

Tariffs: Tactics and Trade-offs in Construction Contracts

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Introduction

- What is a tariff?
- Recently enacted/announced tariffs
- How tariffs are treated in construction contracts
- How might tariff claims and disputes play out
- Strategies to address tariff risks in contracts
- Strategies to address tariffs in disputes

What is a tariff?



Geoff Schultz
Partner - Tax

- Tariffs (duties) are taxes on goods (products) imported into the U.S.
- Typically calculated as a percentage of a product's value.
- Generally, do not apply to services, at least directly.
- Paid by U.S. importer, not foreign exporter

Tariffs under Section 232 vs. IEEPA

Feature	Section 232	IEEPA
Basis	Trade Expansion Act (1962), 19 U.S.C. §1862	International Emergency Economic Powers Act (1977)
Stated Justification	National security via trade	National emergency from foreign threat
Trigger	Commerce Dept. investigation	Presidential emergency declaration
Checks	Procedural investigation required	Fewer procedural checks once emergency declared
Scope	Specific products/sectors	Broad-includes tariffs, sanctions, asset freezes

Recently enacted/announced tariffs

Feb. 1 Announced tariffs:

- Canada: 25% on most goods; 10% on energy products
- Mexico: 25% on all goods
- China: 10% on all goods

Feb. 4 Paused tariffs on imports from Canada and Mexico for 30 days

Announced tariffs :

- China: increased to 20% on all goods

Feb. 10 Announced tariffs:

- 25% tariffs on all steel and aluminum and products (effective Mar. 12th)

Recently enacted/announced tariffs

- Mar. 3**
- Resumed tariffs:
 - Canada: 25% on most goods*; 10% on energy products
 - Mexico: 25% on all goods*
- *Continued pause for any goods meeting the U.S.-Mexico-Canada rules of origin
- Threatened additional IEEPA tariffs on many products, including cars, semiconductors, and oil.
 - China responded with retaliatory measures and initiated WTO dispute settlement proceedings
 - Canada responded with retaliatory tariffs of 25% on \$155 billion of American goods

Recently enacted/announced tariffs

- Mar. 12** Steel and aluminum tariffs became effective
- Impacts \$29 billion of steel imports, \$12 billion of aluminum imports, \$44 billion of derivative products, and \$100 billion of steel and aluminum content value

Recently enacted/announced tariffs

Apr. 2 Announced “Liberation Day” tariffs:

- President declared national emergency caused by foreign trade practices and invoked IEEPA to:
 - Impose 10% tariff on imports from all countries (effective Apr. 5)
 - Impose higher reciprocal tariffs on countries with U.S. trade deficits (effective Apr. 9)
 - Eliminate duty-free *de minimis* treatment for low-value imports from China
- Do not apply to items already subject to 232 tariffs (ex: steel, aluminum, copper, semi-conductors, energy)



Reciprocal Tariffs

Tariffs Charged to the U.S.A.
Including
Currency Manipulation
and Trade Barriers

U.S.A. Discounted Reciprocal Tariffs

Country	Tariffs Charged to the U.S.A. Including Currency Manipulation and Trade Barriers	U.S.A. Discounted Reciprocal Tariffs
China	67%	34%
European Union	39%	20%
Vietnam	90%	46%
Taiwan	64%	32%
Japan	46%	24%
India	52%	26%
South Korea	50%	25%
Thailand	72%	36%
Switzerland	61%	31%
Indonesia	64%	32%
Malaysia	47%	24%
Cambodia	97%	49%
United Kingdom	10%	10%
South Africa	60%	30%
Brazil	10%	10%
Bangladesh	74%	37%
Singapore	10%	10%
Israel	33%	17%
Philippines	34%	17%
Chile	10%	10%
Australia	10%	10%
Pakistan	58%	29%
Turkey	10%	10%
Sri Lanka	88%	44%
Colombia	10%	10%



