LOWER TARIFFS, HIGHER GRAY-MARKET RISK: WHY MANUFACTURERS SHOULD REVIEW INTERNATIONAL DISTRIBUTION NOW

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The 3 November 2026 election delivered Democratic majority for the Congress taking office in January, putting the prospect of tariff relief back in focus for consumer goods manufacturers. That shift raises a practical question: if tariffs fall, how quickly could unauthorized imports return? Manufacturers should review their international distribution now, not after diverted inventory starts appearing on US marketplaces. The election does not itself change duty rates, but manufacturers should not build their distribution strategy around the assumption that today's tariff protection will last.[1]

In our work counseling manufacturers, we have seen higher import costs make some international gray-market channels less attractive. Those channels involve genuine branded goods sourced abroad and resold outside the manufacturer's authorized US distribution network. Tariffs can reduce the profit available to unauthorized importers, but they do not repair the distribution weaknesses that allowed diversion in the first place.

The commercial logic is straightforward: lower duties can reduce landed costs and make previously uneconomic diversion profitable again. Price gaps, overseas sources, and marketplace access may still be there when that happens. Manufacturers should use the current window to identify exposed products, tighten lawful distribution controls, and prepare an enforcement response before unauthorized sellers rebuild inventory.

DO NOT MISTAKE TARIFFS FOR A DISTRIBUTION STRATEGY

The tariff landscape has already changed substantially. On 20 February 2026, the Supreme Court held in *Learning Res., Inc. v. Trump* that the International Emergency Economic Powers Act (IEEPA) does not authorize tariffs, and collection of the IEEPA duties ended on February 24.[2]

A 10% surcharge under Section 122 of the Trade Act of 1974 took effect on 24 February 2026, subject to product and other exceptions. That surcharge expired on 24 July 2026. Section 301 tariffs covering 60 economies took effect the same day, generally at 10% or 12.5%, subject to country-specific calculations that account for existing most-favored-nation duties in certain markets and to product exceptions.[3] Section 232 tariffs on specific sectors were not invalidated by the IEEPA ruling.

For distribution planning, the key issue is not which tariff program supplies the barrier. It is whether the reseller's expected selling price exceeds its acquisition, shipping, duty, marketplace, and other operating costs. A reduction in duties can reopen that margin even if brokerage and compliance costs remain. The exposure must therefore be tested product by product and source market by source market.

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WHY A SMALL CHANGE IN IMPORT COSTS CAN BRING IT ALL BACK

International gray-market resale depends on arbitrage: buying genuine goods in a lower-priced market and reselling them in the United States outside the authorized distribution network. When the remaining margin is small, a change in import costs can determine whether the transaction is commercially attractive.

Consider an illustrative product with an authorized US retail price of US$300. A reseller buys it overseas for US$170, pays US$10 for shipping, and sells it on a marketplace for US$255. Assume a marketplace fee of 15% (US$38.25), a duty base of US$170, and allocated entry costs of US$5 per unit in every scenario. The remaining contribution, before returns, storage, advertising, financing, taxes, and other overhead, is:

Duty Rate	Duty + Entry Costs	Contribution per Unit, Before Other Costs
None	US$0 + US$5	US$31.75
10%	US$17 + US$5	US$14.75
20%	US$34 + US$5	−US$2.25

On these assumptions, a reduction from 20% to 10% changes the transaction from a loss to a positive contribution before other costs. That does not guarantee a viable resale business or establish how quickly unauthorized sellers would enter the market, but it illustrates how a duty reduction can reopen an arbitrage opportunity. The relevant question is which products become attractive to divert first. Actual duties, customs valuation, fees, entry requirements, and operating costs must be assessed separately.

WHY THE ELECTION MATTERS, WITHOUT ASSUMING TARIFF RELIEF

The incoming congressional majority does not itself reduce tariffs. The remaining duties rest on different legal authorities, and changing them may require executive action or legislation that can become law despite presidential opposition. The election may increase scrutiny and pressure for tariff relief, but the timing, scope, and affected products remain uncertain. Manufacturers should distinguish potential routes to lower import costs from limits on particular tariff programs and continuing product-specific risks:

Temporary Tariffs Need Congress

A Section 122 surcharge lapses after 150 days unless Congress extends it, and the last one lapsed without an extension.[3]

Oversight and Pressure

Committees can examine the basis and cost of Section 301 actions, and members can advance bills requiring congressional approval of tariffs.

