Not Having Flexible Buy- and Sell-Side Agreements:** Global trade dynamics necessitate flexible supply chain contracts for suppliers and sell-side contracts that are flexible enough to accommodate the need for tariff surcharges on any purchases. Fixed terms may prevent your company from adapting to sudden tariff increases or the need for rapid sourcing shifts. This white paper covers a variety of supply chain suggestions that can help ensure contractual arrangements are robust and flexible enough to share tariff-related risks on both the buy and the sell side.

3. Risks Arising from Enforcement of Partner Agency Regulations

9

- **Risks Arising from Enforcement of Partner Agency Regulations:** Imports subject to partner agency oversight — such as the Food & Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA) for automotive items, or the Environmental Protection Agency (EPA) for certain chemicals — face heightened enforcement. Because Customs increasingly is using ACE data to flag potential non-compliance with partner agency requirements, there is every reason to believe this trend will continue and increase in the Trump administration. Non-compliance with these regulations can result in detentions, penalties, and shipment rejections. Any company that is conducting an internal customs audit (which we highly recommend) should include compliance with applicable partner agency regulations enforced by Customs.

4. Opportunities from Enhanced Risk Planning

Most of the likely changes tend to be negative, as increasing tariffs essentially is a tax increase paid by the importer of record. Nonetheless, proper risk planning can identify certain opportunities to help mitigate the pain of likely increased costs to some degree. The key items to consider include:

1

- **Opportunities from Duty-Saving Strategies:** Despite rising tariffs, importers can leverage duty-saving programs such as bonded warehouses, foreign-trade zones (FTZs), duty drawbacks, and temporary importation under bond (TIB). Proper classification can, in some instances, result in duty savings. Importers should include the potential application of duty-saving measures in any customs audit, to look for opportunities to reduce duty liabilities and improve cash flow.

2

- **Opportunities Arising from Establishing a Flexible Supply Chain:** A flexible supply chain allows businesses to respond swiftly to tariff changes and supply chain disruptions. Diversifying suppliers and sourcing from lower-risk regions, setting up alternative and secondary sources, and taking other measures to create a flexible supply chain can help enhance resilience and set up the company for import cost efficiencies if the tariff situation rapidly changes (or at least minimize the hit from reciprocal and other tariff increases).

3

- **Opportunities from Tariff-Engineering:** Tariff engineering — redesigning products to shift classifications or the country of origin, using the middle-man rule, changing production patterns to allow full access to free trade agreement preferences, or employing other tariff-saving measures — can help businesses reduce tariff liabilities and increase flexibility in responding to rapid changes in the tariff environment.

The next section outlines six steps importers can take to deal with these risks and opportunities.

Part II. Six Steps to Managing Import Risk under the New Trump Administration

This section gets to the heart of the risk planning and risk mitigation for most importers. We recommend importers work through the following six steps to help them identify and manage tariff-related risks:

1 Risk Identification — Understanding Your Company's Importing Patterns and How They Impact Your Company's Importing Risk Profile

The first step in developing a robust import strategy is identifying the risks affecting your company, which starts with gaining an understanding of your company's importing patterns and risk profile. Key items to do so include:

Identify All Importing Avenues at Your Company. Get a handle on your company's importing patterns by taking the following steps:

- Identify all importer-of-record (IOR) numbers associated with your company at all divisions and subsidiaries.
- Identify all customs brokers used by your organization over the last five years, and determine which ones are still active. Determine which types, which product lines, or which divisions each broker is handling.
- Pull, or have your customs broker pull, the ACE data with all your company's identified IORs, to gather the data needed to analyze import trends and the accuracy of information submitted to Customs at the time of entry.
- Collaborate with procurement teams to anticipate future orders, including for new products, suppliers, and sourcing regions under consideration.
- Document all touchpoints in your supply chain, including warehouses, distribution centers, and logistics providers. When paired with importing data, logistics data provides a clear picture of importing patterns, enabling better risk management and modeling.