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Country	Tariffs Charged to the U.S.A. Including Currency Manipulation and Trade Barriers	U.S.A. Discounted Reciprocal Tariffs
Peru	10%	10%
Nicaragua	36%	18%
Norway	30%	15%
Costa Rica	17%	10%
Jordan	40%	20%
Dominican Republic	10%	10%
United Arab Emirates	10%	10%
New Zealand	20%	10%
Argentina	10%	10%
Ecuador	12%	10%
Guatemala	10%	10%
Honduras	10%	10%
Madagascar	93%	47%
Myanmar (Burma)	88%	44%
Tunisia	55%	28%
Kazakhstan	54%	27%
Serbia	74%	37%
Egypt	10%	10%
Saudi Arabia	10%	10%
El Salvador	10%	10%
Côte d'Ivoire	41%	21%
Laos	95%	48%
Botswana	74%	37%
Trinidad and Tobago	12%	10%
Morocco	10%	10%



Reciprocal Tariffs

Country	Tariffs Charged to the U.S.A. Including Currency Manipulation and Trade Barriers	U.S.A. Discounted Reciprocal Tariffs
Algeria	59%	30%
Oman	10%	10%
Uruguay	10%	10%
Bahamas	10%	10%
Lesotho	99%	50%
Ukraine	10%	10%
Bahrain	10%	10%
Qatar	10%	10%
Mauritius	80%	40%
Fiji	63%	32%
Iceland	10%	10%
Kenya	10%	10%
Liechtenstein	73%	37%
Guyana	76%	38%
Haiti	10%	10%
Bosnia and Herzegovina	70%	35%
Nigeria	27%	14%
Namibia	42%	21%
Brunei	47%	24%
Bolivia	20%	10%
Panama	10%	10%
Venezuela	29%	15%
North Macedonia	65%	33%
Ethiopia	10%	10%
Ghana	17%	10%



Reciprocal Tariffs

Country	Tariffs Charged to the U.S.A. Including Currency Manipulation and Trade Barriers	U.S.A. Discounted Reciprocal Tariffs
Moldova	61%	31%
Angola	63%	32%
Democratic Republic of the Congo	22%	11%
Jamaica	10%	10%
Mozambique	31%	16%
Paraguay	10%	10%
Zambia	33%	17%
Lebanon	10%	10%
Tanzania	10%	10%
Iraq	78%	39%
Georgia	10%	10%
Senegal	10%	10%
Azerbaijan	10%	10%
Cameroon	22%	11%
Uganda	20%	10%
Albania	10%	10%
Armenia	10%	10%
Nepal	10%	10%
Sint Maarten	10%	10%
Falkland Islands	82%	41%
Gabon	10%	10%
Kuwait	10%	10%
Togo	10%	10%
Suriname	10%	10%
Belize	10%	10%



Reciprocal Tariffs

Country	Tariffs Charged to the U.S.A. <small>Including Currency Manipulation and Trade Barriers</small>	U.S.A. Discounted Reciprocal Tariffs
Maldives	10%	10%
Tajikistan	10%	10%
Cabo Verde	10%	10%
Burundi	10%	10%
Guadeloupe	10%	10%
Bhutan	10%	10%
Martinique	10%	10%
Tonga	10%	10%
Mauritania	10%	10%
Dominica	10%	10%
Micronesia	10%	10%
Gambia	10%	10%
French Guiana	10%	10%
Christmas Island	10%	10%
Andorra	10%	10%
Central African Republic	10%	10%
Solomon Islands	10%	10%
Mayotte	10%	10%
Anguilla	10%	10%
Cocos (Keeling) Islands	10%	10%
Eritrea	10%	10%
Cook Islands	10%	10%
South Sudan	10%	10%
Comoros	10%	10%
Kiribati	10%	10%



Reciprocal Tariffs

Country	Tariffs Charged to the U.S.A. <small>Including Currency Manipulation and Trade Barriers</small>	U.S.A. Discounted Reciprocal Tariffs
São Tomé and Príncipe	10%	10%
Norfolk Island	58%	29%
Gibraltar	10%	10%
Tuvalu	10%	10%
British Indian Ocean Territory	10%	10%
Tokelau	10%	10%
Guinea-Bissau	10%	10%
Svalbard and Jan Mayen	10%	10%
Heard and McDonald Islands	10%	10%
Reunion	73%	37%

