

Insights

NAVIGATING TARIFF VOLATILITY IN ENERGY PROJECT DEVELOPMENT WITH BUILD-TRANSFER AGREEMENTS

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Summary

Tariffs have become one of the most unpredictable variables in U.S. energy project development. Duties on imported steel, solar cells, batteries and other equipment have shifted repeatedly over the past several years, often with little advance warning, and there is every reason to expect that volatility to continue as trade policy moves from one administration and one negotiation to the next.

That volatility lands squarely in the middle of build-transfer agreements (“BTAs”), a structure widely used across the renewable and conventional power sectors. In a typical BTA, a developer builds a project, and once the project reaches mechanical or substantial completion, the developer sells it to a buyer, who then owns and operates the asset going forward (and, in the case of a renewable project, gets the benefit of the associated tax credits). Because the BTA is signed well before the project is built, the parties are effectively agreeing on a price today for equipment that will be procured, and tariffs that will be assessed, months or years down the road.

That timing gap creates a real tension. Sellers need enough price protection to procure equipment without absorbing open-ended tariff risk on a fixed-price contract. Buyers need enough cost certainty to underwrite the transaction, secure financing and, in the case of regulated utilities, justify the purchase price to regulators. Getting the balance right requires thinking carefully, up front, about how tariff risk is defined, allocated and capped.

Change in law provisions

Most BTAs address this issue through a Change in Law provision. In substance, these provisions recognize that the purchase price is built around the law as it exists on a reference date, and that anything a relevant government body does after that date, including enacting, modifying or reinterpreting a law, is treated differently from risks the parties priced in at signing. Because tariffs are typically imposed, increased or removed by government action (whether by executive order,

agency rulemaking or otherwise), a well-drafted Change in Law definition will expressly capture tariff and duty changes on imported goods as a species of Change in Law, alongside more conventional regulatory shifts.

Not every legal change should count, however. A workable Change in Law provision is usually conditioned on a “trigger event”, meaning the change must either render performance illegal or unenforceable, or have a material adverse effect on the seller's ability, or cost, to perform. That qualifier matters: it keeps the parties from renegotiating price over immaterial or routine regulatory noise, while still giving the developer a mechanism to seek relief when a real tariff shock hits the procurement budget.

Once a Change in Law trigger event occurs, the mechanics typically work in a few connected steps. The developer notifies the buyer and provides supporting documentation showing the baseline cost assumed at signing and the incremental cost driven by the new tariff. The buyer then has an opportunity to review and verify that documentation, with a dispute mechanism (often involving an independent third-party engineer) if the parties cannot agree on the numbers. Assuming the increase is verified, the agreement will typically provide for the cost to be passed through to the buyer, in whole or in part, as an adjustment to the purchase price, subject to the caps and thresholds (discussed below).

Left unstructured, however, this pass-through concept can create as much uncertainty as it resolves. If “any tariff-driven cost increase” is potentially recoverable, without more, neither side has a clear sense of its actual exposure, and buyers in particular can be left without a ceiling on how far the purchase price might move. The more useful question, then, is not whether tariff risk should be addressed, but how to structure that allocation so both sides have real visibility into their downside. A few structural tools have proven effective in practice.

Structuring tariff risk: three tools worth building in

1. Limit the scope of components subject to tariff adjustment

Rather than allowing any tariff-driven cost increase across the entire project to qualify for a purchase price adjustment, the parties can agree upon a defined, finite list of components and equipment that are set out on a schedule to the agreement. Only cost impacts tied to that defined list of components are eligible for treatment as a Change in Law. This approach gives both parties genuine line of sight into the scope of their exposure at signing, rather than an open-ended, project-wide variable. It also sharpens the diligence and documentation process, since the parties know in advance which cost lines will need to be tracked and verified if a tariff event occurs.

2. Build in off-ramps for major, pre-notice-to-proceed swings

The developer's cost exposure to a tariff change is very different before notice to proceed (NTP) than after: pre-NTP, the developer has generally not committed significant capital to construction,

so there is more room, and more reason, to revisit the deal if tariff costs move materially against the original pricing. A layered structure works well here. Below a first threshold, the seller simply absorbs the increase without a price adjustment. Between that threshold and a second, higher threshold, the parties share the increase, with a corresponding price adjustment. Above that second threshold, rather than requiring either side to keep absorbing an open-ended number, the agreement gives each party the right to walk away from the transaction unless either party is willing to step in and cover the excess itself, or the parties otherwise agree on a resolution. That graduated cost-sharing followed by a walk-away right keeps both sides at the table to find a commercial solution before a large tariff swing derails the deal entirely, while ensuring neither party is stuck with unlimited exposure if no solution can be reached.

3. Build in an upfront estimate with a true-up at closing

Tariff exposure is rarely known with precision at signing, particularly when such tariffs are the subject of ongoing litigation, trade negotiations or agency action. Rather than leaving that number undefined until it is actually incurred, the parties can agree at signing on an estimated cost of compliance with then-current tariffs on the relevant components, built into the purchase price from day one. That estimated number is then trued up at closing against the developer's actual, documented cost of compliance, with the purchase price adjusted upward or downward as an adjustment to the payment due at closing. Critically, that true-up should also account for tariffs that are overturned, rescinded, amended or otherwise invalidated before closing, crediting the buyer to the extent the developer's actual cost came in below the original estimate. To make that mechanism meaningful, the agreement should also require the developer to use commercially reasonable efforts to pursue refunds, reimbursement or other available remedies from the relevant government authority for any duties or tariffs it has already paid but are subsequently overturned, and to pass any amounts actually recovered back to the buyer.

Bringing it together

None of these tools fully eliminate tariff risk in energy project development. However, a well-structured Change in Law provision can turn that uncertainty into something the parties can actually negotiate around: a defined scope of exposure, meaningful thresholds and off-ramps before material spend is committed, and a disciplined, documented true-up process that keeps the final number honest. Getting that structure right at signing is often what determines whether a tariff shock becomes a manageable adjustment or a fight that threatens the deal itself.

BCLP regularly advises developers and buyers on structuring and negotiating these provisions across BTA and other project development transactions and is well positioned to help clients navigate the current tariff environment.

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