Identify Your Complete Supply Chain and Map It Out: Supply chain mapping is the process of documenting all suppliers and the flow of goods and products in a supply network. A clear picture of one's supply chain allows importers to identify efficiency-enhancing opportunities and mitigate the risk of supply chain disruptions as well as identifying supply chain integrity risks. Some best practices for supply chain mapping include:

- **Define Your Product:** Clearly identify the products you are mapping, as different products may have different supply chains.
- **Identify Stakeholders:** Identify all individuals, suppliers, and contractors who contribute to the production, storage, or distribution of your product.
- **Understand Supplier Relationships:** Get your first-tier suppliers involved in the mapping process and ask them to bring forward knowledge regarding second- and third-tier suppliers. Have each entity detail what they sell and what they buy next in the chain from others. As the map expands, you will get a better view of potential risks, bottlenecks, and dangers of relying on single suppliers or businesses with long lead times, as well as understanding which supply sources are vulnerable to unexpected tariff-related shocks.
- **Document the Flow of Materials and Information:** Trace the movement of raw materials through each stage of production, including processing, transportation, and storage, while also documenting the flow of information between stakeholders.

Conduct a Comprehensive Risk Assessment. Use the gathered import data to perform an import risk assessment so that you understand where risks arise, including:

- **Regional Risk:** Analyze regions prone to instability, trade disputes, or changing trade agreements. Consider the impact of regional disruptions such as natural disasters or labor unrest.
- **Political Risk:** Evaluate the vulnerability of goods facing political headwinds, especially those from China, Canada, or Mexico. Evaluate goods from Canada and Mexico that are subject to special rules such as content requirements for automotive goods and heightened rules of origin standards.
- **Product-Related Risk**: Identify goods facing high tariff rates or subject to frequent trade policy changes, such as steel and aluminum.
- **Buy-Related Risk**: Assess the concentration of suppliers in high-risk regions or for key products. Evaluate supplier compliance with trade regulations and their ability to adapt to policy changes.
- **Long-Term Supply Chain Disruptions:** Consider likely increased scrutiny of imports due to UFLPA, forced labor and human trafficking, and other supply chain integrity measures. Evaluate potential long-term disruptions due to geopolitical instability, natural disasters, or pandemics as well as how your company would weather supplier shutdowns due to failure to meet trade or labor standards or for other reasons.
- **Partner Agency Regulations:** Customs acts as the gatekeeper regarding the import-related obligations imposed by several dozen other federal agencies such as the Food & Drug Administration and the Department of Transportation. Failure to meet the requirements of these partner agencies can lead to penalties or detentions of goods at the border. Evaluate whether your organization has identified all potentially applicable partner agency import-related requirements and has taken steps not only to meet these requirements but to document compliance, to allow for a quick response to any detention.

2 Risk Planning — Understanding How To Add Flexibility to Your Supply Chain to Address Your Company's Import-Related Risk

The next step is risk planning by adding flexibility to your supply chain. Diversifying suppliers and sourcing from lower-risk regions, setting up alternative and secondary sources, pre-qualifying and determining the ability of these suppliers to manufacture various products, and taking other measures to create a flexible supply chain can help enhance resilience and set up your company for import cost efficiencies if the tariff situation rapidly changes. By building in flexibility to your supply chains to address your company's import-related risk, you can ensure your company has the ability to respond quickly to changes. Steps to do so include:

- **Define Scenarios:** Collaborate across your Procurement, Legal, Compliance, and Finance teams to identify plausible high-impact scenarios such as rising tariffs on key imports, potential filing of antidumping or countervailing duty actions, or revisions to important USMCA preferences. Incorporate external data on policy trends, trade disputes, and economic forecasts, keeping in mind Trump administration trade and tariff announcements.
- **Quantify Impacts:** Calculate financial exposure for each scenario, including additional duties, delays, or penalties. Assess operational impacts such as delays in sourcing or increased compliance burdens as well as the impact on your company's cost structure for key products.
- **Develop Response Plans:** Create contingency strategies such as diversifying suppliers or renegotiating contracts. Identify alternative sourcing regions with favorable tariff structures and model how flexibility in supply chains can minimize unexpected international trade developments.