Recently enacted/announced tariffs

- Apr. 4** China announced retaliatory tariffs of 34% on all U.S. goods (effective Apr. 10)
- Apr. 7** Threatened 84% tariffs on China if China did not back off the retaliatory 34% tariffs
- Apr. 9** China increased retaliatory tariffs to 84% on U.S. goods
- Apr. 10**
- Paused most reciprocal tariffs, maintaining a baseline 10% tariff for most countries
 - Increased tariffs on Chinese goods to 145%
- Apr. 11** China increased retaliatory tariffs of 125% on all U.S. goods

Summary of Current U.S. Tariffs

- 10% baseline tariff on all countries except Canada & Mexico
- 25% on steel and aluminum from all countries
- 25% on auto imports
- 145% on all imports from China
- 25% on Canadian & Mexican imports not compliance with USMCA

Construction materials most at risk of tariffs?

- Steel & Aluminum
- Copper
- Lumber
- Equipment (steel and aluminum content)
- Pipe
- Gypsum/Drywall
- Metal roofing
- Asphalt shingles
- Anything else?

How tariffs are treated in construction contracts

- **Tariffs**
- Price
- Tax
- Force majeure
- Change in law
- Termination

How tariffs are treated in construction contracts

Identifying the importer of record.

Supplier will act as Importer of Record on all shipments of Goods under the Order **and pay all associated duties, tariffs**, surcharges, or fees due on such Goods and payable to U.S. Customs and Border Protection or any other customs authority. **At no point will such duties, tariffs**, surcharges, or fees, whether known or unknown, **result in any liability for the Indemnified Parties** or any changes to the Order, the Order's terms and conditions, or the Order Price.

How tariffs are treated in construction contracts

Sample specific tariff provision.

The Order Price includes all tariffs or import duties in effect as of the date of the Order. If Supplier or its Subcontractors incur any obligation to pay new or additional tariffs or import duties which take effect after the date of the Order, Supplier will be entitled to a Change Order increasing the Order Price by the actual cost of such tariffs or import duties that Supplier or its Subcontractors are required to pay to a Government Instrumentality, but only if Supplier provides notice to Purchaser of the assessment of such tariffs or duties within the time provided by Article XX of the Agreement and only if Supplier provides supporting documentation reasonably acceptable to Purchaser and sufficient to establish the actual amounts Supplier was required to pay to the applicable Government Instrumentality for such tariffs or import duties. **In the event exclusions are granted, Supplier will reimburse Purchaser for any paid tariff(s) refunded from the Government Instrumentality** in a fair, transparent manner along with reasonable documented proof.

How tariffs are treated in construction contracts

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- **Price**
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How tariffs are treated in construction contracts

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How tariffs are treated in construction contracts

- Tax included in lump sum:
 - **The Contract Price includes Taxes**, costs, charges, and expenses of whatever nature applicable to the Work.
- Tax excluded from lump sum:
 - **The Order Price excludes sales and use taxes** which either Party is required to pay with respect to the Order and the transactions contemplated therein, **with any such sales and use taxes to be paid** and borne **by Purchaser as a separate line item on Supplier's invoices**.

How tariffs are treated in construction contracts

Broad definition of taxes:

“**Taxes**” means any and all taxes, assessments, levies, **tariffs, duties**, fees, charges, and withholdings **of any kind or nature whatsoever and howsoever described**, including, gross receipts, sales, use, license, payroll, federal, state, local or foreign income, environmental, profits, premium, franchise, property, excise, capital stock, import, stamp, transfer, employment, occupation, generation, privilege, utility, regulatory, energy, consumption, lease, filing, recording, and activity taxes, levies, duties, fees, charges, imposts, and withholding, together with any and all penalties, interest, and additions thereto.

How tariffs are treated in construction contracts

No definition/narrow use of taxes - AIA A201 2017

§ 3.6 Taxes. The Contractor shall pay **sales, consumer, use and similar taxes for the Work** provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

How tariffs are treated in construction contracts

- Tariffs
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- **Force majeure**
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TEC Olmos, LLC v. ConocoPhillips Co

Assessed whether a market downturn can be a force majeure event using the doctrine of *ejusdem generis*

Should either Party be prevented or *hindered* from complying with any obligation created under this Agreement, other than the obligation to pay money, *by reason of* fire, flood, storm, act of God, governmental authority, labor disputes, war or ***any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected***, then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention or hindrance, provided the affected Party exercises all reasonable diligence to remove the cause of force majeure.

