

Tariffs, Transfer Pricing, §1059A, Customs, Retaliation and More

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Agenda

- Executive Authority over Customs Tariffs
- Summary of Applied Customs Tariffs
- Overview: Customs Valuation / Transfer Pricing Scope, Standards, Objectives and Proof
- Customs Valuation Fundamentals: Price Paid or Payable, Methodologies
- Transfer Pricing Fundamentals
- Intersections: TP vs. CV, 1059A limitation
- Tariff Planning

US Tariff Authority

The US Congress (legislature) has the constitutional power to set tariffs but under specific laws, the President (executive) can impose tariffs, particularly in cases involving national security or in economic emergencies.

	§232	§301	§201	§122	§338
Who?	Department of Commerce	U.S. Trade Representative	International Trade Commission	Department of Treasury	International Trade Commission
Why?	National security	Unfair trade practices	Protect domestic industries from surge in imports	Balance of payments	Discriminatory practices
What?	Examples: aluminum and steel	Example: China origin products	Example: solar panels in 2018	Maximum of 15%	Maximum of 50%
Duration	No fixed duration	No fixed duration	Initial period up to 4 years	Maximum of 150 days	No fixed duration

Examples of how Administration has used the laws so far

	§232	IEEPA and §301	Reciprocal - IEEPA and §301
Rationale	National security	National security, immigration, illicit drugs	National emergency, unfair trade practices
Targeted Goods	Steel and Aluminum, and derivatives; autos and auto parts	Everything	135 countries
Examples	wire fencing, machinery parts (elevators, bulldozers, etc.), electrical conduit, modular building units, kitchen utensils	Everything	Everything except... (i) articles encompassed by 50 U.S.C. 1702(b); (ii) articles and derivatives of steel and aluminum subject to §232 duties and proclaimed in various prior Proclamations; (iii) automobiles and automotive parts subject to the additional duties imposed pursuant to section 232 and proclaimed in Proclamation 10908 of March 26, 2025; (iv) other products enumerated in Annex II, including certain pharmaceuticals, semiconductors, lumber articles, certain critical minerals, and energy and energy products; (v) articles subject to the Column 2 rates of the HTSUS; and (vi) articles that may become subject to duties pursuant to future actions under section §232.
Targeted Countries	All	China, Canada, Mexico	135 countries
Effective Date	March 12, April 2, May 3 and June 3, 2025	Feb. 4, 2025 for China; March 4, 2025 for Canada and Mexico	April 5, 2025; April 9, 2025; full % deferred 90 days except China @ 55%
Tariff Rate	50% steel and aluminum; 25% autos and auto parts	10% (China); 25% (Canada and Mexico); 10% (Canada and Mexico)	Various depending on country and HS classifications; 41 countries >10% / 94 countries @ 10%
Duration	No fixed duration	No fixed duration	No fixed duration
Retaliation	Pledged by EU and others	China levied tariffs on §14b; Canada targeted §107b; Mexico unspecified	Retaliatory tariffs imposed by China; Pledged by EU and others
Key considerations	No drawback steel and aluminum	No drawback	Tariffs applied on non-US content provided at least 20% is US originating
	FTZ at Privileged Foreign Status	FTZ at Privileged Foreign Status	FTZ at Privileged Foreign Status
	Maximum penalty under law (i.e., full value of imports)	de minimis	Canada or Mexico: No tariffs on USMCA qualified goods; 25% USMCA non-qualified
	No mitigating factors in penalty action	No exclusion process	Tariffs non-stacking in cases of §232, and Canada or Mexico USMCA-ineligible goods

Overview

Transfer Pricing: Appropriate application of the Arm's Length Standard consistent with local laws/regulations

Customs Valuation:
Application of the appropriate customs valuation method consistent with the WTO standard and local laws/regulations

	Transfer Pricing	Customs Valuation
Scope	Goods and Services	Goods
Prevailing Standard	Arm's length result	Price paid or payable
Primary Objective	Allocate income between two parties	Fix dutiable value of a specific item
Required Proof	Contemporaneous documentation	Examination of circumstances of sale

Customs Valuation Fundamentals

Primarily: Transaction Value – price paid or payable

Burden is on the importer/buyer to prove that relationship with exporter/seller did not influence the price paid or payable

- Types of transactions
 - Tangible Property
 - Intangible Property
 - Certain Services Related to Trade in Goods
- Types of methods
 - Transaction Value
 - Transaction Value of Identical Merchandise
 - Transaction Value of Similar Merchandise
 - Deductive Value
 - Computed Value
 - Fallback (or Residual/Derivative)

Customs Valuation Fundamentals

“Price Actually Paid or Payable”

- The **total payment** (whether direct or indirect) for the imported merchandise from the buyer to the seller.
- General presumption that **all payments** from the buyer to the seller are dutiable. *Generra Sportswear Co. v. U.S.*, 905 F.2d 377 (Fed.Cir. 1990).
- Can be the invoice price, but certain upward and downward adjustments may/must be made to arrive at a “net entered value”

Must have sale (no consignment shipments)

Related party sales must be at arm’s length

- An examination of the circumstances of sale must indicate that relationship did not influence the price actually paid or payable...

Transfer Pricing Within the Supply Chain

High tariff levels are now a significant additional cost that affects transfer pricing structures

How can the tariff be split within the supply chain between the manufacturer, distributor, and the third-party customer?