Model USMCA Changes. By thoroughly reviewing and modeling current compliance with USMCA, companies can mitigate risks from CBP enforcement. We anticipate heightened scrutiny by CBP of claims that entries meet USMCA preferential tariff rates. But in addition, importers need to risk plan for the future and the potential impact of USMCA renegotiations, should the USMCA remain in effect. USMCA modeling should cover the following areas:

- **Assess the Risk of Stricter Rules of Origin:** Model scenarios where rules of origin might tighten such as requiring higher percentages of North American content for products like automobiles, machinery, or textiles. Evaluate likely risk points for increased regional content or special rules such as those affecting steel and aluminum. Evaluate whether your existing suppliers and manufacturing processes can meet potential increases in regional content thresholds or how supply chains could adapt.
- **Anticipate Changes in Sector-Specific Provisions:** Monitor developments in sectors like automotive, agriculture, and pharmaceuticals as well as steel, aluminum, and derivative products, which may see targeted updates. Evaluate whether stricter labor or environmental standards could alter sourcing costs and require supplier realignment.
- **Conduct Supply Chain Reviews:** Analyze your supply chain for dependencies on non-USMCA countries that are used as sources of parts and components for USMCA regional production. If rules of origin become more stringent, reliance on these sources might disqualify products from duty-free treatment, thereby increasing costs, so model areas where alternative or secondary suppliers would be prudent.
- **Prepare for Cost Impact Modeling:** Assess how potential changes could affect tariffs, transportation costs, and pricing. Consider consulting trade specialists to evaluate the financial implications of a shift in USMCA provisions.

Implement Practical Commercial Strategies. To effectively navigate trade risks and disruptions, companies must adopt pragmatic commercial strategies. These steps aim to strengthen supply chains, ensure continuity, and reduce tariff exposure:

- **Supplier Diversification:** Identify and engage alternative suppliers across various regions to reduce dependency on high-risk countries. Assess supplier capabilities, including production capacity, quality standards, and compliance with trade and labor regulations.
- **Secondary Sourcing:** Establish relationships with secondary or alternative suppliers to facilitate rapid transitions if primary sources are disrupted. Prequalify secondary or alternative suppliers to ensure readiness for rapid transitions. Develop a database of approved suppliers for critical products to facilitate quick decision-making during disruptions.
- **Proactive Vetting:** Use trade fairs, government networks, and supplier databases to vet potential partners. Conduct due diligence on potential suppliers, including labor standards, certifications, and production practices. Consider initiating qualification procedures, quality vetting, and other measures to ensure potential secondary or alternative suppliers can meet quality, cost, and safety standards.
- **Safety Stock:** Increase inventory for high-priority or tariff-sensitive goods to buffer against supply chain delays or sudden cost spikes. Balance inventory costs with the need for operational flexibility.
- **Collaborate with Existing Suppliers:** Engage in transparent discussions with current suppliers about risks and mitigation strategies. Encourage suppliers to diversify their sourcing of raw materials to prevent cascading disruptions.

3 Contractual Risk Management — Identifying Ways to Increase Your Company's Contractual Ability to Adapt to Unexpected Changes in the Importing Environment

Both buy- and sell-side contracts are pivotal in managing risks associated with tariff volatility and trade disruptions. Regularly revisiting and revising these agreements can provide the flexibility needed to adapt to evolving trade environments.

Importers should not assume force majeure and commercial impracticability clauses provide tariff-related flexibility. While these clauses are traditional defenses to performance, they are generally intended to deal with unexpected and drastic changes the parties did not anticipate, and not cost-based changes. Courts view cost fluctuations as foreseeable risks that parties assume when entering into fixed-price contracts.

