War Series: Trump’s Tariffs and How US Businesses Can Challenge Foreign Retaliatory Tariffs Under Bilateral Investment Treaties

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In Light of the April 2, 2025, Executive Order on Reciprocal Tariffs

On April 2, 2025, President Trump signed the Executive Order titled “**Presidential Action: Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits**.” This order targets countries deemed to be engaging in unfair trade practices and imposes reciprocal tariffs to counterbalance the perceived disadvantage to American goods. In turn, several trading partners—claiming that the Executive Order undermines existing market access arrangements—have swiftly introduced **retaliatory tariffs** aimed at United States exports. These foreign duties potentially affect a wide swath of American industries, including manufacturing, technology, agriculture, and other key sectors.

Amid this new climate, **US manufacturers, industrial firms, farmers, and investors with international operations** may find themselves confronting sudden and detrimental market barriers. Unexpected surcharges on goods entering foreign countries or discriminatory policies targeting US-based enterprises can quickly erode profit margins and disrupt long-standing commercial relationships. Although these retaliatory tariffs arise in part from a broader geopolitical and trade-policy standoff, they can directly harm the bottom lines of individual American businesses.

Critical to US businesses is that **Bilateral Investment Treaties (BITs)** or similar international agreements sometimes offer a legal avenue to challenge such foreign measures. This article explores how businesses—ranging from large-scale manufacturers to family-owned farming enterprises—can potentially invoke BIT protections and **pursue arbitration** when confronted with retaliatory tariffs that unfairly or discriminatorily harm US investments abroad.

1. **Background: Retaliatory Tariffs and Their Impact on US Industries**

Retaliatory tariffs are hardly new in global commerce. Still, the **2025 Executive Order** has generated considerable turbulence because it establishes reciprocal tariffs targeted at countries the administration views as contributing to persistent US goods trade deficits. Countries subject to these reciprocal measures are employing their own instruments to counter perceived US pressure. For instance, additional duties might be levied specifically on American agricultural products, advanced machinery, or technology components—often those with significant export volume or strategic political influence.

For **US manufacturers** that depend on selling products overseas, these newly imposed foreign tariffs can disrupt supply chains, inflate operational costs, and render American goods uncompetitive in key markets. Similarly, **farmers** who have cultivated relationships with foreign buyers—often built over decades—could see the demand for US-grown commodities plummet if foreign tariffs place local producers at an advantage. In the technology or industrial sectors, certain retaliatory measures may specifically target cutting-edge components, crippling the ability of some American firms to remain profitable in international markets.

These actions are often politically motivated: foreign nations, frustrated by the US’s reciprocal tariff approach, design retaliatory tariffs to exert pressure on policymakers in Washington. However, the brunt of this pressure frequently falls on everyday American businesses—who may be singled out for punitive treatment to achieve diplomatic or economic goals.

2. **How BITs Can Offer a Path to Relief**

Bilateral Investment Treaties typically grant a private party—the investor—the right to **sue a host government** if that government’s actions cause harm to the investor’s business or property in the host’s territory. Traditionally, these claims arise from expropriation, unfair or inequitable treatment, denial of justice, or discriminatory measures. Retaliatory tariffs can, in certain circumstances, fit within these categories if they disproportionately burden US investors compared to local or third-country businesses.

The key question for many in the US business sphere is whether their foreign presence qualifies as a protected “investment.” BITs often define “investment” broadly, potentially encompassing **cross-border supply chains, distribution agreements, or minority stakes** in foreign companies—arrangements that might be significantly harmed by retaliatory duties. If the effect of a tariff is to undermine a US investor’s capacity to sell goods or to operate profitably, that investor may argue that the tariff contravenes BIT standards.

This legal reasoning has gained traction in international jurisprudence. One notable reference is the **Costello judgment** in Ireland’s Supreme Court, which, while addressing the constitutionality of the Canada-EU trade agreement, illustrates how investor-state tribunals wield authority to rule on alleged breaches of treaty obligations—even when those breaches manifest as tariff disputes (Costello v The Government of Ireland, Ireland and the Attorney General (Approved) [2022] IESC 44_5). In paragraph 127 of the Costello judgment, the Court comments on how retaliatory tariffs—adopted in response to a finding that one party had violated trade rules—spurred lawsuits from private companies suffering trade restrictions:

“[127. As it happens, the CJEU has taken a similar view with regard to liability of the Union under Article 340 TFEU (ex. Article 288 EC). Thus, for example, in FIAMM and Fedon (Joined Cases C 120 and 121/06P, EU: C: 2008: 476) two Italian companies contended that they had suffered loss when a WTO Disputes Panel had authorised the US to impose retaliatory tariffs on certain products …]”

This observation underscores that **retaliatory tariffs** can become a focal point for investor claims, especially where a measure deliberately singles out goods from a particular country. If the duties disrupt an American company’s ability to access a foreign market or fulfill contractual obligations, the possibility of a BIT-based challenge arises.