- Should the distributor (US) bear all of the cost?
- To what extent will the third-party customer bear all of the cost?
- What do IC agreements tell us?
- What do the comparables tell us?
 - Comparables that are subject to a tariff regime
 - Comparables that are not subject to a tariff regime
 - The lag time in observing profitability of comparables

Transfer Pricing Within the Supply Chain

Transfers of functions (manufacturing, HQ, etc.) as a result of tariffs

Allocation of non-tariff costs, such as warranties and logistics between manufacturers and distributors

Important to consider “tariff intensity” on legal entity P&Ls

How does price demand elasticity come into play when passing on this cost to the third-party customer?

- Short term vs. long term
- Substitutes

Intercompany P&Ls in a TP Structure with Tariffs

In its simplest form...

Distributor bears all tariff cost

	Manufacturer P&L	Distributor P&L	Distributor P&L w Tariff	Distributor Price at Constant Margin
Price	70	100	100	118.3
Price Increase (%)				18%
COGS / Transaction Value	49	70	70	70
Tariff @ 25%	0	0	17.5	17.5
Operating Expenses	16	25	25	25
Operating Profit	5	5	-12.5	5.8
Operating Margin	7%	5%	-12.5%	5%

Routine Distributor would need to increase prices to maintain “benchmarked” margin

Distributor and Manufacturer share tariff cost

	Manufacturer P&L w Tariff	Distributor P&L w Tariff	Manufacturer P&L w Tariff at Constant Margin
Price	70	100	79.4
Price Increase (%)			13%
COGS / Transaction Value	49	70	49
Tariff @ 25%	8.75	8.75	8.75
Operating Expenses	16	25	16
Operating Profit	-3.75	-3.75	5.6
Operating Margin	-5.4%	-3.8%	7%

Routine Manufacturer would need to increase prices to maintain “benchmarked” markup. Iterative solution for distributor price

How Should Companies Deal With the Uncertainty of Tariff Levels?

Scenario analysis and probability-based modeling

Can tariff costs be treated as something akin to an allocated passthrough cost evaluated on their own?

- No change to how transactions are tested
- No change to traditional comparables sets

Evaluation of which operations should move to the US.:

- Simplicity/lead time
- Reversibility

Impact of Trump Tariffs 2.0 on Transfer Pricing

Impact on comparables-based benchmark

Impact on tested party results – from stable profit to substantial loss

Require post-import adjustment to comply with transfer pricing

Administrative issues from post-import adjustments

- Customs
- Mutual Agreement Procedure

Impact of Transfer Pricing on Tariffs

If you have the right facts and contractual support, you can avoid transfer pricing and customs compliance problems and reduce tariffs

- Reduce the transfer price for tariff not borne in U.S.
- Importer profits are not impacted by tariffs
- No post-import adjustment necessary for customs
- Import price is lower, so tariff is lower

Intersections: TP ≠ CV

Circumstances of Sale

- Provide pertinent detail regarding the relationship
- Show price was settled in manner consistent with industry
- Show price is adequate to cover costs plus profit equivalent to seller's profit

What about the transfer pricing method applied?

- “...the mere fact that an importer provides CBP with an [advance pricing agreement (“APA”)] or transfer pricing study is not sufficient to establish that a related party transaction value is acceptable.”

Determining the Acceptability of Transaction Value for Related Party Transactions,
CBP Informed Compliance Publication (2007)

- Even after several decades of consideration and decisions, CBP generally continues with an *ad hoc* approach, allowing for assessment of facts and circumstances in each case
- Incremental discovery of convergence with Sec. 482

Intersections: 1059A Limitation

Section 1059A provides that the maximum amount a U.S. taxpayer may claim as basis in inventory goods imported from a related party is the amount that was determined for customs purposes when the goods were imported.

This regulation effectively binds the taxpayer to the “finally-determined customs value” as determined under the customs laws. Under customs law, the customs value becomes final upon liquidation, which generally occurs 314 days after entry.

A trap for the unwary can occur when intercompany prices are changed after goods are imported. Key areas where the 1059A can give rise to risks:

- Royalty and license fee payments
- Assists
- Exchange rate swings
- Transfer pricing adjustments

Exhibit: Potential adverse tax consequences of Sec. 1059A

Final liquidated value (ceiling on inventory tax basis)	\$	100M
Retroactive price increase (or other undeclared customs value)	\$	10M
True inventory cost basis/COGS	\$	110M
Tax rate		35%
Tax cost of underdeclaring customs value	\$	3.5M

- The taxpayer cannot by operation of Sec. 1059A take a full offset for its cost of goods sold (\$110 million).
- The taxpayer may deduct only the \$100 million final customs value.
- The result is an additional tax cost or tax adjustment exposure of \$3.5 million.

Planning for Tariff Uncertainty

Managing disruption from tariffs requires a multifaceted strategy. By leveraging short and long term duty mitigation strategies, companies can optimize tariff liabilities and promote supply chain resiliency while enhancing their competitive edge in the global market.

First Sale for Export

Reduce duty costs by declaring customs value based on manufacturer's initial sales price rather than final price paid by the importer

Foreign Trade Zones

Defer duty payment until foreign merchandise leaves the FTZ for US Consumption

Country of Origin Planning

Plan and manage the country of origin for goods strategically to benefit from preferential trade agreements and reduced duty rates

Cost Unbundling

Removing or “unbundling” elements from the declared customs price to facilitate a reduction in customs duties

Strategic Tariff Classification

Ensure precise and strategic classification to avoid overpayment and capitalize on favorable tariff treatments

Valuation: Post Importation Refunds

Obtain duty refunds from retroactive downward transfer price adjustments which results in a reduced customs value

Duty Drawback

Claim 99% refund of duties, fees and taxes paid on goods imported into the U.S. that are ultimately exported or destroyed (certain Tariffs are excluded)

Other Strategies

Bonded warehouses, Temporary Importation Bonds, Chapter 98

First Sale for Export