Since 2018, *no* cases have successfully invoked the defenses of force majeure or commercial impracticability based on changes to tariff levels. In particular:

- Price increases for key inputs, taken alone, rarely constitute commercial impracticability.[2]
- Courts typically rule that financial hardship, even due to extreme price increases, does not excuse performance.[3] The only court to accept a price increase argument required a 572% cost increase and the buyer receiving an unjustified windfall.[4]

Thus, because tariff increases are just another form of increases in the cost structure — and often to a degree less than those involved in these cost-based cases — it is unlikely these doctrines can be successfully invoked to avoid performance due to tariff increases, even if they are substantial. Courts rarely excuse performance based on government actions unless they fundamentally alter contractual obligations. Regulatory changes, tariffs, or emergency orders that increase costs are generally considered foreseeable risks.[5]

2 See, e.g., *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1285 (Fed. Cir. 2002); *Steel Industries, Inc. v. Interlink Metals*, 969 F. Supp. 1046 (E.D. Mich. 1997).

3 See *Louisiana Power & Light Co. v. Allegheny Ludlum Industries, Inc*., 517 F. Supp. 1319 (E.D. L.A. 1981) (holding simply being deprived of anticipated profits does not establish commercial impracticability); *Publicker Industries, Inc. v. Union Carbide Corp.* 1975 U.S. Dist. LEXIS 14305 (E.D. Penn. 1975) (86% increase in ethylene did not establish force majeure or commercial impracticability); *TECO Coal Corp. v. Orlando Utilities Comm'n*, No. 6:07-CV-444-KKC, 2010 WL 8750622 (E.D. Ky. Sept. 17, 2010) (42% increase in coal did not establish commercial impracticability); *Novelis Corp. v. Anheuser-Busch, Inc.*, No. 1:06-CV-2257, 2007 WL 9822634 (N.D. Ohio Feb. 28, 2007) (32% increase in aluminum did not establish commercial impracticability); *Exelon Generation Co., LLC v. General Atomics Techs. Corp.*, 559 F. Supp.2d 892 (N.D. Ill. 2008) (30% increase in uranium did not establish commercial impracticability); *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983) (15% increase in steel did not establish commercial impracticability); *Cosden Oil & Chemical Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064 (5th Cir. 1984) (45% increase in polystyrene did not establish force majeure); *Tilcon New York, Inc. v. Morris Cnty. Co-op. Pricing Council*, No. A-5453-10T3, 2014 WL 839122 (N.J. Super. Ct. App. Div. Mar. 5, 2014) (135% increase in asphalt cement did not establish commercial impracticability); *Upsher-Smith Labs. v. Mylan Labs.*, 944 F. Supp. 1411 (D. Minn 1996) ((40% increase did not establish commercial impracticability); *Neal--Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (61% increase in granular potash and 67% increase in coarse potash did not establish commercial impracticability); *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327 (4th Cir. 1987) (56% increase in oil did not establish force majeure).

4 *Aluminum Co. of America v. Essex Group*, 499 F. Supp 53 (W.D. Pa. 1980

5 See American Trading & Production Corp. v. Shell International Marine Ltd., 453 F.2d 939, 940 (2d Cir. 1972) (33% increase in costs due to the Suez Canal closure did not excuse performance); BAE Indus., Inc. v. Agrati - Medina, LLC, 2022 WL 4372923 (E.D. Mich. Sept. 21, 2022) (supplier's claim of commercial impracticability due to COVID-19-related steel price hikes was rejected because its contract excluded price changes from force majeure); Rohm & Haas Co. v. Crompton Corp., 2002 WL 1023435 (Pa. Com. Pl. Apr. 29, 2002) (increased compliance costs due to EPA regulations were deemed foreseeable and did not justify nonperformance).

