100 Days In:

Implications of U.S. Tariffs, Trade, and Foreign Policy on U.S. Business

Fredrikson & Byron Webinar

Tariffs: Marking a New Era; From Globalization to Localization

By Michael J. Meagher, Esq.

Ray Dalio, founder of Bridgewater, the world's largest hedge fund manager, recently stated that producers and investors in China and the United States "must now go about making alternative plans, regardless of what the next round of trade negotiations are like."

We are now in a new era of global trade, where individual country markets are quickly becoming protected, and imports are subject to significant tariffs. At the same time, countries around the world are competing to attract new investments to expand domestic employment opportunities, increase tax bases, and improve local economies.

1. **Export Licensing, Sanctions, and Other Restrictions Lead to Separation of Markets**
   a. Led by the U.S. and China—but also followed by European and other countries—there have been increasing restrictions on the export of sensitive technology and information, particularly advanced technologies, strategic materials, and sensitive personal and financial data.
   b. This has resulted in separate data, technology, and financing infrastructures, especially between the U.S. and China.
2. **Increased Tariffs Lead to Separation of Markets**
   a. Tariffs have existed throughout modern history, but the Trump administration proposed sharply higher tariffs on all countries, focusing on those with larger trade imbalances with the U.S.
      i. A global 10% tariff on all countries exporting to the U.S.
      ii. Varying reciprocal tariffs depending on each country's trade balance with the U.S.
      iii. Separate tariff programs for steel, aluminum, and certain derived products under Section 232.
   b. China, Canada, and other countries have responded by increasing tariffs on imports from the U.S. and placing restrictions on key exports to the U.S. (NB: Just announced meeting between trade representatives of China and the United States).
   c. Tariffs have changed quickly and frequently, initially increasing on many products, then decreasing or being removed for USMCA products, auto parts, electronics, and more; changes are likely to continue.
   d. Companies must carefully analyze HTS code applicability to determine tariff exposure.
3. **How Tariff Value Is Determined**
   a. Methods to determine the value on which tariffs are assessed (in order of CBP requirements):
      i. **Transaction Value:** The price actually paid or payable when sold for export to the U.S.
      ii. **Transaction Value of Identical Merchandise:** At the same commercial level, quantity, and time.
      iii. **Transaction Value of Similar Merchandise:** As above, but for similar—not identical—goods.
      iv. **Deductive Value:** U.S. resale price to unrelated parties, minus:
      v. **Computed Value:** Cost of production plus profit and general expenses (based on CBP regulations and guidance).
      vi. **Fallback Method:** A reasonable method aligned with CBP rules if others cannot be used.
   b. **Additions Required to Invoice Price:**
      i. Packing costs.
      ii. Selling commissions paid by buyer.
      iii. "Assists" (see below).
      iv. Royalties/license fees paid as a condition of sale.
      v. Resale proceeds accruing to the seller.
      vi. Payments to the seller or related parties presumed dutiable unless proven otherwise.

c. **First Sale for Export Pricing:**
   i. Requires two bona fide sales.
   ii. Original manufacture intended for U.S. sale.
   iii. Arm's-length pricing (some affiliated sales permitted).
d. **Changing Country of Origin:**
   i. Transshipment does not change origin.
   ii. Verify suppliers' claims regarding manufacturing origin.
   iii. See substantial transformation guidance below.
e. **Changing HTS Codes:**
   i. Risky and subject to CBP enforcement.
   ii. Legitimate changes in manufacturing may alter classification.
f. **"Assists":**
   i. Design, engineering, or services performed abroad must be added back into valuation.
   ii. Services performed in the U.S. or local transportation are not dutiable.
g. **Substantial Transformation:**
   i. Origin usually based on where wholly manufactured.
   ii. If multiple countries involved, last country of substantial transformation determines origin.
   iii. Requires significant transformation into a new product with a different name, character, and use.
h. **Manufacturing in Customer Country:**
   i. Most effective way to reduce or eliminate tariffs.
   ii. Entirely avoid tariffs if wholly manufactured locally.
i. **Duty Drawback:**
   i. Exported goods not used in the U.S.
   ii. Imported components in goods that are exported.
   iii. Defective or nonconforming goods returned or destroyed under CBP supervision.

4. Possible Solutions and Associated Liabilities

a. Creative tariff-reduction strategies exist, but importers bear primary liability for misrepresentation.
b. CBP has significantly increased inspections and enforcement since tariff hikes.
c. Import contracts now frequently impose liability on manufacturers for misstatements.
d. Importers increasingly require relocation of manufacturing to low- or no-tariff countries.
e. Companies must analyze product-specific tariff applicability.
f. Companies should identify and exclude non-dutiable charges where possible.
g. Strategies must comply fully with applicable laws and be well documented.
h. Exporters must also comply with U.S. export licensing laws and seek rulings where necessary.

5. Moving Manufacturing to Low/No-Tariff Countries

a. Greenfield Projects:
   i. Legal guidance on site selection, acquisition, permits, company formation, and operations.
b. M&A and Joint Ventures:
   i. Legal support for due diligence, negotiations, acquisition, operation, and integration in low-tariff regions or the U.S.