

USTR proposes new tariffs on EU under Section 301; WTO Appellate Body set to disband

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Executive summary

The United States (US) Trade Representative (USTR) published, on 6 December 2019, a notification announcing a review of actions taken on European Union (EU) origin goods subject to punitive tariffs under the Section 301¹ investigation pertaining to the EU Large Civil Aircraft Subsidies dispute.² Proposed actions include the addition of 365 new tariff codes to be subject to punitive tariffs of up to 100%, as well as increased tariffs on products that are currently subject to punitive tariffs up to 100%. The announcement follows a 2 December USTR press release alerting that further actions may be considered after a World Trade Organization (WTO) compliance panel rejected an EU claim that recent changes to subsidies provided to civil aircraft and aircraft parts producers brought the EU into compliance with WTO rules.³

With respect to the WTO, terms for two of the three judges residing on the WTO Appellate Body expired on 10 December 2019, leaving the Appellate Body without the requisite minimum number of three arbitrators necessary to preside over cases brought to the intergovernmental organization review panel. The Appellate Body, which typically consists of seven adjudicators, has gradually decreased to three after the US has repeatedly vetoed the appointment of new judges over the last two years.

Detailed discussion

Review of Section 301 tariffs on EU-origin goods

The US has historically taken the position that the EU countries,⁴ and specifically four of its Member States (France, Germany, Spain and the United Kingdom (UK)), have unfairly subsidized non-US aircraft manufacturers to an extent that was damaging to the US and its economy. Following unsuccessful discussions with the EU to cease subsidization, the US submitted a formal challenge to the WTO on EU subsidies provided to large civil aircraft in 2004.

The WTO subsequently determined that the assistance was inconsistent with the EU's obligations under the General Agreement on Tariffs and Trade (GATT) 1998 and Articles 5 and 6.3 of the Agreement on Subsidies and Countervailing Measures. The EU was granted until 1 December 2011 to become compliant with the WTO recommendations. While the EU did respond by adjusting some subsidies, the US requested a compliance panel in 2012 to evaluate the EU's overall actions and whether those remedies resolved the adverse effects as determined by the WTO. In May of 2018, the WTO concluded that there were additional violations. This result permitted the US to initiate the process to seek countermeasures.

On 2 October 2019, the WTO Arbitrator issued its report regarding the appropriate value of acceptable countermeasures that the US could impose on the EU for providing subsidies to non-US aircraft manufacturers. The WTO arbitrators determined that the US was entitled to impose tariffs on US\$7.5 billion⁵ of EU-origin goods.⁶

Following the WTO announcement, the USTR released a formal statement noting that the arbitration award represented the largest ever in WTO history,⁷ and published a final product list with 15 different sections covering 160 different 8-digit Harmonized Tariff Schedule of the US (HTSUS) codes.⁸ Certain aircrafts from specified EU countries are subject to a 10% ad valorem duty rate, and other products are subject to a 25% duty rate. All 15 sections went into effect on 18 October 2019 (see EY Global Tax Alert, [WTO rules on US complaint regarding EU civil aircraft subsidies; US announces countermeasure duties on certain EU products and also takes further actions on China origin goods](#), dated 3 October 2019).

On 2 December 2019, the USTR published an announcement stating that in light of a recent WTO compliance panel decision finding that the EU's changes to its subsidies

launched on large civil aircrafts were not enough to bring the member countries into compliance with WTO rules, the USTR would review current actions being taken under Section 301 and consider the addition of new products to be subject to increased duty rates of up to 100%, as well as potentially increasing the duty rates of goods currently subject to punitive tariffs up to 100%.

The announcement was followed by a formal USTR notice on 6 December 2019. In the notice, the USTR requests public comment on two Annexes in the notice. Annex I contains a list of EU-origin products currently subject to punitive duties of 10% and proposed to increase to 25% and Annex II contains a list of new products consisting of 365 tariff headings, broken into 16 Sections.

Notable products on the newly proposed Annex II list include:

- ▶ New helicopters, non-military imported under HTSUS 8802.11.0030 from France, Germany, Spain or the UK
- ▶ Virgin olive oil and its fractions imported under HTSUS 1509.10.40 imported from all EU member countries
- ▶ Various wine of fresh grapes imported under HTSUS 2204.22 imported from all EU member countries
- ▶ Sparkling wine imported under HTSUS 2204.10.00 from all EU member countries
- ▶ Whiskies, other than Irish and Scotch whiskies, imported under HTSUS 2208.30.60 from all EU member countries
- ▶ Certain handbags, with outer surface of leather imported under HTSUS 4202.21.90 from all EU member countries
- ▶ Various carpets and other textile floor coverings imported under HTSUS 5701.10 from all EU member countries
- ▶ Iron or steel containers for compressed or liquefied gas imported under HTSUS 7311.00.00 from all EU member countries
- ▶ Motorcycles imported under HTSUS 8711.40.30 from all EU member countries

