

SHADOW TARIFFS AND THE EXECUTIVE VOLATILITY REGIME

DORON NAROTZKI*

ABSTRACT

This Article identifies and theorizes a neglected element of tariffs: “shadow tariffs,” the tariff-like burdens created by executive volatility rather than by durable border collection. When an administration repeatedly announces, delays, conditions, escalates, and reverses tariffs, it changes the expected distribution of future trade costs. Corporations respond ex ante by repricing risk, rewriting contracts, pulling forward inventory, reconfiguring supply chains, investing in compliance and origin planning, and delaying hard-to-reverse investments. Those defensive adjustments impose real costs, even when threatened tariffs are never implemented or are withdrawn before meaningful revenue is collected. The Article uses President Trump’s second term as a case study because it combines unusually frequent threats with aggressive testing of statutory and constitutional boundaries. It makes three contributions. First, it distinguishes shadow tariffs from ordinary incidence analysis and explains why policy reversal does not undo the harm. Second, it maps the private-law and operational channels through which volatility “collects” burdens. Third, it proposes a measurement strategy based on threat windows and observable proxies, and it shows how the Constitution’s separation-of-powers design is economic policy in this setting.

* Associate Professor of Tax and Business Law and Director of the MTax Program, Steinger Faculty Fellow at the University of Akron, College of Business, Daverio School of Accountancy.

TABLE OF CONTENTS

INTRODUCTION	2
I. DEFINING SHADOW TARIFFS	6
A. <i>The Concept</i>	6
B. <i>Distinguishing Shadow Tariffs from Ordinary Tariff Incidence</i>	7
C. <i>Why Reversal Does Not Undo the Harm</i>	7
II. HOW SHADOW TARIFFS ARE CREATED	8
A. <i>Pricing and Precautionary Margins</i>	8
B. <i>Contracting and the Private Law of Volatility</i>	9
C. <i>Inventory Distortion and Pull-Forward Behavior</i>	10
D. <i>Supply-Chain Reconfiguration and Duplication</i>	11
E. <i>Compliance, Classification, and Origin Planning</i>	12
F. <i>Investment Delay and Uncertainty</i>	12
III. DISTRIBUTIONAL AND CROSS-BORDER INCIDENCE	14
A. <i>The Domestic Incidence in the United States</i>	14
B. <i>Burdening Other Nations Through Volatility Rather Than Collection</i>	15
IV. THE INSTITUTIONAL ENGINE OF SHADOW TARIFFS	17
A. <i>Speed, Delegation, and Emergency Powers</i>	17
B. <i>The Constitutional Allocation and Nondelegation Anxiety</i>	19
V. MEASURING SHADOW TARIFFS.....	19
CONCLUSION.....	21

INTRODUCTION

Tariffs can be “hidden” in one sense and visible in another. Tariffs are generally visible to importers and customs-facing businesses, but often invisible to consumers because the burden is embedded in final prices rather than charged as a separate line item.¹ Yet tariffs are visible in formal terms: They rest on identifiable statutory authority, are assessed and collected at the border, and appear in published tariff schedules and customs revenue data.² This standard view misses a second system, one that can impose large

1. Mary Amiti, Stephen J. Redding & David E. Weinstein, *The Impact of the 2018 Tariffs on Prices and Welfare*, 33 J. ECON. PERSP. 187, 207 (2019); Reuven S. Avi-Yonah, Doron Narotzki & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U.C. L.J. 497, 512 (2026) [hereinafter Avi-Yonah et al., *From Relic to Relevance*]; Doron Narotzki, Tamir Shanan & Reuven S. Avi-Yonah, *The U.S. Tax Paradox*, 14 TEX. A&M L. REV. (forthcoming Fall 2026) (manuscript at 9) (on file with the author).

2. U.S. CONST. art. I, § 8, cl. 1; 19 U.S.C. §§ 1202, 1505(a); U.S. Int’l Trade Comm’n, *Harmonized Tariff Schedule of the United States*, <https://hts.usitc.gov> [<https://perma.cc/ZQK3-R8LZ>]; U.S. Dep’t of the Treasury, Bureau of the Fiscal Serv., *Monthly Treasury Statement of Receipts and Outlays of the United States Government* (Apr. 5, 2026), <https://fiscaldata.treasury.gov/datasets/>

and persistent burdens, even when formal tariffs are never collected or when threatened tariffs are later withdrawn. I refer to that second system as “shadow tariffs.”

Shadow tariffs are not metaphors; they are a describable incidence mechanism. When a government repeatedly announces, threatens, delays, conditions, escalates, and partially reverses tariffs, it changes the expected distribution of future trade costs. Corporations and states react by re-pricing risk, rewriting legal contracts, shifting inventory timing, paying for compliance and litigation, and delaying investments. All of these reactions come with a hefty economic price. Therefore, in effect, shadow tariffs operate like tariffs because they force private actors to shift resources from production and exchange to defensive adaptation. Furthermore, they operate like the tariff system because they persist across episodes and compound across supply chains. Last, they are “shadow” only in the narrow sense that they are not line items in the Harmonized Tariff Schedule and do not appear as a tax enacted by Congress.

President Trump’s second term is a unique case study for this because it combines two features that create shadow tariffs at a scale the global economy has not experienced before. First, it created a tariff enforcement environment that is unstable and unpredictable, with frequent threats and sudden changes.³ Second, this term tests the institutional boundary between Congress’s power over tariffs and the executive branch’s role to act quickly through delegated authorities and emergency powers, including the International Emergency Economic Powers Act (IEEPA).⁴ The Supreme Court’s decision in *Learning Resources* narrows this issue, but certainly does not eliminate the problem. The Court held that IEEPA does not authorize the President to impose tariffs, making IEEPA a failed attempt rather than the end to this institutional problem. Executive tariff volatility can migrate to other delegated authorities, including Sections 122, 201, and 301 of the Trade Act of 1974; Section 232 of the Trade Expansion Act of

monthly-treasury-statement/summary-of-receipts-outlays-and-the-deficit-surplus-of-the-u-s-government [https://perma.cc/RS44-2BHS] (listing “Customs Duties” receipts).

3. Doron Narotzki, *Bluff Without Purpose: Rethinking Trump’s Tariff Policy and the Misuse of Game Theory* 2–4 (May 26, 2026) (unpublished manuscript), <https://ssrn.com/abstract=5220905> [https://perma.cc/4JT5-C9QV]; Brendan Murray, *TACO Tracking: Trump Carries Out One in Four Tariff Threats*, BLOOMBERG (Jan. 27, 2026), <https://www.bloomberg.com/news/articles/2026-01-27/bluffing-or-not-counting-trump-s-tariff-threats-versus-actions> [https://perma.cc/D24D-CDUP]; Chloe Taylor, *Trump’s Latest Tariffs U-Turn Is Sparking a Global Market Rally – and Reviving Talk of the ‘TACO Trade’*, CNBC (Jan. 22, 2026), <https://www.cnbc.com/2026/01/22/trump-tariffs-greenland-europe-deal-taco-trade-sell-america.html> [https://perma.cc/4U4Z-L23J].

4. Doron Narotzki, *Hidden Taxation and the Rise of the Shadow Fiscal State*, 7 CORP. & BUS. L.J. 59, 92–106 (2026), [hereinafter Narotzki, *Hidden Taxation*]; Doron Narotzki, *Tariffs Are Taxes, Congress Must Levy Them*, 80 U. MIA. L. REV. CAVEAT 29, 35–38 (2026) [hereinafter Narotzki, *Tariffs Are Taxes*].