In light of these legal realities, your contractual review should include the following steps:

- **Reviewing Existing Contracts to Determine Tariff Exposure:** Because force majeure and commercial impracticability doctrines are unlikely to excuse performance, it is essential that importers gather all of their buy- and sell-side contracts, evaluate their contractual options for dealing with tariff increases, and consider ways to proactively reach out to revise agreements to address tariff- and import-related risks. Many contracts do not explicitly mention which party bears the risk of increased tariffs. In such cases, the responsibility for tariff increases may be determined by certain key contractual provisions, including pricing and delivery provisions.
- **Addressing Tariffs when Revising Existing Contracts or Negotiating New Contracts**: Companies should not assume their contracts provide the flexibility to deal with unexpected increases in tariffs. Given the unpredictability of tariffs and what appears likely to be an escalation of trade wars, including the imposition of reciprocal tariffs, companies should proactively include tariff-related provisions in their new or revised contracts. These provisions can take the following forms and, in some cases, should be used together with other of the below terms:
  - **Using Incoterms to Assign Tariff Responsibility:** Incoterms are international trade terms that define which party is responsible for tariffs, duties, and transportation costs, such as Ex Works (EW) provisions (buyers bear responsibility for all taxes and duties, including tariffs); Delivered Duty Paid provisions (DDP) (seller assumes responsibility for duties and taxes); and Free On Board (FOB) and Cost, Insurance & Freight (CIF) (responsibility depends on the shipment location and agreed-upon terms).
  - **Explicitly Specifying Which Party is the Importer of Record:** Because the importer of record is required to take care of all importing arrangements, including the payment of customs duties, including this provision clarifies which party will pay any tariffs.
  - **Explicitly Allocating Tariff Costs:** Buy- or sell-side contracts also can expressly specify which party bears responsibility for tariff-related costs, avoiding ambiguity. Note that it is permissible for parties to share or shift tariff costs behind the scenes such that one party is responsible for initially paying the tariffs but will receive a partial or total reimbursement from the counterparty. Examples would include language requiring tariff reimbursement, the sharing of tariff-related costs, the sharing of tariff-related costs if tariffs rise above a certain level, or the right to change quantities if tariff changes exceed a certain level. The only type of reimbursement that is not allowed is for the special situation of antidumping or countervailing duties, as the Department of Commerce has issued rules that essentially prohibit reimbursement of these duties by the manufacturer to the importer. But all other tariffs can be reimbursed.
  - **Mandating Tariff-Triggered Price Renegotiations:** These types of provisions include a requirement for renegotiation upon a specific tariff-triggered event. One might also include a termination right if the parties cannot agree on new pricing.
  - **Including Price Adjustment Rights in the Quotation or Quote Updates:** This type of provision is designed to preserve flexibility to reflect unexpected changes in tariffs and thus avoids the problem of force majeure or commercial impracticability clauses not being triggered by even sharp changes to tariff levels.
  - **Incorporating Alternative Sourcing Requirements:** This provision requires suppliers to maintain backup production capabilities or secondary sources to mitigate disruptions. Consider incorporating these requirements into contractual arrangements and establishing service credits or incentives to ensure compliance with these requirements.

Suppliers often will be reluctant to renegotiate contracts, particularly if it involves potential price increases or sharing of tariff-related risks. Look for contractual leverage points relating to contract renewals or potential expansion of purchasing patterns. Consider moving up contract renewals to combine term extensions with tariff-related risk sharing.

4 Risk Minimization — Ensuring Your Company's Customs Compliance Is in Order

Risk minimization involves an examination of the current state of your company's compliance to ensure you are exercising reasonable care in import operations and not underpaying tariffs. This is especially important in the context of a high-tariff environment, where potential penalties for underpayment of tariffs are vastly greater.

