

Using Contractual Terms To Allocate The Risks of Reciprocal Tariffs

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On April 2, 2025, President Trump used the power granted to him by the International Emergency Economic Powers Act ("IEEPA") to issue an Executive Order titled "Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits" (the "EO").^[1] Contrary to its name, the EO is not limited to imposing tit-for-tat tariffs on countries that impose tariffs on US goods, but rather focuses on economic policies that the White House perceives to be promoting trade imbalances (like suppression of domestic wages and consumption, discouraging importation of U.S. goods).

The Reciprocal Tariff Policy In a Nutshell

Unless covered by an exemption under the EO, as of April 5, 2025, an additional 10% tariff is to be imposed on all articles being imported into the United States, in the understanding that as of April 9, said tariff is to increase to a country-specific rate provided in Annex I to the EO.^[2] The EO also provides that, generally, tariffs shall apply only to the non-U.S. content^[3] of a subject article, provided at least 20% of the value of the subject article is United States originating. These tariffs add to, but do not necessarily replace, already existing tariffs.

As for the Latin American ("LatAm") region generally, it appears that the EO only includes Nicaragua and Venezuela as countries getting specific increases above the *ad valorem* 10%. Mexico, as a party to the United States-Mexico-Canada Agreement (USMCA) previously negotiated by President Trump, stands apart.

The USMCA as an exemption

It appears that the USMCA, and President Trump's previous imposition (and then delay) of tariffs on Mexico and Canada under the IEEPA, played a major role in this EO. Although the existingentanyl/migration IEEPA orders are still in effect, the current EO provides that:

- USMCA compliant goods from Canada or Mexico continue to be eligible to enter the United States under preferential terms, that is, a 0% tariff.
- Non-USMCA compliant goods from Canada or Mexico are to be subject to a 25% tariff.
- Non-USMCA compliant energy resources and potash imported from Canada are to be subject to a 10% tariff.

The Fact Sheet makes clear that Mexico's entry into the USMCA gives it preferential treatment to the extent that the administration is satisfied that the previous declaration is complied with. Specifically, it provides that "USMCA compliant goods will continue to see a 0% tariff, non-USMCA compliant goods will see a 25% tariff, and non-USMCA compliant energy and potash will see a 10% tariff. In the event the existingentanyl/migration IEEPA orders are terminated, USMCA compliant goods would continue to receive preferential treatment, while non-USMCA compliant goods would be subject to a 12% reciprocal tariff."

Allocating Risks in Cross-Border Transactions

While uncertainty remains, the EO makes clear that the United States is open to negotiations, while at the same time reserving the right to modify the additional tariffs if retaliatory actions are taken against the United States. In light of this uncertainty, it would appear that the 10% tariffs are here to stay for the foreseeable future. As a result, companies are encouraged to review their existing contracts, and consider this fact in future negotiations.

Generally speaking, tariffs are paid by the importing entity in the country that imposed the tariff (*i.e.*, U.S. companies). It is possible importers will try to reallocate these risks, and try to suspend, renegotiate or even terminate their contracts, whether (1) under the agreed-upon terms by the parties, (2) *force majeure*, or (3) hardship causes. Unless pre-2025 contracts contain specific clauses dealing with tariffs, the enforcement of *force majeure* or hardship clauses will be extremely case specific and difficult.

Parties involved in cross-border trade should therefore look to address these issues proactively, both in new contracts and at the contract renewal phase. This should include consideration of the following:

- Inclusion of price adjustment clauses, triggering thresholds that allocate tariff increases (and decreases) in a way that would preserve the economics of the original deal or, in the appropriate situation, provide a mechanism for the parties to re-negotiate the deal.
- Include alternative dispute resolution mechanisms, such as mediation and/or arbitration, that provide a streamlined mechanism for an arbitrator to resolve disputes about the effects of tariff increases (or decreases) in an efficient manner.
- Include governing law provisions for jurisdictions that have a body of law that respects the parties' ability to allocate contractual risks.
- Include early termination provisions in connection with the imposition of tariffs over a certain threshold.

[1] Available at <https://www.whitehouse.gov/presidential-actions/2025/04/regulating-imports-with-a-reciprocal-tariff-to-rectify-trade-practices-that-contribute-to-large-and-persistent-annual-united-states-goods-trade-deficits/> (last checked, April 5, 2025). Concurrently, the White House also issued a "fact sheet" about these tariffs. Available at <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security/> (last checked, April 5, 2025).

[2] Available at <https://www.whitehouse.gov/wp-content/uploads/2025/04/Annex-I.pdf> (last checked April 5, 2025).

[3] As per section 3.(f) of the EO, "United States content" shall refer to the value of an article attributable to the component produced entirely, or substantially transformed in, the United States.

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