1962; and Section 338 of the Tariff Act of 1930.⁵ Each authority has different predicates, procedures, and limits. The shadow-tariff analysis still shows not that every statutory theory will succeed, but that firms may continue to face credible tariff risk while the executive shifts between statutory justifications as courts test these different theories.

This Article offers three contributions. First, it defines “shadow tariffs” not merely as hidden, incidental costs, but as a distinct instrument in effect: a volatility regime in tariff policy that imposes tariff-like burdens in advance (ex-ante) through private risk pricing and adjustment on corporations and governments on both sides of the border, even when no additional duty is ultimately collected. Legal analysis often misses that this threat-and-reversal cycle can impose real and uneven burdens without any increases listed in the tariff schedule. The key historical benchmark is the 2018–2019 U.S.-China trade war, when the United States imposed multiple rounds of tariffs on Chinese imports, China retaliated against U.S. exports, and the tariff program was administered through product lists, exclusions, revisions, deadlines, and partial adjustments.⁶ This experience made later tariff threats credible: Firms already saw that large tariffs could be imposed, modified, and sustained long enough to affect pricing, contracts, inventory, supply chains, and investment decisions. The empirical economic literature on trade policy uncertainty provides the missing bridge. For example, using an economy-wide statistical model tracing how trade policy uncertainty shocks affect investment over time, one study estimates that the rise in trade policy uncertainty in 2018 reduced U.S. business investment by about 1% to 2%, reflecting a macroeconomic effect from uncertainty itself rather than from the statutory tariff rate alone.⁷ The uncertainty effects also extend beyond trade and into financial markets and credit. A growing empirical literature shows that trade policy volatility affects finance, not just trade. One study finds that higher tariff uncertainty can weaken the U.S. dollar by raising risk premia.⁸ Another study, using bank supervisory loan data from the 2018–2019 trade war, finds that banks more exposed to trade uncertainty

5. See *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 691 (2026) (Kavanaugh, J., dissenting); Megan Messerly, Doug Palmer, Daniel Desrochers & Ari Hawkins, *The White House’s Plan A Is Winning Its Supreme Court Tariff Case. It Also Has a Plan B.*, POLITICO (Sept. 4, 2025) <https://www.politico.com/news/2025/11/04/trumps-trade-wall-faces-a-legal-stress-test-the-whitehouse-isnt-panicking-yet-00633773>.

6. Nurullah Gur & Serif Dilek, *US–China Economic Rivalry and the Reshoring of Global Supply Chains*, 16 CHINESE J. INT’L POL. 61, 63 (2023).

7. Dario Caldara, Matteo Iacoviello, Patrick Molligo, Andrea Prestipino & Andrea Raffo, *The Economic Effects of Trade Policy Uncertainty*, 109 J. MONETARY ECON. 38, 48 (2020). To be clear, the impact of trade policy uncertainty is not limited to U.S. corporations. See, e.g., Felipe Benguria, Jaerim Choi, Deborah L. Swenson & Mingzhi (Jimmy) Xu, *Anxiety or Pain? The Impact of Tariffs and Uncertainty on Chinese Firms in the Trade War*, J. INT’L ECON., Mar. 20, 2022, at 22.

8. Şebnem Kalemli-Özcan, Can Soylu & Muhammed A. Yildirim, *Global Trade, Tariff Uncertainty and the U.S. Dollar* 10 (Nat’l Bureau of Econ. Rsch., Working Paper No. 34728, 2026).

reduce lending, shorten loan terms, and raise borrowing costs, with corporations that heavily rely on bank credit suffering the largest negative effects.⁹

Second, it explains how tariff threats create real costs. Shadow tariffs show up in higher risk pricing,¹⁰ rewritten legal contracts,¹¹ inventory pull-forwards,¹² supply-chain shifts,¹³ added compliance and classification work,¹⁴ and delayed investment.¹⁵ Therefore, frequent tariff reversals do not mean *de minimis* or low harm, but a real and meaningful economic burden; by the time the tariff threat is withdrawn, corporations and governments have often already incurred the price to hedge, reorganize, and adapt to the potential tariff threat. Hence, even when a threatened tariff never takes effect, the sunk costs have already been incurred through private markups and wasted resources.

Third, it explains why this matters for institutions and for legitimacy. Tariffs are both a way to raise money and a way to regulate trade. The key problem is not only who has the power to set tariffs, but what happens when fast executive action turns tariff volatility into bargaining leverage. Volatility pushes costs onto U.S. corporations, workers, and consumers, and onto foreign governments coerced into bargaining. It also weakens the credibility of trade commitments and can spill into finance, exchange rates, and supply chains. These burdens are hard to track and hard to challenge.

9. Ricardo Correa, Julian di Giovanni, Linda S. Goldberg & Camelia Minoiu, *Trade Uncertainty and U.S. Bank Lending* 23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31860, Nov. 2023, rev. May 2024).

10. Alberto Cavallo, Gita Gopinath, Brent Neiman & Jenny Tang, *Tariff Pass-Through at the Border and at the Store: Evidence from US Trade Policy*, 3 AM. ECON. REV.: INSIGHTS 19, 26–31 (2021).

11. Brooks E. Allen et al., *Navigating the Impact of the Trump Tariffs on Commercial Contracts*, SKADDEN INSIGHTS (June 2025), <https://www.skadden.com/insights/publications/2025/06/insights-june-2025/navigating-the-impact-of-the-trump-tariffs> [https://perma.cc/7KAC-7HVK].

12. See, e.g., George Alessandria, Shafaat Yar Khan & Armen Khederlarian, *Taking Stock of Trade Policy Uncertainty: Evidence from China's Pre-WTO Accession*, J. INT'L ECON. Apr. 2024, at 1 (finding “the costs associated with the trade policy induced stockpiling reduce entrants’ incentive to operate in a market with tariff uncertainty”); Cavallo et al., *supra* note 10, at 30.

13. Kyle Handley, Fariha Kamal & Ryan Monarch, *Supply Chain Adjustments to Tariff Shocks: Evidence from Firm Trade Linkages in the 2018-2019 U.S. Trade War* 29–30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31602, 2023); Gene M. Grossman, Elhanan Helpman & Stephen J. Redding, *When Tariffs Disrupt Global Supply Chains*, 114 AM. ECON. REV. 988, 1026 (2024).

14. See U.S. Customs & Border Prot., *What Every Member of the Trade Community Should Know About: Tariff Classification* 3, 8–9 (May 2004), https://www.govinfo.gov/content/pkg/GOVPUB-HS4_100-PURL-LPS74209/pdf/GOVPUB-HS4_100-PURL-LPS74209.pdf [https://perma.cc/9QAT-9US3]; U.S. Customs & Border Prot., *What Every Member of the Trade Community Should Know About: Recordkeeping* 3, 12–17, 20–23 (Jan. 2005), <https://www.cbp.gov/sites/default/files/2025-07/Recordkeeping.pdf> [https://perma.cc/KP96-THN6]; U.S. Customs & Border Prot., *What Every Member of the Trade Community Should Know: Reasonable Care* 3, 8–13 (Sept. 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/icprescare2017revision.pdf> [https://perma.cc/894G-5Q54].

15. Caldara et al., *supra* note 7, at 45.

They do not look like taxes, but they act like taxes that are not transparent, nor clearly assigned, nor easily undone.

