

# Interview with Timothy C. Brightbill

Timothy C. Brightbill is Co-Chair of Wiley Rein LLP's International Trade practice and an Adjunct Professor at Georgetown University Law Center. Below, he discusses the legal authorities that the US president has to impose tariffs and argues that President Trump's recent tariff actions fall within these authorities.

*The views stated herein are those of the interviewee and do not necessarily reflect those of Goldman Sachs.*



**Jenny Grimberg: What specific authorities does the US president have to impose tariffs?**

**Tim Brightbill:** The president has a wide variety of tools at his disposal to impose tariffs, three of which President Trump has utilized across his two terms. One, the International Emergency Economic Powers Act

(IEEPA), which was the basis for Trump's February 1 Executive Order that imposed additional 10% tariffs on China and the 25% tariffs on Canada and Mexico that were ultimately postponed. IEEPA gives the president broad power to regulate commerce during a national emergency, has almost-immediate effects on international trade, and doesn't require an agency investigation to invoke.

Two, Section 232 of the Trade Expansion Act, which allows the president to impose tariffs on imported products deemed a threat to national security and was the basis for Trump's original and expanded steel and aluminum tariffs. And three, Section 301 of the US Trade Act of 1974, which the current administration hasn't invoked but was the basis for the 25% tariffs on hundreds of billions of dollars of Chinese goods in 2018 that kicked off the US-China trade war. Section 122 of the same 1974 Act, which is the president's balance-of-payments authority, has never been used by Trump but would allow him to impose an additional 15% tariff on imports for up to 150 days, unless extended by Congress. And Section 338 of the Tariff Act of 1930, which hasn't been used in over 70 years, allows the president to impose tariffs of up to 50% on any country discriminating against US producers. So, President Trump could conceivably use this to impose reciprocal tariffs.

**Jenny Grimberg: Whether IEEPA can be used to impose tariffs seems to be a matter of debate. Is there historical precedent for such use of IEEPA, and what have the courts had to say in this regard?**

**Tim Brightbill:** IEEPA has never before been used to impose tariffs, although both the first Trump Administration and the Biden Administration used IEEPA to sanction countries and individuals, and the courts repeatedly upheld these actions. So, this is new territory for IEEPA. However, the courts have generally upheld the president's power to declare an international economic emergency, and tend to be deferential on matters of national security. And while the use of IEEPA to impose tariffs is novel, the Nixon Administration invoked IEEPA's predecessor—the 1917 Trading with the Enemy Act—to justify a 10% import tariff in 1971 due to a balance-of-payments crisis. The Court of Customs and Patent Appeals, which was the appellate court at the time, upheld this action in

*United States v. Yoshida International*. So, some legal basis exists for such use of IEEPA.

**Jenny Grimberg: But can the president just declare anything a "national emergency" to justify tariffs?**

**Tim Brightbill:** That's the key question. Trump has declared several national emergencies, including the fentanyl crisis and the immigration issues at our borders, and used these to justify the China, Mexico, and Canada tariffs. But he has also talked at length about dumping, subsidies, and other unfair trade practices. Whether the courts will uphold Trump's tariff actions because a genuine economic emergency exists that would justify tariffs, or find that the president is just using IEEPA to address trade problems that should be covered under other laws, is an open question.

During the first Trump Administration, the courts were generally deferential to the president's ability to decide what constituted a national security threat or economic emergency. But even in those cases, some judges raised different opinions and doubts as to whether the president had overreached his authority. The courts have also indicated that the president's power to act during national security or economic emergencies is not without limits. Eventually, the president may cross the line, or the remedy offered of tariffs might not align with the alleged problem. So, any court challenges on the president's IEEPA authority will be important to watch.

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**Jenny Grimberg: Who might file such court challenges, and what court(s) would hear any challenges to tariff actions?**

**Tim Brightbill:** Trade associations, companies, or importers paying the increased tariffs might bring a lawsuit; hundreds of importers filed the ultimately unsuccessful lawsuit to overturn the Section 301 China tariffs. These cases would be heard by the US Court of International Trade in New York, followed by the Court of Appeals for the Federal Circuit in Washington and then possibly the US Supreme Court, though few trade cases ever make it to the Supreme Court. The Court of International Trade heard the Section 232 disputes on steel and aluminum as well as the challenges to the Section 301 tariffs on China during the first Trump Administration. And in both of those cases, the Court upheld the president's power to act.