It also is clear that, along with increasing tariffs, there will be an increasing emphasis by Customs on ensuring that U.S. importers do not manipulate country-of-origin principles to make an end-run around higher tariffs, particularly from China. There are numerous anecdotal reports of importers using Chinese parts and components with minor assembly operations in third countries to erroneously claim a non-Chinese country of origin to avoid paying Section 301 duties. As a result, we are hearing from numerous importers that Customs is closely scrutinizing imports from third countries, particularly imports from Southeast Asia and Mexico, to be certain that products containing substantial Chinese-origin content are claiming the correct country of origin.

To address these risks, Step 4 is for importers to closely examine their Customs compliance, focusing on the following areas:

Ensure Your Customs Compliance is Robust. In a high-tariff environment, the stakes for compliance miscues sharply rise, increasing potential penalties and interest for underpayments. For the same reason, the advantages of identifying tariff-saving opportunities are much greater. Some key areas to consider for ongoing customs compliance include:

- **Ensure Your Company Maintains a Thorough Classification Index for Proper and Consistent Tariff Coding:** Inaccurate classifications can result in incorrect duties or penalties, so confirm your company has procedures to correctly classify goods using the correct Harmonized Tariff Schedule (HTS) codes and maintains a regularly updated import classification index to reflect new products or changes in tariff codes. Your classification index should contain or link to justifications used to arrive at classification decisions, such as Form 28s or 29s from Customs, supporting advisory opinions, and analyses your company has made of any classification issues.
- **Ensure Your Company Maintains a Customs Manual for Consistent Procedures in Importing:** Confirm your organization maintains a detailed customs compliance manual that outlines procedures for classification, valuation, origin determination, recordkeeping, interactions with brokers and Customs, and other relevant matters that impact the accuracy of information reported to Customs. A clear, documented import process ensures consistency and reduces the risk of errors.
- **Ensure Your Company Tracks and Attributes Assists Using a Consistent Methodology:** Review and ensure there are procedures to track and properly report assists, royalties, or other non-invoice costs that might affect the declared value of imported goods. Misreporting these costs could lead to underpayments of duties and penalties.
- **Ensure Your Company Conducts Regular Post-Entry Checks to Identify Errors in Importation:** Ensure there are procedures to regularly review entries after entry to identify potential errors in valuation, origin declarations, classification, or other entry-specific items that impact how much duties are owed. Do not forget to include areas of tariff savings like duty drawbacks, or reconciliation filings to identify and address discrepancies. Use post-summary corrections to make timely adjustments within the 310-day post-summary correction period.

- **Establish Regular Customs Audits:** In addition to post-entry checks, more detailed customs audits can uncover underlying issues that can lead to Customs penalties. Major importers should consider conducting regular customs audits, pulling a judgmental sample of entries for thorough examination to determine if there are areas that contain errors.
- **Ensure Your Company Maintains Procedures for Overseeing Customs Brokers and Freight Forwarders:** Frequent importers should maintain written protocols that are consistently followed to ensure there is proper oversight of customs brokers and freight forwarders. Confirm that someone at the company is playing point on this coordination and also has been given ACE access to monitor communications to and from Customs.
- **Ensure Your Company Maintains Procedures to Monitor Changing Regulations and Importing Requirements:** It is important to stay informed about regulatory updates, especially in times when import-related requirements might quickly change. Use tools like ACE data to proactively adjust compliance practices to evolving rules.