The core claim in this Article is simple. Tariff harm is not limited to the posted tariff schedule. A Bloomberg Economics review of 49 tariff threats since November 2024 suggests that most of these threats were not ultimately implemented,¹⁶ yet these repeated threats and reversals still create a shadow tariff system imposing real costs without new collection.

I. DEFINING SHADOW TARIFFS

A. *The Concept*

Shadow tariffs are economically costly obligations and behavioral changes created by tariff threats and tariff volatility, even when the threatened tariff is never implemented or is later reduced or is withdrawn. The key feature of shadow tariffs is that they are incurred *ex ante*, when corporations respond to credible tariff risk by repricing, renegotiating, hedging, and reconfiguring sourcing and logistics. These effects can persist even if the threatened tariff is never imposed or is later rolled back.

However, shadow tariffs are not just uncertainty, because corporations face uncertainty in every market and under many legal regimes. Shadow tariffs are the private costs created when an administration uses tariff volatility, including threats and reversals, as a policy tool to gain leverage, including in trade negotiations. They arise when tariff outcomes are meaningfully plausible across a wide range of rates, the timing is hard to predict, and the downside of being unprepared is large. Corporations then respond predictably by treating the tariff as a real contingency and spending resources on hedging, repricing, renegotiation, or reconfiguration of their operations. Even if the administration later withdraws the threat (as it did more often than not¹⁷) or reaches a deal, those costs have already been incurred, and many cannot be fully unwound.

This is consistent with the theory of irreversible investment and real options.¹⁸ When entry costs are sunk, policy uncertainty increases the option value of waiting, so corporations rationally delay irreversible commitments until the policy environment clarifies. Applied to trade, this implies that tariff uncertainty can reduce investment and entry into export markets even when current tariffs are low. Furthermore, that delay itself is

16. Murray, *supra* note 3.

17. *Id.*

18. AVINASH DIXIT & ROBERT PINDYCK, INVESTMENT UNDER UNCERTAINTY 3–25 (1994); Robert S. Pindyck, *Irreversibility, Uncertainty, and Investment*, 29 J. ECON. LIT. 1110, 1111–13 (1991); Kyle Handley & Nuno Limão, *Trade and Investment Under Policy Uncertainty: Theory and Firm Evidence*, 7 AM. ECON. J.: ECON. POL'Y 189, 214 (2015).

costly because it decreases trade volume and can reduce welfare even without an immediate tariff increase.¹⁹

B. *Distinguishing Shadow Tariffs from Ordinary Tariff Incidence*

Tariff incidence is about who pays the tariffs once those are imposed. Evidence from the 2018 trade war suggests many tariffs were largely passed through into duty-inclusive import prices, so domestic importers and consumers bore much of the cost.²⁰ That is classic incidence analysis. A recent shipment-level study of the 2025 tariff shock reports the same basic pattern on a larger scale, estimating that foreign exporters absorbed about 4 percent of the burden—passing roughly 96 percent through to U.S. buyers.²¹

Shadow tariffs operate differently because they impose costs through uncertainty and the protective steps corporations take in response. Corporations can be harmed without ever paying a duty: When tariff outcomes become harder to predict, corporations may implement certain buffers into prices, incur higher legal and compliance costs, shift supply chains, and delay investment.²² Those responses shift the burden to others, raising prices for consumers and creating inflationary pressure in exposed goods and inputs,²³ while also weighing on hiring and capital spending.²⁴ Also, small and medium-sized enterprises are often more impacted because they cannot diversify supply chains or spread fixed compliance costs,²⁵ which can weaken economic competition and leave consumers with higher prices and fewer choices.²⁶

C. *Why Reversal Does Not Undo the Harm*

It is tempting to treat tariff reversals as evidence that threats were harmless. Yet this conclusion fails for two reasons. First, shadow tariffs

19. See Handley & Limão, *supra* note 18, 190–91, 211 tbl. 6, 214.

20. Amiti et al., *supra* note 1, at 207–08.

21. Julian Hinz, Aaron Lohmann, Hendrik Mahlkow & Anna Vorwig, *America's Own Goal: Who Pays the Tariffs?*, KIEL POL'Y BRIEF, Jan. 2026, at 2.

22. See *supra* notes 6–13.

23. Amiti et al., *supra* note 1, 207–08.

24. Daniel Fried, *The Effects of Tariffs and Trade Barriers in CBO's Projections*, CONG. BUDGET OFF. BLOG (Aug. 22, 2019), <https://www.cbo.gov/publication/55576> [<https://perma.cc/38GS-NS42>]; Juan M. Londono, Sai Ma & Beth Anne Wilson, *Costs of Rising Uncertainty*, FEDS NOTES 3 (Apr. 24, 2025), <https://www.federalreserve.gov/econres/notes/feds-notes/costs-of-rising-uncertainty-20250424.html> [<https://perma.cc/YB8X-RECH>].

25. See Philippe Andrade et al., *Small and Medium-Sized Businesses' Expectations Concerning Tariffs, Costs, and Prices*, CURRENT POL'Y PERSPS., Apr. 10, 2025, at 2, <https://www.bostonfed.org/publications/current-policy-perspectives/2025/smb-expectations-concerning-tariffs-costs-prices.aspx> [<https://perma.cc/G838-EALJ>] (“[F]irms planned to pass along the expected tariff-induced changes in unit costs to their customers through price increases.”).

26. Eliot G. Disner, *Barrier Analysis in Antitrust Law*, 58 CORN. L. REV. 862, 862–63 (1973).

incur costs when a threat is issued and treated as credible. Once corporations begin taking protective measures, the resources committed are sunk, and a later rollback does not recoup those costs.

Second, a rollback can eliminate the specific tariff threat, or even remove an imposed tariff, but it does not restore stability. One deal can settle the immediate dispute while still signaling that tariffs remain available as a rapid, discretionary lever under adjacent executive authorities. After the Supreme Court rejected IEEPA tariff authority, the administration promptly invoked Section 122 of the Trade Act of 1974, reminding firms that the volatility problem is not limited to one statute.²⁷ Corporations therefore keep pricing and planning around renewed tariff risk. The expected tariff level may fall, but the range of credible future tariff outcomes can still be broad, and this kind of policy volatility is widely understood to deter investment and reduce output.²⁸

II. HOW SHADOW TARIFFS ARE CREATED

A. Pricing and Precautionary Margins

In a stable tariff regime, corporations can price around known customs duties. In a volatile tariff regime, pricing must also account for downside risk. A threatened tariff is not a forecast, but a plausible adverse state that can arrive quickly. Because supply chains are slow to adjust, underpricing that risk can be costly. Corporations thus build precautionary margins into prices, which can look like inflationary pressure even if the tariff is never collected.

The tariff incidence literature documents substantial pass-through of imposed tariffs into domestic prices. Evidence from the 2018 trade war indicates that many duties were incorporated into duty-inclusive import prices, so the burden fell largely on United States importers and consumers and produced measurable real-income losses.²⁹ The shadow tariff point is

27. KEIGH E. HAMMOND & WILLIAM F. BURKHART, CONG. RSCH. SERV., R48549, PRESIDENTIAL 2025 TARIFF ACTIONS TIMELINE AND STATUS 2–5 (2026) (summarizing repeated tariff actions followed by negotiations, framework statements, and temporary tariff truces), https://www.congress.gov/crs_external_products/R/PDF/R48549/R48549.12.pdf [<https://perma.cc/6BHN-7VZ7>]; Michael Lowell et al., *Trump 2.0 Tariff Tracker*, Trade Compliance Resource Hub, <https://www.tradecomplianceresourcehub.com/2026/01/27/trump-2-0-tariff-tracker/> [<https://perma.cc/84AS-VPDJ>]. Even after the use of Section 122 for these tariffs was struck down by the Court of International Trade, the Trump “administration is already working on its next plan for tariffs.” Tony Romm & Ana Swanson, *Trade Court Rules Trump’s 10% Global Tariff Is Illegal*, N.Y. TIMES (May 7, 2026), <https://www.nytimes.com/2026/05/07/business/economy/trump-global-tariff-ruled-illegal.html> [<https://perma.cc/Y9UB-NL8J>].