3. **Potential Grounds Under BITs: Fair Treatment and Non-Discrimination**

Many BITs contain provisions on **national treatment** (treating foreign investors no less favorably than domestic investors) and **most-favored-nation (MFN) treatment** (treating investors from one treaty partner no less favorably than investors from other countries). When a retaliatory tariff exclusively targets American goods or is intentionally calibrated to disadvantage US-produced items, it may violate one or both of these commitments.

For instance, the language in several US BITs is quite explicit. A typical article might state:

"Each Party shall accord treatment no less favorable than that it accords … to investments of its own nationals or companies (national treatment) or to investments of nationals or companies of a third country (most-favored-nation treatment)."

Should a government's retaliatory tariff exclude local producers or third-country producers from comparable duties, US businesses could argue the measure amounts to **less favorable treatment** of American investments. When these measures carry signs of punitive or protectionist intent, the case for discrimination is further bolstered.

Additionally, many BITs oblige governments to respect **fair and equitable treatment** (FET). This standard protects investors from arbitrary, unreasonable, or unpredictable governmental conduct. A tariff that is indiscriminately aimed at harming US commercial interests—without a legitimate regulatory basis—could be cast as violating FET obligations. Although states do enjoy wide regulatory latitude, tribunals often look for objective justifications. Where purely political motives or open hostility toward American exporters are on display, an FET claim might succeed.

4. **Political Motivations and Potential Legal Vulnerabilities**

Unlike generalized tariffs that can be defended as responding to economic exigencies or trade imbalances, politically driven retaliatory tariffs often lack a clear neutral rationale. The US's reciprocal tariff approach is justified by the President's stated goal of **rectifying ongoing trade deficits**. By contrast, some foreign countermeasures appear more overtly aimed at harming American producers as a pressure tactic.

Recent comments by public officials highlight this dynamic. For example, on March 27, 2025, Ontario Premier Doug Ford declared:

"…we're going to make sure that we inflict as much pain as possible … to the American people…”

Such statements suggest a motive less about fair trade policies and more about **punishment or leveraging political outcomes**. Although rhetorical flourishes are common in trade standoffs, they can serve as corroborating evidence that measures are discriminatory in nature.

This recalls the scenario in **LG&E v. Argentina**, where the tribunal considered whether the Argentine government, under the strain of economic crisis, used foreign-owned utility companies to bear a disproportionate burden (LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1). In that dispute, the claimants argued that the government singled out their sector for unfavorable treatment, effectively transferring wealth from foreign investors to local consumers. The tribunal recognized that such intent—coupled with tangible economic harm—could give rise to liability under the applicable treaty.

If a foreign state’s retaliatory tariff policy is similarly **selective** or accompanied by aggressive rhetoric targeting American interests, a US business might argue that the measure constitutes unfair or inequitable treatment, discrimination, or even a form of indirect expropriation if it deprives the investor of substantially all economic benefit.

5. **Determining Damages: Insights from the Costello Judgment**

Returning to the **Costello** decision, the Irish Supreme Court notes that investor-state arbitration can impose significant damages on a host State if its regulations breach treaty standards. In paragraph 129, the Court points out that:

“[129. … at least at a theoretical level – CETA represents a potentially significant extension of the non-contractual liability of the State. … the State would be exposed to strict liability claims for damages arising from mere legislative non-compliance with CETA, even if the measures were not in themselves unconstitutional … or even if the State had acted in perfect good faith … .]”

Substitute “CETA” with any relevant BIT or investment agreement, and the principle remains the same: if a state’s measure, including a retaliatory tariff, **contravenes treaty commitments**, the state could face substantial compensation claims—even if it believed it was acting lawfully or in the national interest.

For US businesses, this underscores the viability of seeking monetary redress. Suppose a foreign government’s retaliatory tariffs result in immediate and severe losses—by blocking key markets or imposing prohibitively high duties. In that case, an investor-state tribunal might award damages reflecting lost revenue or the diminution in the value of the investor’s enterprise abroad. Consequently, these potential liabilities can act as a deterrent for host states contemplating retaliatory measures.

6. **Establishing Jurisdiction: Framing Exports as an Investment**

One common misconception among **US exporters, manufacturers, and agricultural producers** is that BIT protections only apply to large, capital-intensive projects, such as major infrastructure or significant equity stakes in a foreign subsidiary. While it is true that some BITs require a direct or indirect ownership interest in the host country, many treaties adopt **broad definitions** of “investment,” potentially including long-term distribution agreements, supply chain contracts, or intangible rights crucial to a business’s presence in the foreign market.

To access these protections, a US entity must demonstrate that it holds a protected investment under the treaty’s definition. Even an export-oriented business might qualify if it has structured operations in the host country—such as local partnerships, a distribution network, or commercial activities that go beyond one-off sales. Retaliatory tariffs that cripple these operations could be challenged as a violation of the treaty.