Separate Litigation Risk

Court challenges can change tariff exposure independently of the election. The reported Section 122 ruling illustrates why manufacturers should track the operative orders, any stays or appeals, and the particular duties affecting their products rather than assume all tariff programs will rise or fall together.[4]

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Product-Specific Exposure

Manufacturers should monitor actual changes to the duties affecting their products and source markets, rather than wait for a comprehensive change in trade policy.

Manufacturers do not need a firm prediction of tariff policy to act. They need to know how much duties would have to fall to make diversion attractive, which distributors could supply that inventory, and whether their agreements and evidence would support a prompt response. That assessment can begin before any tariff changes take effect.

Duty-free treatment of low-value shipments is a separate issue from reductions in tariff rates. US Customs and Border Protection (CBP[KLG2.1]) regulations effective 24 June 2026 suspend the commercial low-value exemption under 19 U.S.C. § 1321(a)(2)(C) for both postal and nonpostal merchandise; Congress's separate statutory repeal takes effect 1 July 2027.[5] Manufacturers should model both commercial inventory shipments and direct-to-consumer parcels where relevant to their actual diversion channels. Changes to one entry route do not establish whether another route will be profitable.

WHY RESURGENCE MATTERS

The cost of renewed international arbitrage goes well beyond lost sales:

Price Erosion

Discounted foreign-sourced listings pull down marketplace prices and undercut geographic pricing strategies.

Retailer Conflict

Authorized retailers investing in service, display, and training may face lower-priced competing listings. That pressure can lead to demands for concessions, discounting, or reduced support for the brand.

Brand and Customer-Service Risk

Foreign-market products may differ in warranty, labeling, accessories, software, or support. Customers who do not understand those differences may look to the manufacturer for a remedy.

Weaker Enforcement Position

Inconsistent enforcement during the quiet period can undermine a later claim that quality controls are real and consistently applied.

THE LEGAL TOOLKIT: EFFECTIVE, BUT ONLY IF BUILT IN ADVANCE

Unauthorized resale is not, by itself, trademark infringement. The first-sale doctrine generally protects resale of genuine goods, so a useful response starts with the facts: product differences, actual quality controls, the source of diverted inventory, and available contractual rights. The tools below serve different functions and require supporting evidence. Building that evidence and putting workable controls in place takes lead time.

Material Differences

Goods that differ materially from those authorized for US sale are not “genuine” under the Lanham Act, and their unauthorized sale can infringe. The First Circuit sets a low threshold: any difference a consumer would likely

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consider relevant to a purchase can qualify, including differences in formulation, packaging, or warranty.[6] Other circuits agree, finding material differences in removed batch codes and in foreign-language packaging and instructions.[7]

Border Enforcement

In Lever Bros., the DC Circuit held that Section 42 of the Lanham Act reaches physically and materially different foreign goods despite affiliation between the foreign and US trademark owners.[8] Manufacturers should assess trademark recordation and product-specific Lever-rule protection under 19 C.F.R. § 133.23. Protection depends on eligibility and CBP's determination of physical and material differences. The regulation also permits qualifying goods to avoid detention through a prescribed, conspicuous label meeting placement and durability requirements. Border measures should complement, not replace, source-level distribution controls.

Quality Control

A trademark owner relying on this theory must show legitimate, substantial, nonpretextual quality-control procedures, actual adherence to them, and that nonconforming sales will diminish the mark's value.[9] Relief may be available even if the goods are physically identical and no actual defect has been proved. Manufacturers should document the procedures they genuinely use, including relevant storage, handling, inspection, and traceability standards. Unauthorized status or paper requirements aimed only at controlling distribution are not enough.