28. See, e.g., Caldara et al., *supra* note 7, at 45–46; Londono, Ma & Wilson, *supra* note 24, at 3.

29. Amiti et al., *supra* note 1, at 208.

that credible tariff threats can produce similar pricing effects to inflation even without collection, because corporations build the risk of a high-tariff outcome into prices through precautionary margins and contractual repricing. In 2025, that credibility is reinforced by the 2018 trade war experience, which naturally showed that large tariffs can, in fact, be imposed and sustained, so corporations rationally treat renewed threats as plausible rather than hypothetical.³⁰

B. Contracting and the Private Law of Volatility

Shadow tariffs inspire parties to shift tariff risks within private contracts. Even when an administration uses tariff threats mainly as a negotiation lever, the threat does not happen in a vacuum and thus does not stay in the negotiation room. Once the threat is considered credible, corporations and their counterparties must protect themselves in real time, and they do so by rewriting deals, changing pricing terms, and reallocating risk in their legal contracts. The result is that a public bargaining tactic becomes a private cost that shows up in contract terms, prices, and business decisions.

This changes contracting in different ways. First, contracts allocate tariff risk expressly through tariff-adjustment clauses, reopener provisions, and indexation, which increases drafting, negotiation, and monitoring costs.³¹ These clauses do more than increase transaction costs: They determine whether the importer, foreign supplier, downstream buyer, or final customer bears the tariff-risk premium. Second, contract duration often shortens as a protection mechanism.³² Long-term pricing becomes harder when tariff terms can change quickly, so parties rely more on shorter agreements, which raises transaction costs and can discourage relationship-specific investment. Third, parties adjust the legal framework. They may choose governing law, forum, and dispute terms with greater care, or shift sourcing and counterparties toward jurisdictions that appear more predictable.³³ They may also use change-in-law clauses, termination rights, minimum-volume commitments, indemnities, delivery terms, and documentation obligations to determine who must absorb a potential tariff change.

30. Reuven S. Avi-Yonah & Doron Narotzki, *The Tariffs Are Coming! The Tariffs Are Coming!*, 116 TAX NOTES 1577, 1577–79 (2024); Doron Narotzki, *Tariffs: Back to the Future*, 116 TAX NOTES 565, 567–69 (2024).

31. Flavio Peter, Clio Mordivoglia & Carolina Solis Villares, *The Impact of U.S. Tariffs on International Sales Contracts*, P&K INSIGHTS, Apr. 16, 2025, https://peterandkim.com/uploads/2025/04/Peter-Kim-Insights_Impact-of-US-tariffs-on-International-Sales-Contracts.pdf [<https://perma.cc/9L LR-9C83>]; see also Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 823–39 (2006) (describing how front- and back-end adjustments to contracts can result in different costs to the parties).

32. See Peter et al., *supra* note 31.

33. *Id.*

The normative point is that volatility changes how the costs are borne. Stable tariffs impose visible border costs. Executive tariff volatility pushes a large share of the burden into private contracting, where it is embedded in pricing and allocation terms and largely “disappears” into ordinary commercial pricing. Also, because contracting outcomes frequently follow bargaining power, smaller corporations typically have less ability to protect themselves. In practice, larger counterparties can push tariff risk upstream to suppliers or (more often) downstream to buyers, while smaller importers and suppliers are more likely to absorb the risk through lower margins, shorter commitments, higher compliance costs, or price increases where pass-through is possible.

C. Inventory Distortion and Pull-Forward Behavior

When the threat of a new tariff is time-sensitive, as it often is, corporations have a predictable incentive to accelerate imports to clear goods before the effective date. That produces short-term pull-forward surges as corporations spend real resources to win the timing race: expedited freight, additional warehousing, and working-capital financing, along with internal compliance and logistics effort.³⁴ The main economic cost is not a tariff payment, because in many instances no new tariff is ever collected,³⁵ and the cost is the deadweight resource waste from threat-driven timing behavior: corporations spend to rush, store, and finance inventory earlier than economically necessary, rather than in response to consumer demand, productive efficiency, or ordinary inventory needs.³⁶ Furthermore, bottlenecks and system strain can add to the harm in some cases through delays and higher logistics prices, but they are secondary to the corporate resource cost.

These incentives also distort the data. Customs receipts can rise before any tariff takes effect, simply because corporations accelerate entries to beat

34. See, e.g., Academy Sports + Outdoors, Inc., Current Report (Form 8-K) (June 10, 2025), <https://www.sec.gov/Archives/edgar/data/1817358/000181735825000116/exhibit991pressreleaseq120.htm> [<https://perma.cc/D245-X2BT>]; Aditya Kalra & Munsif Vengattil, *Apple Airlifted iPhones Worth a Record \$2 Billion From India in March as Trump Tariffs Loomed*, REUTERS (Apr. 15, 2025), <https://www.reuters.com/technology/apple-airlifted-iphones-worth-record-2-billion-india-march-trump-tariffs-loomed-2025-04-15/> [<https://perma.cc/B74C-KAVH>]; Evolus, Inc., Current Report (Form 8-K) (Aug. 5, 2025), <https://www.sec.gov/Archives/edgar/data/1570562/000157056225000094/q22025eolsex991.htm> [<https://perma.cc/JSD8-CS8H>]; Helios Technologies, Inc., Annual Report (Form 10-K) (Feb. 2, 2025), <https://www.sec.gov/Archives/edgar/data/1024795/000095017025026703/hlio-20241228.htm> [<https://perma.cc/WF78-HH3R>]; *Mercedes-Benz Stocking Inventory in U.S. Ahead of Tariffs, Analyst Note Says*, REUTERS (Apr. 1, 2025), <https://www.reuters.com/business/autos-transportation/mercedes-benz-stocking-inventory-us-ahead-tariffs-analyst-note-says-2025-04-01/> [<https://perma.cc/94NS-N4S3>].

35. Murray, *supra* note 3.

36. See, e.g., sources cited *supra* note 34.

a possible effective date. If the tariff is later delayed or withdrawn, that temporary spike can be mistaken for a real increase in trade or revenue. But the costs remain sunk: inventory was pulled forward, working capital was tied up, and supply chains absorbed avoidable disruption. Overall, this whole process damages the natural flow of business activity and does not benefit the economy.

D. Supply-Chain Reconfiguration and Duplication

Tariff volatility can push corporations to build redundancy into their supply chains because it makes a single, optimized network fragile.³⁷ When a tariff can be announced and take effect on short notice, reliance on one country or one supplier exposes the corporation to sudden margin compression and delivery failure mid-contract. Switching is not frictionless. Inputs are often relationship-specific and cannot be substituted overnight without search, qualification, and renegotiation.³⁸ Therefore, redundancy is the defensive response: add suppliers, qualify substitute inputs, duplicate tooling or capacity where needed, and shift sourcing or assembly so they have an operational fallback if the tariff state changes.³⁹ The economic cost is the real resource waste of building and maintaining this hedging strategy, including sunk engineering, testing, and compliance costs to qualify substitutes and underused duplicate capacity, rather than a tariff payment.