### **Jenny Grimberg: If court cases are filed against tariff actions, do the tariffs in question still take effect?**

**Tim Brightbill:** Whether the parties that bring a lawsuit against the Administration's tariff actions can also obtain an injunction to stop the tariffs is an important question, which is already playing out in the legal challenges to some of the President's other recent executive actions. Such injunctions are difficult to obtain because they require the plaintiffs to show evidence of "irreparable harm", and financial losses due to tariffs often don't cut it—a higher showing of financial harm, such as a significant likelihood that the company or importer could go out of business altogether as a result of the tariffs, would be required. So, injunctions, and trade lawsuits in general, tend to be an arduous process for the plaintiffs, and oftentimes a lengthy one. A case filed before the Court of International Trade and then any appeal to the Federal Circuit could each take six months to a year to resolve. So, even if the arguments may be on their side, companies cannot rely on court challenges to address the impact of tariffs; they have to think carefully about how to minimize the impacts to their businesses through other means, perhaps by shifting their supply chains closer to home.

### **Jenny Grimberg: Which, if any, of the tariffs that Trump has announced/floated will likely invite challenges?**

**Tim Brightbill:** Many, if not all, of Trump's tariff actions will likely face legal challenges despite the fact that the courts upheld such actions during the first administration. That said, the Trump Administration has come into office more prepared for such challenges than it was eight years ago—it is more well-versed in the legal authorities at its disposal and how to utilize them, and is more willing to test previously-unused authorities like IEEPA or Section 122 of the 1974 Trade Act to impose tariffs. In my view, the tariffs announced so far are aggressive but arguably within the president's authority. So, while I expect challenges, the recent tariff actions are unlikely to be halted by the courts.

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### **Jenny Grimberg: If not the courts, what role could Congress potentially play in curbing Trump's tariff plans?**

**Tim Brightbill:** Article 1, Section 8 of the Constitution gives Congress the power to regulate commerce with foreign nations and to lay and collect taxes and duties. But, over time, Congress has delegated that power as well as the power to declare national emergencies and security risks to the Executive Branch through the authorities we've discussed. Now, Congress could try to reclaim some of this power. Legislative proposals to do so were floated during the first Trump Administration when Trump initiated an investigation on automobile imports on US national security grounds, which several senators and members of Congress claimed was an overreach of presidential authority. If the president continues to

push the boundaries of his authorities, Congress may again try to restrict the president's trade authority, which would require passing a law. However, it's hard to envision that the president would sign a law to restrict his own power, complicating any such legislative effort.

Congress could more easily influence trade policy by withholding agreement on key legislation. Congress has the power to appropriate money and therefore has substantial leverage as the March 14 deadline to enact a fiscal year 2025 spending agreement and prevent a government shutdown approaches. Congress could pass a temporary stopgap measure in the form of a continuing resolution, and lawmakers could potentially threaten to vote 'no' or withhold their vote on the resolution—which requires a majority vote in both the Senate and the House—unless the Executive Branch agrees to a deal on tariffs. The reconciliation bills currently making their way through Congress also give it leverage, as they include funding for many of the administration's priorities. Lawmakers concerned about tariffs could similarly oppose these bills or hold out for an agreement on tariffs. So, Congress has a few tools to potentially push back on the president's tariff plans, if it so desires.

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### **Jenny Grimberg: How much power would targeted countries have to challenge tariffs through the World Trade Organization (WTO) and the US-Mexico-Canada Agreement (USMCA)?**

**Tim Brightbill:** The WTO has limited power to police the Trump Administration's actions. The WTO ruled that Trump's first-term steel and aluminum tariffs and Section 301 China tariffs violated WTO agreements, and a panel on the recently-announced tariffs would probably make the same finding. However, the WTO Appellate Body—which hears appeals in disputes brought by the organization's members—has been shut down for several years as the US has blocked the appointment of the new members necessary to form a quorum. This prevents a WTO ruling from taking effect, as the US can simply appeal any losing decision to the now-defunct Appellate Body in a process known as "appealing into the void", which is what the US previously did.

Mexico and Canada would also face an uphill battle challenging Trump's tariffs under the USMCA. The Agreement includes a national security provision—a standard feature of the US' free trade agreements—that allows members to take actions necessary to protect their security interests as they themselves define them. So, the US could invoke this provision if Mexico and Canada pursue a challenge. In addition, the USMCA will be renegotiated next year, and the Trump Administration is likely counting on being able to reach a deal with Canada and Mexico before any dispute panel would rule on the new tariffs. So, bottom line: neither the WTO nor the USMCA will likely be an impediment to Trump's tariff plans.