Address USMCA Compliance. Moreover, it would be prudent of importers to proactively address USMCA compliance, which still remains in effect. We expect Customs to continue prioritizing its review of claims for USMCA preferential treatment, which has been a point of emphasis for CBP over the last few years. Key areas to review include:

- **Proper Certificates of Origin at Importation:** Importers must have a valid certificate of origin to claim duty-free treatment in hand at the time of importation. Lack of documentation at the time of importation may result in denied preferences and cannot be remedied after the fact. This is one of the most common importing errors that we see (along with failure to track assists, failure to implement valuation requirements for related parties, and misclassifications). Avoid this problem by ensuring certificates are available, complete, and maintained for at least five years. Collaborate with suppliers to provide accurate certificates before shipment.
- **Compliance with Regional Content Requirements:** Products like automobiles must meet specific regional value content thresholds. Conduct a detailed analysis of your supply chain to confirm sourcing meets required content levels.
- **Proactively Engage with Suppliers:** Communicate with suppliers to verify their understanding of regional content requirements and to confirm they are accurately reporting the same to your company. Work with them to resolve discrepancies and improve compliance practices.
- **Proper Declaration of Country of Origin:** Incorrect origin declarations may trigger penalties or loss of USMCA benefits; misclassifications can result in the application of the wrong USMCA requirements and also increase scrutiny from CBP. Validate claims of USMCA origin using clear supplier documentation and other supporting information. Ensure employees managing import declarations are trained on proper classification and country of origin rules, which often differ from the normal Customs substantial transformation rules, such as when the USMCA requires a tariff-shift analysis or product-specific requirements.

Conduct a Customs Audit. A comprehensive customs audit can be essential for identifying compliance gaps and mitigating risks in an increasingly complex trade environment. Regular audits ensure your organization adheres to import regulations, minimizes the risk of penalties, and maximizes efficiency in import operations. A well-conducted compliance audit can identify inconsistencies in tariff classifications, valuation, or country-of-origin claims, and can streamline processes to avoid unnecessary delays and errors in filings. Use Customs audits to verify that declared values include all dutiable costs, such as assists and royalties, and implement rules relating to pricing from affiliated parties. A customs audit also should evaluate the robustness of your company's procedures for identifying errors after entry and correcting them using post-entry corrections and protests against liquidation. A final benefit is that a Customs audit will help ensure your company is maintaining proper documentation.

5 Opportunity Identification — Ensuring Your Company Is Maximizing Tariff Savings

With enhanced risk planning comes potential opportunities for importers. A well-structured strategy to minimize duty costs can significantly offset the financial burden of potentially increasing tariffs and improve overall cost efficiency in import operations. By leveraging available tools and programs, companies can enhance cash flow, lower landed costs, and reduce their tariff liabilities while ensuring compliance with Customs regulations. Key duty saving measures to consider using include:

- **Customs Bonded Warehouses:** Customs bonded warehouses, which are secure facilities where imported goods can be stored, manipulated, or manufactured without paying import duties, can provide cash flow advantages, particularly for products that may be reexported without duty payment.
- **Foreign Trade Zones (FTZs):** FTZs allow companies to store, assemble, or process goods with deferred or reduced tariffs. Goods within FTZs can be reexported duty-free or entered into the U.S. market with reduced duties based on final product classification.
- **Duty Drawback Programs:** Duty drawback programs allow importers to recover up to 99 percent of duties paid on goods that are later exported. This is especially beneficial for businesses with significant reexport activities or defective goods returns.
- **Temporary Importation Bonds (TIBs):** TIBs allow the importation of goods temporarily without paying duties, provided the goods are reexported within a specified timeframe. TIBs are useful for items like trade show samples, prototypes, or tools of the trade.
- **Free Trade Agreements (FTAs) and Special Trade Programs:** FTAs, such as the USMCA, provide potential access to preferential duty rates. Importers should investigate eligibility for programs such as the Generalized System of Preferences (GSP), which provides lower tariffs for developing countries and duty-free treatment on qualifying imports.
- **Apply Tariff Engineering:** Importers can legally reduce tariffs by modifying supply chains or the manufacturing steps of products. Tariff engineering can include adjusting production processes to qualify goods under preferential trade agreements, shifting sourcing to countries with lower tariff rates, and implementing product changes that result in more favorable classifications.