Though some of this duplicity may be genuine resilience, when the driver of this is policy volatility rather than bona fide business growth reasons, it can lead to inefficiency that eventually raises costs.

37. Jafar Namdar, Sachin Modi & Jennifer Blackhurst, *Diversify or Concentrate? Supply Chain Responses to Policy Uncertainty*, 61 J. SUPPLY CHAIN MGMT. 62, 66 (2025).

38. Grossman et al., *supra* note 13, at 988, 1024.

39. See, e.g., Tennant Co., Quarterly Report (Form 10-Q) (Nov. 4, 2025), <https://www.sec.gov/Archives/edgar/data/97134/000009713425000036/tnc-20250930.htm> [<https://perma.cc/WQ55-BLHE>] (describing “targeted supply chain initiatives, including . . . dual sourcing, and logistics shifts . . . to mitigat[e] tariff-related cost inflation”); Omnicell, Inc., Quarterly Report (Form 10-Q) (Nov. 5, 2025), <https://www.sec.gov/Archives/edgar/data/926326/000092632625000031/omcl-20250930.htm> [<https://perma.cc/T6X8-STR2>] (stating that, “[i]n an effort to address” fluctuating tariffs, the company “implemented various mitigation measures, including dual-sourcing of components and nearshoring manufacturing”); Universal Elecs. Inc., Annual Report (Form 10-K) (Mar. 11, 2025), <https://www.sec.gov/Archives/edgar/data/101984/000010198425000038/ueic-20241231.htm> [<https://perma.cc/F8Z3-8W4Y>] (explaining a strategy to “de-risk [the company’s] reliance on a [Chinese]-based supply chain,” to evaluate “additional third-party manufacturers and sources of supply,” while noting that it previously “maintained duplicate tooling for certain of our products”).

E. Compliance, Classification, and Origin Planning

Tariffs function as taxes on importation, so they predictably generate some planning to reduce liability.⁴⁰ Volatility amplifies that planning because uncertainty over future rates increases the expected payoff from flexibility, designs with contingencies, and reclassification strategies.

Tariff compliance has three recurring fixed-cost components: classification, valuation, and country-of-origin determination.⁴¹ Volatility increases those costs for two reasons. First, it forces corporations to plan for multiple tariff rates rather than a single, stable schedule. Second, it raises the payoff to legal and operational redesign aimed at reducing tariff exposure.

Corporations can respond by modifying product attributes to fit a different tariff classification,⁴² shifting where value is added to alter origin outcomes, or restructuring transactions to satisfy exemption criteria.⁴³ Some of this activity is unavoidable because lawful importation requires correct classification, valuation, and origin reporting. However, volatility-induced planning often functions as avoidance through private redesign rather than productive (or bona fide) business investment, and though the private costs are real, the economic, social, and welfare gains are little or nothing, because resources go toward changing labels or routes to lower duties rather than producing more goods or services.

F. Investment Delay and Uncertainty

Investment delay under tariff uncertainty is the most important mechanism, and the trade policy uncertainty literature supports this conclusion.⁴⁴ When trade policy creates uncertainty, corporations delay or scale back sunk investments to enter or expand,⁴⁵ even if effective tariff rates are lower than expected.⁴⁶ On the other hand, binding trade

40. See, e.g., *Ford Motor Co. v. United States*, 254 F. Supp. 3d 1297, 1303 (Ct. Int'l Trade 2017), *rev'd*, 926 F.3d 741 (Fed. Cir. 2019); Kevin J. Fandl, *2019 International Trade Law Decisions of the Federal Circuit*, 69 AM. U. L. REV. 1301, 1302 (2020); Andrew O'Brien-Penney, *The Changing Landscape of Tariffs and Taxation, and What Companies Can Do*, TAX NOTES, Oct. 23, 2025, at 2, 7–10, <https://www.taxnotes.com/special-reports/tariffs/changing-landscape-tariffs-and-taxation-and-what-companies-can-do/2025/10/22/7t6hb> [<https://perma.cc/ZKQ2-VTW2>].

41. See Fandl, *supra* note 40, at 1302, 1314–16.

42. *Id.*, at 1302.

43. *Id.*

44. Handley & Limão, *supra* note 18, at 190–91.

45. *Id.*

46. In this context, it is important to distinguish headline announced tariff rates from realized effective tariff incidence. The Penn Wharton Budget Model estimated that the average effective U.S. tariff rate, measured as customs duties as a share of import value, was 9.8 percent through December

commitments, especially tariff bindings in trade agreements, can increase trade and new market entry because they reduce the likelihood of future tariff increases, therefore reducing downside risk for corporations contemplating irreversible entry and expansion investments.⁴⁷

Market entry is just the first place this shows up. The same point applies whenever corporations must make hard-to-reverse commitments. When tariff policy is volatile, corporations face more risk when they commit to fixed supply chains, specialized equipment, long-term legal contracts, or market-specific distribution, and they often respond by delaying investment, shortening commitments, and favoring choices that are easier to unwind.

The effect is not limited to who pays the tariff if it is imposed; it also arises when the tariff never takes effect, because the threat creates uncertainty, and uncertainty makes delay rational when investments are hard to reverse. Therefore, higher trade policy uncertainty is associated with lower business investment and weaker real activity.⁴⁸ Perhaps more importantly in fiscal terms, the burden shows up as delayed or foregone output, rather than collected customs revenue.

Furthermore, this matters for stated “reshoring” and domestic-investment goals. If the administration’s stated goal is to attract more domestic investment, tariff volatility can work against that goal because it increases uncertainty about future input costs, retaliation, and market access, creating uncertainty that makes corporations less willing to commit hard-to-reduce capital. Instead of rushing to build, corporations postpone projects, scale them back, or choose more flexible arrangements.⁴⁹ This effect is exactly what standard investment theory predicts when uncertainty

2025 and 8.9 percent through February 2026. See *Effective Tariff Rates and Revenues*, PENN WHARTON BUDGET MODEL, <https://budgetmodel.wharton.upenn.edu/p/2026-04-15-effective-tariff-rates-and-revenues-updated-april-15-2026/> [https://perma.cc/224D-NHCY]. Bloomberg’s reporting points in the same direction, but on a different metric: Rather than measuring tariff incidence, it tracked tariff threats and trade actions, reporting in January 2026 that only about one quarter of 49 tariff threats or trade investigations since November 2024 had been carried out in full. Murray, *supra* note 3. Bloomberg’s updated tracker in June 2026 similarly stated that, since November 2024, Trump had followed through on some major threats, but that most had been watered down or never implemented. See BLOOMBERG, *Tracking Trump’s Tariffs Across the Global Economy* (June 8, 2026), <https://www.bloomberg.com/graphics/trump-tariffs-tracker/> [https://perma.cc/D6TB-HRXN].

47. Kyle Bagwell, Chad P. Bown & Robert W. Staiger, *Is the WTO Passé?*, 54 J. ECON. LIT. 1125, 1169 (2016); Alberto Osnago, Roberta Piermartini & Nadia Rocha, *Trade Policy Uncertainty as Barrier to Trade* 3 (World Trade Org. Working Paper No. ERSD-2015-05, 2015), https://www.wto.org/english/res_e/reser_e/ersd201505_e.pdf [https://perma.cc/SS24-WVTD].