Typically, the procedural steps to initiate investor-state arbitration under a BIT involve:

1. **Notice of Dispute:** The US investor notifies the host State of the alleged treaty breach.
2. **Cooling-Off Period:** Many BITs mandate a waiting period (commonly 3–6 months) for parties to attempt amicable resolution.
3. **Arbitration Filing:** If no settlement is reached, the claimant can file its case under the agreed-upon rules (often ICSID or UNCITRAL).

This mechanism is reminiscent of the principle in **Banco Nacional de Cuba v. Sabbatino**, recognizing that extraterritorial judicial or arbitral review of governmental actions can occur if provided for by treaty. BIT arbitration stands out precisely because it bypasses local courts and places the dispute before an international forum empowered to render enforceable awards.

7. **The Political and Economic Stakes for Foreign States**

From a policy perspective, states that impose retaliatory tariffs in response to the **April 2, 2025, Executive Order** risk opening themselves to significant liability if they fail to calibrate these measures consistently with their BIT obligations. While officials may view “reciprocal” or retaliatory tariffs as a strategic tool to extract concessions from the US, they must consider the potential for major arbitral awards.

In recent years, tribunals have demonstrated a willingness to scrutinize **politically charged actions** that discriminate against foreign investors. If a tariff is accompanied by public statements urging punitive action against Americans—rather than citing neutral economic considerations—it may be easier for investors to show the measure is arbitrary, lacking legitimate justification.

Indeed, the line between permissible countermeasures under international trade law and impermissible conduct under investment treaties can be fine. Even if a host state believes it is responding to the US's reciprocal tariff regime, it still has a duty not to violate the fair and equitable treatment or national treatment rights guaranteed to US companies. Put differently, states cannot simply invoke reciprocal trade retaliation as a shield if the measure in question breaches investor protections enshrined in a BIT.

8. **Practical Considerations for US Manufacturers, Farmers, and Investors**

For **US-based manufacturers**, the immediate concern is calculating the financial impact of retaliatory tariffs on existing foreign contracts. If a contract becomes unprofitable or impossible to fulfill due to extreme tariff hikes, businesses should examine their relevant BIT coverage. Where coverage exists, the next step is documenting the nature of the investment, the timeline of the tariff, any discriminatory language used by foreign officials, and the loss incurred.

Agricultural producers may likewise consider how their supply chain agreements and distribution networks abroad are structured. Even small or medium-sized farming operations, if integrated into a larger export system, might have enough of a "footprint" in a foreign country to assert BIT rights. Detailed record-keeping—especially regarding changes in market access, lost sales, and local competitor advantage—can bolster claims of discriminatory treatment.

Meanwhile, **foreign investors** from the US (for instance, those who have established local facilities or partnerships abroad) should review their corporate structure. Some businesses maintain complex global footprints, with intermediate holding companies or subsidiaries in multiple jurisdictions. Determining which BIT is most advantageous—and whether the relevant entity qualifies as an “investor” under that treaty—can be crucial in selecting the optimal route for arbitration.

9. **Conclusion: Turning the Tables on Retaliatory Tariffs**

The **2025 Executive Order on Reciprocal Tariffs** has intensified tensions in global trade, spurring certain nations to respond with measures aimed squarely at US businesses. Although these moves are often framed as legitimate countermeasures, they may expose foreign governments to **significant legal and financial consequences** under the network of BITs that protect American investments.

For **US manufacturers, agricultural producers, technology exporters, and other industries** bearing the brunt of retaliatory duties, BIT arbitration represents a tangible opportunity to challenge measures that appear discriminatory or punitive. As the **Costello** judgment illustrates, tribunals can award substantial damages if they conclude that a host State has breached treaty obligations, particularly when the action was politically motivated.

From a US business perspective, the **practical takeaway** is clear: While trade wars can be fought on the global stage through diplomacy and reciprocal measures, there is also an **individualized legal recourse** if retaliatory tariffs infringe on internationally guaranteed protections. By methodically documenting losses, verifying treaty coverage, and pursuing investor-state arbitration where applicable, American enterprises have a powerful tool to seek relief.

Thus, in a climate of escalating **reciprocal tariffs and retaliatory measures**, American businesses need not assume that absorbing losses is the only path. BIT protections offer a channel for redress. While mounting such a claim requires careful analysis and legal support, successful arbitration can offset financial harm, reaffirm the value of treaty-based rights, and—ideally—encourage more balanced and equitable trade practices in the long run.

In sum, as the United States implements its April 2, 2025, Executive Order to address large and persistent trade deficits by regulating imports through reciprocal tariffs, foreign governments have launched retaliatory duties that could devastate certain segments of the US economy. However, those burdens need not be passively endured. Through the framework of BITs, US manufacturers, farmers, and other investors possess a significant legal mechanism to challenge unjust or discriminatory retaliatory tariffs. By understanding the scope of BIT protections, documenting the real-world impact, and considering prompt recourse to investor-state arbitration, American businesses can assert their rights in what has become a complex and high-stakes global trade landscape.

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