Distribution and Resale Restrictions

The priority is to reduce leakage at its source, rather than rely solely on claims against downstream sellers. Agreements with foreign distributors and resellers can create enforceable obligations even when products are identical across markets. Subject to local competition and contract law, the review should address:

- *Territorial and export provisions* tailored to the distribution model and applicable local law, rather than a blanket prohibition copied across markets.
- *Customer restrictions* limiting sales to end users or approved retailers, not wholesalers, brokers, or known diverters.
- *Know-your-customer obligations* requiring verification of bulk buyers, flags for unusual order volumes, and record-keeping.
- *Flow-down clauses* requiring the distributor to impose the same restrictions on its sub-distributors and retailers.
- *Traceability obligations* prohibiting removal or alteration of serial numbers, lot codes, and labeling.
- *Audit and reporting rights* giving the manufacturer visibility into sell-through.
- *Enforceable remedies* for documented diversion, potentially including loss of contractual rebates, termination, and properly structured damages provisions, subject to local law and notice requirements.

The review should test implementation as well as drafting: who reviews order anomalies, who can obtain sell-through records, how suspected diversion is investigated, and what happens after a breach. Remedies and

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termination procedures should be commercially workable and legally available in the relevant territory. Signing a stronger agreement without changing operating practices will leave the same gaps.

The objective is a coordinated program: lawful source-level restrictions, visibility into the supply chain, documented product and quality-control distinctions where they exist, and an escalation process when diversion is detected. No single clause, trademark theory, or border measure substitutes for that program.

BUILD CONTROLS THAT WORK ACROSS BORDERS

The contract terms intended to reduce diversion at its source carry their own competition risk, and the rules differ by region. Under US federal antitrust law, vertical nonprice territorial and customer restrictions are generally judged under the rule of reason. A genuinely unilateral pricing policy under Colgate may offer a compliance approach, but it is not the only potentially lawful one: vertical minimum-resale-price agreements are also assessed under the federal rule of reason after *Leegin*. State antitrust and pricing laws require separate review.[10] In the European Union, a ban on distributors exporting outside the European Economic Area (EEA) is assessed for its effect inside the European Union, but any clause that also restricts passive sales within the EEA is a hardcore restriction that forfeits block-exemption protection.[11] In Canada, cutting off a dealer for low pricing can raise price-maintenance issues under the Competition Act.[12] Each anti-diversion term should be reviewed region by region before it is enforced.

FIVE PRIORITIES FOR AN INTERNATIONAL DISTRIBUTION REVIEW

Identify the First Products at Risk

Model likely resale prices and fully landed costs by product and source market at current and reduced duty rates. Include marketplace fees and other operating costs. Rank the products most likely to become profitable to divert.

Map and Repair Contractual Gaps

Review international agreements, renewal dates, downstream resale terms, customer checks, reporting rights, audit access, and remedies. Identify amendments and operating changes that are lawful and practical in each market.

Build the Evidence Before a Dispute

Document genuine product-by-market differences in formulation, packaging, labeling, warranty, and service. Confirm that relevant quality controls are legitimate, consistently followed, and supported by records.

Assess Border Options

Review trademark recordation and whether the products qualify for Lever-rule protection. Prepare the necessary product-specific evidence and an update process where that protection is appropriate.

Make Monitoring Actionable

Establish or refresh marketplace monitoring, test purchases, and serial-number or lot tracing. Assign responsibility for investigating suspected diversion and escalating to distributors, platforms, border authorities, or litigation counsel as appropriate.

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Manufacturers should act before lower duties make international diversion attractive again. Contract amendments, product evidence, and tracing systems take time to put in place and are harder to assemble once diverted inventory reaches US customers. Preparing now means being ready with documented evidence, workable distribution controls, and a practical enforcement plan, rather than chasing sellers after they are established.

FOOTNOTES

[1] Midterms 2026 highlights: Democrats win control of Congress, NBC News (Nov. 4, 2026).

[2] *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 644, 646 (2026) (Nos. 24-1287 & 25-250); U.S. Customs & Border Protection, CSMS No. 67834313, Ending Collection of International Emergency Economic Powers Act Duties (Feb. 22, 2026); White & Case LLP, *Decision* (Mar. 2, 2026).