48. Caldara et al., *supra* note 7, at 39.

49. See, e.g., Tasmin Lockwood, *Novartis’ U.S. Deal Could Shield It from Tariffs, CEO Tells CNBC*, CNBC (Jan. 21, 2026), <https://www.cnbc.com/2026/01/20/possible-us-deal-to-shield-novartis-from-tariffs-ceo-tells-cnbc.html> [https://perma.cc/YM66-PY7Y].

risers and investments are difficult to undo, matching the macro evidence linking higher trade policy uncertainty to weaker investment.⁵⁰

III. DISTRIBUTIONAL AND CROSS-BORDER INCIDENCE

A. *The Domestic Incidence in the United States*

Formal tariffs are legible in law and accounting: The rate schedule is public, and collections show up as customs revenue.⁵¹ But their economic incidence is still partly opaque because the burden can be transmitted through pass-through, margin compression, input costs, and supply-chain adjustments.⁵² Shadow tariffs add another layer of opacity because a large share of the burden arises through behavior under uncertainty, such as precautionary pricing, redundant sourcing, compliance redesign, and delayed investment, even when no new tariff is ultimately collected. The result is a less transparent burden, and whether it is more regressive depends on the context, so I argue it should be framed as a likely outcome rather than a certain one.

For consumers, the burden often takes the form of higher prices, reduced variety, and higher supply-chain costs, especially in sectors that rely on imported final goods or imported intermediates. The evidence from the 2018 tariff episode is consistent with substantial pass-through and real income losses borne domestically.⁵³

For workers, the burden is less direct and shows up more through slower investment and weaker labor demand.⁵⁴ When corporations delay their investment or reconfigure their supply chains, labor demand can fall in exposed regions and industries. Also, the risk of retaliation can further increase this effect by reducing demand in export-facing industries and sectors.

50. Sasatra Sudsawasd & Robert E. Moore, *Investment Under Trade Policy Uncertainty: An Empirical Investigation*, 12 Rev. Int'l Econ. 316, 323–25 (2006); Sangyup Choi, Davide Furceri & Chansik Yoon, *Policy Uncertainty and Foreign Direct Investment*, 29 Rev. Int'l Econ. 195, 200 fig.1, 220 tbl.10, 221–22 (2019).

51. See, e.g., BUREAU OF THE FISCAL SERV., U.S. DEP'T OF THE TREASURY, MONTHLY TREASURY STATEMENT OF RECEIPTS AND OUTLAYS OF THE UNITED STATES GOVERNMENT 4 Fig.1 (May 2026), <https://fiscaldata.treasury.gov/datasets/monthly-treasury-statement/summary-of-receipts-outlays-and-the-deficit-surplus-of-the-u-s-government> [<https://perma.cc/K8B9-HJ3M>].

52. See, e.g., Avi-Yonah et al., *From Relic to Relevance*, *supra* note 1, at 512.

53. Cavallo et al., *supra* note 10, at 26–31.

54. Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Issues FOMC Statement (Dec. 10, 2025), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20251210a.htm> [<https://perma.cc/3PZ9-2BT7>] (“Available indicators suggest that economic activity has been expanding at a moderate pace. Job gains have slowed this year, and the unemployment rate has edged up through September.”).

For corporations, volatility changes the relative burden depending on the corporation's size.⁵⁵ Large corporations can diversify suppliers, shift sourcing, and spread fixed compliance and adjustment costs across higher volumes. Small and medium-sized corporations face higher per-unit costs and weaker bargaining power, and some may reduce trade exposure or exit importing altogether. The result is a competitive distortion risk: When participation requires costly and uncertain adjustments, smaller importers are more likely to be constrained or fail, which can weaken entry, expansion, and competition.⁵⁶

The 2018 trade war has useful evidence on this point. The economic literature finds large welfare losses from the policy shift toward protectionism and retaliation, along with measurable declines in real income tied to tariffs and their price effects.⁵⁷ Shadow tariffs can deepen these same harms because, as discussed earlier, uncertainty itself imposes meaningful costs.

B. Burdening Other Nations Through Volatility Rather Than Collection

Tariffs can burden foreign nations by restricting market access through border duties that raise the cost of their exports.⁵⁸ Shadow tariffs can impose costs on foreign corporations because, even when the tariff schedule does not change, the relevant mechanism is credible tariff risk rather than duties collected. In other words, the economically meaningful response happens *ex ante*. By the time a tariff is imposed, foreign corporations have often already incurred adjustment costs to reduce exposure, whether by diversifying export markets, reconfiguring production and sourcing, reallocating inventory and shipping routes, renegotiating supply contracts and pricing terms, shifting assembly or final processing to alternative

55. Veronika Penciakova, Valerie Nguyen, Camelia Minoiu & Lauren Taylor, Federal Reserve Bank of Atlanta, *Are US Importers Ready for the New Tariff Landscape?*, POLICY HUB: MACROBLOG (Aug. 26, 2025), <https://www.atlantafed.org/research-and-data/publications/policy-hub-macroblog/2025/08/26/are-us-importers-ready-for-new-tariff-landscape> [https://perma.cc/4MRW-CEVE].

56. Edward J. Markey, U.S. Senate Comm. on Small Bus. & Entrepreneurship, *The Trump Tariffs: A Small Business Crisis* 4–7 (Apr. 17, 2025), www.sbc.senate.gov/public/_cache/files/a/7/a760a470-5f3b-40ca-b728-634359e07490/DB068FE37D91B435A2A5129F16312542E67F495E3EE68150167EF9FCC14ADE1A.the-trump-tariffs-a-small-business-crisis.pdf [https://perma.cc/2VYG-5Z7C]; Penciakova, *supra* note 55.

57. Pablo D. Fajgelbaum, Pinelopi K. Goldberg, Patrick J. Kennedy & Amit K. Khandelwal, *The Return to Protectionism*, 135 Q.J. Econ. 1, 1 (2020).

58. It should be noted that, though the duty is typically remitted by the importer at the point of entry, legal incidence is not the same as economic incidence. A tariff increases the domestic price of the imported good relative to substitutes; that price wedge can reduce quantity demanded and shift part of the burden to foreign exporters through lower received prices, lost sales, or both, depending on demand and supply elasticities and the availability of alternative sources.

jurisdictions, or delaying and discounting investment tied to United States demand.⁵⁹

The point is not that threatened tariffs replicate the effects of an enacted tariff. The point is that credible volatility changes decision-making conditions. Foreign corporations and their counterparties have no choice but to treat tariff exposure as a real risk when they set prices, choose legal contract terms, and decide whether to commit sunk capital. This leads to three predictable effects.

First, tariff uncertainty can deter foreign corporations from investing in U.S. capacity or from forming relationship-specific supply arrangements with U.S. buyers. When the probability, timing, and magnitude of a tariff shock are hard to forecast, foreign corporations rationally discount projects based in the United States.⁶⁰ That discount will be greatest for projects with high sunk costs, long lead times, relationship-specific tooling, regulatory approvals, or dependence on stable long-term U.S. demand. The result can be less cross-border integration even if market access remains formally open.⁶¹

Second, volatility can function as bargaining leverage. When foreign corporations and their U.S. counterparties treat rapid executive tariffs as a credible downside risk, they have incentives to offer concessions that reduce exposure—even if the threatened tariff is never imposed. The mechanism operates through the threat and the risk premium it creates, not through the later collection of duties.⁶² The price is often relational, as repeated tariff threats strain long-term commercial relationships by undermining trust, increasing suspicions of opportunism, and pushing parties to rely on protective contract terms and alternative suppliers rather than cooperative, relationship-specific investments.