To constitute force majeure events that fall within the “catch-all” phrase must be of the same type as the listed terms

How tariffs are treated in construction contracts

Force Majeure (AIA A201 2017 8.3.1)

If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) **labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control**; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then **the Contract Time shall be extended** for such reasonable time as the Architect may determine.

How tariffs are treated in construction contracts

Force Majeure (EJCDC C700 2018, 4.05(c))

If Contractor's performance or progress is delayed, disrupted, or interfered with by unanticipated causes not the fault of and beyond the control of Owner, Contractor, and those for which they are responsible, then Contractor shall be entitled to an equitable adjustment in Contract Times. Such an adjustment will be Contractor's sole and exclusive remedy for the delays, disruption, and interference described in this paragraph. Causes of delay, disruption, or interference that may give rise to an adjustment in Contract Times under this paragraph include but are not limited to the following:

1. Severe and unavoidable **natural catastrophes such as fires, floods, epidemics, and earthquakes**;
2. **Abnormal weather** conditions;
3. Acts or failures to act of third-party utility owners or other third-party entities (other than those third-party utility owners or other third-party entities performing other work at or adjacent to the Site as arranged by or under contract with Owner, as contemplated in Article 8); and
4. Acts of **war or terrorism**.

How tariffs are treated in construction contracts

- Tariffs
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- Tax
- Force majeure
- **Change in law**
- Termination

How tariffs are treated in construction contracts

Open ended change in law provision (EJCDC C700 General Conditions 2018 - 7.11(C))

Owner or Contractor may give written notice to the other party of **any changes** after the submission of Contractor's Bid (or after the date when Contractor became bound under a negotiated contract) **in Laws or Regulations having an effect on the cost or time of performance of the Work**, including but not limited to changes in Laws or Regulations having an effect on procuring permits and on sales, use, value-added, consumption, and other similar taxes. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in Contract Price or Contract Times resulting from such changes, then within 30 days of such written notice Contractor may submit a Change Proposal, or Owner may initiate a Claim.

How tariffs are treated in construction contracts

Broad definition of “law (EJCDC C700 General Conditions 2018 – 1.01(a)(25))

Laws and Regulations; Laws or Regulations. **Any and all applicable laws**, statutes, rules, regulations, ordinances, codes, and binding decrees, resolutions, **and orders of any and all governmental bodies**, agencies, authorities, and courts having jurisdiction.

How tariffs are treated in construction contracts

Narrower change in law definition:

“**Change In Law**” means any amendment, modification, superseding act, deletion, addition or change in or to **Applicable Law** (excluding changes to Tax laws where Taxes are based upon Contractor’s inventory, revenue, income, profits/losses or cost of finance or withholding Tax) that **occurs and takes effect after the Effective Date, provided that Contractor did not know that the** amendment, modification, superseding act, deletion, addition or **change in or to Applicable Law would occur following the Effective Date.**

How tariffs are treated in construction contracts

Change in law by change order:

Contractor may only apply for a Change Order if any of the following events occur with respect to the Project: ... (b) **changes in Law that materially and adversely affect Contractor's actual cost** (which cost will be adequately documented and supported) **of performance of the Work or ability to perform any material requirement under this Agreement**, and with respect to any delays caused by the Changes in Law, a time extension to the Substantial Completion Date and Final Completion Date to the extent allowed under Section XX (Force Majeure).

How tariffs are treated in construction contracts

- Tariffs
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Other strategies to address tariff risk in construction contracts

- Price escalation tied to index for specific materials subject to tariffs.
- Allowance for materials subject to tariffs.
- Early procurement of materials.
- Domestic sourcing of materials.
- Others?

Strategies to track/demonstrate price increases/decreases relating to tariffs

- Must know the baseline
- Need back up to support costs
- What about component parts?
- Tracking domestic costs increased due to tariffs from foreign goods is much harder

Thank you

Questions?

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