[3] 19 U.S.C. § 2132(a); Proclamation No. 11,012, 91 Fed. Reg. 9,339 (Feb. 24, 2026) (signed Feb. 20, 2026); Office of the U.S. Trade Representative, Notice of Actions in Section 301 Investigations of Acts, Policies, and Practices of Various Economies Related to the Failure to Impose and Effectively Enforce a Prohibition on the Importation of Goods Produced with Forced Labor (July 23, 2026), Dates & pt. II; J. Scott Maberry et al., IEEPA Tariffs Struck Down, Replacement Tariffs Expired: What Importers Need to Know Now, The Procurement Lawyer (Oct. 5, 2026); Covington & Burling LLP, IEEPA Tariffs Terminated, Replacement Section 122 Tariffs Take Effect (Feb. 27, 2026).

[4] *Oregon v. United States* 835 F. Supp. 3d 1307, 1340-41 (Ct. Int'l Trade May 7, 2026); Order Granting Stay Pending Appeal, Nos. 26-1804 & 26-1805, ECF No. 61 (Fed. Cir. June 11, 2026). *See also* Brooks E. Allen et al., US Trade Court Strikes Down Section 122 Tariffs, but Ruling's Fate Is Uncertain and Practical Impact Is Limited, Skadden, Arps, Slate, Meagher & Flom LLP (May 20, 2026).

[5] Exec. Order No. 14,324, 90 Fed. Reg. 37,775 (Aug. 5, 2025) (signed July 30, 2025); Exec. Order No. 14,388, 91 Fed. Reg. 9,433 (Feb. 25, 2026) (signed Feb. 20, 2026); 19 C.F.R. §§ 10.151(b), 145.31; *Axle of Dearborn, Inc. v. Dep't of Commerce*, No. 25-00091, Slip Op. 26-94, at 29 (Ct. Int'l Trade Aug. 13, 2026); One Big Beautiful Bill Act, Pub. L. No. 119-21, § 70531(b)(1), (3), 139 Stat. 72, 283 (2025) (statutory repeal effective July 1, 2027). *See also* Alvarez & Marsal, USCIT Upholds IEEPA Suspension of De Minimis Treatment in Axle of Dearborn (Aug. 13, 2026); Brownstein, The Supreme Court Held IEEPA Tariffs Are Invalid: Legal Analysis and What's Next for Businesses (Feb. 24, 2026).

[6] *Société des Produits Nestlé, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 639 n.7, 641–44 (1st Cir. 1992).

[7] *Davidoff & Cie, S.A. v. PLD Int'l Corp.*, 263 F.3d 1297, 1301–04 (11th Cir. 2001); *Original Appalachian Artworks, Inc. v. Granada Elecs., Inc.*, 816 F.2d 68, 70–73 (2d Cir. 1987).

[8] *Lever Bros. Co. v. United States*, 981 F.2d 1330, 1337–39 (D.C. Cir. 1993); 15 U.S.C. § 1124; 19 C.F.R. §§ 133.2(e), 133.23(a)(3), (b)–(d).

[9] *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6–8 (2d Cir. 1996); *Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 243–47 (2d Cir. 2009).

[10] *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977); *United States v. Colgate & Co.*, 250 U.S.

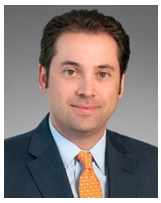
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300, 307–08 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43–47 (1960); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

[11] Case C-306/96, *Javico International and Javico AG v. Yves Saint Laurent Parfums SA*, EU:C:1998:173, ¶¶ 19–28; Commission Regulation (EU) 2022/720, arts. 3–4, 2022 O.J. (L 134) 4 (see particularly the exceptions in art. 4(b)(ii), (iv), (c)(i)(2), (4), and (d)(ii), (iv)).

[12] Competition Act, R.S.C. 1985, c. C-34, s. 76; C. Finnerty, Terminating Authorized Dealers in Canada: Contract Discipline, Notice Reasonableness, and the Competition Act Backstop, National Law Review (Nov. 3, 2026).

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