Third, volatility can trigger defensive responses abroad. States may subsidize domestic substitutes, redirect supply chains toward alternative markets, accelerate “friend shoring” and regional blocs, or design contingency arrangements to reduce exposure to the discretion of the U.S. government. Those adjustments can fragment the trading system and raise global costs, again without any change in the posted tariff rate.⁶³

59. See *supra* notes 36–37.

60. See Handley & Limão, *supra* note 18, at 191.

61. See, e.g., *VW Chief Blume: New Audi Plant in US Not Feasible with Tariffs*, YAHOO FIN. (Jan. 25, 2026), <https://finance.yahoo.com/news/vw-chief-blume-audi-plant-102835297.html> [<https://perma.cc/L3MA-FMBN>].

62. See, e.g., David Ferris, *Hyundai Pledges \$21B in US Investment to Avoid Tariffs*, E&E NEWS BY POLITICO (Mar. 25, 2025), <https://www.eenews.net/articles/hyundai-pledges-21b-in-us-investment-to-avoid-tariffs/> [<https://perma.cc/2VX6-AQBN>].

63. See, e.g., Peggy Corlin & Maria Tadeo, *What Is the EU's Anti-Coercion Instrument, and How Does It Work?*, EURONEWS (Jan. 18, 2026), <https://www.euronews.com/my-europe/2026/>

The trade policy uncertainty literature supports the general idea that trade policy uncertainty can depress trade and investment.⁶⁴ What is distinctive about the Trump-era approach is the scale and frequency of discretionary tariff threats.⁶⁵ Existing statutory delegations, as interpreted and used by the executive, allow tariffs to be announced, revised, and withdrawn with limited ex ante procedure.⁶⁶ That institutional flexibility allows the executive to create credible tariff risk for virtually any trading partner and for any corporation whose business materially depends on U.S. market access. Foreign corporations and foreign governments then incur mitigation, pricing, and bargaining costs in advance, even when no tariff is ultimately imposed, or when it is imposed only briefly and generates little revenue.

IV. THE INSTITUTIONAL ENGINE OF SHADOW TARIFFS

A. *Speed, Delegation, and Emergency Powers*

Shadow tariffs are created at scale when the executive branch can impose tariff risk quickly and with minimal checks and balances. Traditional trade statutes often require investigation, findings, and procedural steps,⁶⁷ which also slow the policy cycle and make abrupt changes harder to make. Put differently, traditional trade policy provides some stability.

The recent controversy over IEEPA illustrates a different mechanism for the executive branch to impose tariffs.⁶⁸ President Trump invoked IEEPA in early 2025 to impose a broad tariff program, including a baseline tariff and then higher “reciprocal” tariffs layered by country.⁶⁹ That move was a significant departure from ordinary practice and triggered litigation over whether an emergency sanctions statute can support a general tariff

01/18/what-is-the-eus-anti-coercion-instrument-and-how-does-it-work [https://perma.cc/SX6Y-76HF]; Didi Tang & Sam McNeil, *Pushed by Trump, U.S. Allies Are Resetting Relations with China*, ASSOCIATED PRESS (Jan. 30, 2026), <https://apnews.com/article/china-trump-europe-allies-trade-greenland-ff445f3c6e2c52d6229d05441aae23f0> [https://perma.cc/AUW4-AXAD]; Jakub Krupa, *EU-India Deal 'Accelerated' over Past Six Months Amid Trump's Tariff Threats - Europe Live*, THE GUARDIAN (Jan. 27, 2026), <https://www.theguardian.com/world/live/2026/jan/27/european-union-india-trade-deal-ukraine-greenland-holocaust-news-updates-europe-live> [https://perma.cc/UM9F-4RJ2].

64. See Caldara et al., *supra* note 7, at 38–39; Handley & Limão, *supra* note 18, at 214; Osnago et al., *supra* note 47, at 15.

65. Trade Compliance Resource Hub, *Trump 2.0 Tariff Tracker*, <https://www.tradecomplianceresourcehub.com/2026/01/27/trump-2-0-tariff-tracker/> [https://perma.cc/55DE-KVKV].

66. See Narotzki, *Hidden Taxation*, *supra* note 4, at 84.

67. *Id.*, at 72–74; CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R48435, CONGRESSIONAL AND PRESIDENTIAL AUTHORITY TO IMPOSE IMPORT TARIFFS 9–24 (2025).

68. See Narotzki, *Hidden Taxation*, *supra* note 4, at 94–96; Narotzki, *Tariffs Are Taxes*, *supra* note 4, at 32–34.

69. Narotzki, *Hidden Taxation*, *supra* note 4, at 89.

schedule.⁷⁰ The resulting cases reached the Supreme Court through different procedural paths, with *Learning Resources* coming from a decision by the District of Columbia Circuit and *V.O.S. Selections* from the Federal Circuit.⁷¹ On February 20, 2026, the Court held that IEEPA does not authorize the President to impose tariffs.⁷²

For the shadow tariff mechanism, however, the key dispute is not the merits of this specific case, as the Trump administration had already publicly stated its intention to continue to impose its prior tariff policy through other statutory means.⁷³ Justice Kavanaugh's dissent makes the same point: Although the Court rejected the argument that IEEPA granted the president tariff powers, there are other statutory authorities, including Section 232, Section 122, Section 201, Section 301, and Section 338, that function as possible alternative routes for presidential tariff action (though sometimes with additional procedural steps).⁷⁴ Hence, Tariffs would still be announced, revised, and withdrawn within days, and corporations would not be able to rely on the current state of trade agreements. Unfortunately, the Supreme Court's questioning about reliance interests and the practical consequences of broad executive use of tariffs did not fully consider this volatility mechanism.⁷⁵

The remedial point is part of the same shadow-tariff mechanism. Even when a tariff is later held unlawful, importers do not immediately return to the status quo ante. They may have already paid the duties, financed the cash outflow, passed part of the cost through prices, renegotiated contracts, filed protests or refund claims, and waited for liquidation, reliquidation, or a special administrative refund process. The IEEPA refund litigation illustrates the point: After *Learning Resources*, the Court of International Trade had to address how CBP would liquidate or reliquidate entries without IEEPA duties, and CBP developed CAPE to process refunds at scale rather than entry-by-entry.⁷⁶ That remedial lag reinforces defensive behavior as a rational response. If corporations know that even an unlawful tariff may require months of financing, documentation, litigation, and

70. *Id.* at 90.

71. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 238–39 (2026).

72. *Id.* at 255.

73. *See, e.g., Bessent Expects Supreme Court to Uphold Legality of Trump's Tariffs but Eyes Plan B*, CNBC (Sep. 1, 2025), <https://www.cnbc.com/2025/09/01/bessent-expects-supreme-court-to-uphold-legality-of-trumps-tariffs-but-eyes-plan-b.html> [<https://perma.cc/Y9LA-54DG>].

74. *Learning Res.*, 607 U.S. at 354–55 (Kavanaugh, J., dissenting).

75. *See generally* Transcript of Oral Argument, *Learning Res., Inc. v. Trump*, 607 U.S. 229 (2026) (No. 24-1287) and *Trump v. V.O.S. Selections, Inc.*, 607 U.S. 229 (2026) (No. 25-250).