6 Minimizing Supply Chain Integrity Risks

Supply chain integrity will likely receive unprecedented levels of scrutiny in the Trump administration. With many supply chain concerns directly or indirectly relating to China — an almost-certain future target for import-related actions — it is apparent that increasing regulator focus on supply chain integrity concerns, including under the UFLPA, should be handled alongside concerns about potentially rising tariffs.

Compliance with labor and transparency requirements is integral to tariff management. After mapping your supply chain, conducting integrity checks or audits of your suppliers can help your company stay abreast of new developments and comply with laws — especially in the areas of forced labor, human trafficking, modern slavery, and environmental regulations — thus avoiding potential fines or blockages of goods at the border.

- **Risk Assessment:** Once your supply chain map from Step 1 is complete, conduct evaluations of your suppliers and analyze potential risks at each stage of the supply chain, considering factors like geographical location, political instability, regulatory compliance, labor practices, cybersecurity, and financial stability.

- **Update All Terms and Conditions:** Make sure your contracts are up to date, and clearly define expectations of your suppliers regarding quality control, documentation responsibilities, labor and UFLPA practices, and environmental impact.
- **Incorporate Third-party Audits to Verify Supplier Practices:** Use third-party audits, including onsite audits, to help evaluate your suppliers and assess their compliance with environmental and labor laws and the company's standards regarding product quality, safety, and ethical practices.
- **Build and Maintain Supplier Relationships:** Foster open communication with suppliers and encourage them to disclose any potential issues before they become significant issues. Offer to help address concerns and implement improvements proactively throughout the supply chain system.
- **Continuous Monitoring:** Implement systems and regularly monitor your suppliers' performance and compliance. Evaluate your supply chain for new potential risks that might arise.

We provide deeper coverage of such supply chain integrity concerns, including under the UFLPA, in our companion white paper on "Managing Supply Chain Integrity Risks." But these steps are the starting point to position companies to navigate supply chain integrity requirements.

Conclusion

Though the international trade legal landscape remains in flux, two things are certain: Tariffs will be rising, and change will occur rapidly and potentially without any warning. Identifying risks, and then taking steps to implement supply chain flexibility and to otherwise adapt to rapid changes in the cost of imports, are essential for any major importer.

The Foley International Trade & National Security team regularly advises companies that source and import from overseas regarding the full range of import-related matters, including both for U.S. Customs & Border Protection (CBP) and supply chain integrity issues. The Foley Manufacturing — Supply Chain team is a multi-disciplinary group of lawyers who take a holistic approach to addressing supply chain issues. The Foley international trade and supply chain teams are working together to develop legal strategies to help multinational companies and importers adapt to the rapidly changing international trade environment.

Learn more:

Foley International Trade Practice

Foley Supply Chain Practice

ABOUT FOLEY & LARDNER LLP

Foley & Lardner LLP is a preeminent law firm that stands at the nexus of the Energy, Health Care & Life Sciences, Innovative Technology, and Manufacturing Sectors. We look beyond the law to focus on the constantly evolving demands facing our clients and act as trusted business advisors to deliver creative, practical, and effective solutions. Our 1,100 lawyers across 26 offices worldwide partner on the full range of engagements from corporate counsel to intellectual property work and litigation support, providing our clients with a one-team solution to all their needs. For nearly two centuries, Foley has maintained its commitment to the highest level of innovative legal services and to the stewardship of our people, firm, clients, and the communities we serve.

FOLEY

FOLEY & LARDNER LLP

FOLEY.COM

AUSTIN | BOSTON | BRUSSELS | CHICAGO | DALLAS | DENVER | DETROIT | HOUSTON | JACKSONVILLE | LOS ANGELES | MADISON | MEXICO CITY | MIAMI | MILWAUKEE
NEW YORK | ORLANDO | RALEIGH | SACRAMENTO | SALT LAKE CITY | SAN DIEGO | SAN FRANCISCO | SILICON VALLEY | TALLAHASSEE | TAMPA | TOKYO | WASHINGTON, D.C.