76. *Atmus Filtration, Inc. v. United States*, No. 1:26-cv-01259, 2026 WL 679285, at *1–2 (Ct. Intl. Trade Apr. 8, 2026); U.S. CUSTOMS & BORDER PROTECTION, CSMS #68340863, UPDATE - CONSOLIDATED ADMINISTRATION AND PROCESSING OF ENTRIES (CAPE) FOR IEEPA REFUNDS, APRIL 20, 2026 DEPLOYMENT (Apr. 13, 2026).

refund uncertainty, they have reason to respond at the threat stage rather than wait for later judicial relief. Illegality may end the government's authority to retain the duty, but it does not erase the interim costs of payment, financing, compliance, and uncertainty.

B. The Constitutional Allocation and Nondelegation Anxiety

Tariffs sit at the intersection of taxation and the regulation of foreign commerce.⁷⁷ The Constitution assigns those fiscal choices to Congress,⁷⁸ but modern trade law contains wide delegations that can be activated quickly, especially when framed as “national security” or “emergency” measures.⁷⁹

During the *Learning Resources* argument, the Justices repeatedly returned to the separation-of-powers problem created by treating emergency authority as an implied tariff statute,⁸⁰ and Justice Gorsuch pressed the government on the limiting principle: What stops Congress from handing over “all responsibility” for trade or other core powers if the Court accepts the government's theory?⁸¹ That exchange captures the institutional concern that drives shadow tariffs: Broad delegation substantially reduces ex ante procedural checks and allows the executive to generate tariff volatility at a speed and scale that ordinary trade statutes do not. The implications are also broader than the Court's discussion suggested because the Court did not fully address either the real economic impact of tariff volatility or the practical mechanism by which the federal government would refund importers after unlawful tariffs had already been collected.⁸²

V. MEASURING SHADOW TARIFFS

The following proposes a structured measure of shadow tariffs. The first task is conceptual, because we need to identify the phenomenon: the costs are imposed by credible tariff risk even when the posted tariff schedule does not change, or changes only briefly. Only after the phenomenon is recognized does measurement become useful. Measurement will also rarely

77. See Narotzki, *Hidden Taxation*, *supra* note 4, at 71.

78. U.S. CONST. art. I, § 8.

79. Adam Looney & Elena Patel, *Why Does the Executive Branch Have So Much Power over Tariffs?*, BROOKINGS INST. (Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs> [<https://perma.cc/KLT2-XM7H>]; see also John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 254 n.29 (1967).

80. See Narotzki, *Hidden Taxation*, *supra* note 4, at 104–106.

81. Transcript of Oral Argument at 65, *Learning Res., Inc. v. Trump*, 607 U.S. 229 (2026) (No. 24-1287) and *Trump v. V.O.S. Selections, Inc.*, 607 U.S. 229 (2026) (No. 25-250).

82. See Narotzki, *Hidden Taxation*, *supra* note 4, at 105–06.

be reduced to a single number. The object is not “the tariff rate,” and more likely requires a combination of observable proxies that reflect information, legal contracting, and operational responses.

A reasonable measurement strategy is therefore incremental and mixed. Begin with observable indicators that track the mechanisms described earlier, test whether they move during clear “threat windows” (announcements, deadlines, reversals, and implementation dates), and then refine the framework as the evidence accumulates. One can think of the result as an index, but the more important point is triangulation: multiple imperfect measures pointing in the same direction.

To see the logic, consider a simple stylized example. Assume the executive announces on Day 1 that a 25 percent tariff on a major input from Country *X* will take effect on Day 30, signals on Day 20 that implementation may be delayed, and withdraws the tariff on Day 29. The posted tariff schedule may never meaningfully change, and revenue may be near zero, but the shadow tariff can still be substantial because behavior adjusts during the risk window. In those thirty days, uncertainty measures can spike; buyers may insist on tariff-adjustment clauses or reopeners in new contracts; importers may pull shipments forward to beat the deadline; customs brokers may see higher volume and more classification and origin questions; and corporations may pause, re-route, or diversify orders rather than commit to long-lead inputs tied to Country *X*. These are observable responses to risk, not to collection, and are what the measurements must capture.

With that in mind, a measurement framework can draw on at least five observable components:

1. **Information and uncertainty** - Trade policy uncertainty measures, including the series developed by Caldara and coauthors from newspaper coverage, earnings-call transcripts, and tariff actions,⁸³ can proxy for how salient and variable tariff risk is at a given time.
2. **Contract adaptation** - The private-law response can be proxied by tracking changes in tariff-related contract terms, including tariff-adjustment provisions, renegotiation triggers, origin flexibility, change-in-law clauses, and termination rights tied to tariff changes. This proxy is imperfect and may lag the threat itself: parties may add tariff clauses before a tariff is imposed, and those clauses may remain in contracts after a threat subsides. For that reason, the relevant measure is not the raw presence of tariff clauses alone, but changes

83. See generally Caldara et al., *supra* note 7.

in clause prevalence, amendment timing, renegotiation frequency, and sector-specific clustering around identifiable threat windows.

3. **Inventory and shipment timing** - If corporations fear a near-term change in tariff rates, they may pull purchases forward. Industry inventory-to-sales ratios, import timing at major ports, and shipment bunching around threat windows can proxy for this precautionary behavior.

4. **Compliance and dispute activity** - Volatility can raise the practical stakes of classification and origin decisions. Changes in customs brokerage demand, ruling requests, protests, and trade-related litigation can track the compliance burden generated by tariff risk.

5. **Investment and entry** - If tariff exposure becomes harder to predict, corporations may delay, scale down, or re-route long-horizon projects. Corporation-level investment patterns and entry decisions in trade-exposed industries can serve as a proxy for this “wait or shift” response.

Note that these measures are not decisive on their own. If shadow tariffs are operating, several of these indicators should move in the same direction around the same period. That is also where legal scholarship can add value. Economists can measure uncertainty and correlate it with macro-outcomes; legal analysis can help specify when a threat is institutionally credible, why it is credible, and which episodes should count as the relevant threat windows for measurement and, later, for reform.

CONCLUSION

A key mistake in contemporary tariff debate is to treat the posted tariff rate as the entire instrument because that focus misses the volatility regime, which can operate as a parallel system. Shadow tariffs are burdens collected through precautionary behavior: corporations change prices, legal contracts, inventories, sourcing, and investment plans in response to credible tariff risk, often before any duty is collected and sometimes even when no tariff is ultimately imposed.

This matters because the standard defense of tariffs assumes a stable tool that can be evaluated in familiar cost-benefit terms. Volatility changes the nature of the instrument. It moves tariffs away from a rule-like policy and towards a threat technology. A threat strategy may sometimes gain bargaining leverage, but it is also costly in the aggregate because it forces defensive behavior, generating real resource waste, not merely transfers.

Whether an administration intends those costs is not the point; the mechanism operates once the risk is credible.

Volatility also tends to compound. As tariff risk rises, corporations invest more in defensive planning. Defensive planning increases pressure for exceptions and carve-outs. Exceptions and carve-outs increase complexity. Complexity expands planning opportunities and deepens uncertainty. The result can be a recursive complexity loop in which the shadow tariff system grows, even if the formal tariff schedule does not. If the goal is predictable trade and investment, this is the wrong direction.

Instability is therefore not only costly for business and the economy; it is a problem of institutional design as much as of trade policy. The legal stakes follow directly. Shadow tariffs scale when credible tariff risk can be generated cheaply and quickly. Boundary questions about emergency tariff authority, statutory delegation, and separation of powers are therefore not technical disputes; they set the institutional cost of creating tariff risk. The Constitution's separation-of-powers design is therefore economic policy: it determines how cheaply the executive can create tariff volatility, and thus how much shadow-tariff capacity the legal system permits.