With respect to the items on the newly proposed list, it should be noted that some products of French-origin are also included on the list of proposed items to be tariffed under a separate Section 301 investigation regarding France's Digital Service Tax (DST). Goods noted on both lists include sparkling wine and handbags, as noted in the above list, as well as various cheeses, butters and yogurts. For more information regarding the French DST and US Section 301 investigation findings, see EY Global Tax Alert, [US issues findings of Section 301 investigation regarding France's Digital Services Tax](#); proposes imposition of tariffs, dated 4 December 2019.

With respect to Annex I, the USTR requests comment on:

- ▶ Whether specific products of specific EU Member States should be removed from the list
- ▶ Whether specific products of specific EU Member States should remain on the list
- ▶ If a product remains on the list, whether the current rate of additional duty should be increased to as high as 100%

With respect to Annex II, the USTR requests comment on:

- ▶ Whether maintaining or imposing additional duties on a specific product of one or more specific EU Member States would be appropriate to enforce US WTO rights and/or would be likely to result in the EU complying with recommendations regarding Large Civil Aircraft subsidies
- ▶ Whether maintaining or imposing additional duties on specific products of one or more specific EU Member States would cause disproportionate economic harm to US interests

To be taken into consideration by the USTR, all comments must be submitted by 13 January 2020.

WTO Appellate Body set to disband

The WTO was established on 1 January 1995 to act as an international organization to address rules and legalities of trade between nations that are members of the WTO. This role includes, but is not limited to, administering WTO trade agreements, acting as a forum for trade negotiations, monitoring national trade policies and handling trade disputes, as they pertain to the 164 WTO member countries.⁹

The WTO Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.¹⁰ The Appellate Body, which consists of seven persons, upholds, modifies or reverses the legal findings and conclusions of a WTO panel, and Appellate Body Reports, once adopted by the Dispute Settlement Body (DSB), must be accepted by the parties to the dispute.

The seven members of the Appellate Body are appointed by the DSB, which is comprised of all member country governments, typically represented by ambassadors or equivalents. The adjudicators serve four-year terms, with the opportunity to be reappointed once. Each member country, as part of the DSB, has a vote when determining new appointees to the Appellate Body. The US has, over the last two years, exercised its veto and blocked new appointments, leaving the WTO Appellate Body with just three members, the minimum required to review cases. Two of the three's

terms expire on 10 December 2019. With only one member left on the Appellate Body, no further cases will be able to be brought before the international organization's review panel.

The WTO Appellate Body has reviewed and issued decisions on notable cases such as the recent decision in which they determined the US was entitled to impose tariffs on \$7.5 billion of EU-origin goods due to the EU providing subsidies to non-US aircraft manufacturers, as well as ongoing reviews of the US imposition of countervailing measures on softwood lumber from Canada.

Actions for businesses

Companies that import goods with origins of EU member countries that are currently subject to punitive duties and/or are on the proposed list of new products should closely monitor the progression of the proposed USTR actions and further developments. These include negotiations between the US and the EU, or any EU retaliatory actions.

Immediate actions companies can consider are:

- ▶ Fully understand the extent of products impacted on the proposed list of 8-digit Harmonized Tariff codes
- ▶ Consider filing comments in response to the announcements by the 13 January 2020 due date
- ▶ Consider implications of increased duties and taxes and impact on US Customs bonds

Additionally, US distributors who purchase from related parties will almost certainly have transfer prices impacted by the imposition of 301 duties. Along with the strategic importance of mitigating duty impact while aligning the income tax and customs approaches, mechanics for reporting any transfer pricing adjustments to US Customs should also be reviewed. This process may be particularly complex when duties are present for only a portion of the year, and in many cases, actions need to be taken in advance of importations.

US Customs has very specific rules for reporting adjustments to prices made after importation, such as transfer pricing adjustments. These rules require that the importer take specific actions before importation of goods for which prices may be adjusted, including adding customs specific language to transfer pricing policies. As these new 301 duties, if implemented, will likely take effect early next year, importers are well advised to address these requirements now in order that they be in place when 301 duties are imposed.

Companies who conduct any form of international trade should closely monitor WTO Appellate Body updates and consider long-term impacts to their businesses.

Endnotes

1. Section 301 investigations and actions are provided for under the *Trade Act of 1974*.
2. https://ustr.gov/sites/default/files/enforcement/301Investigations/Review_of_Action_Enforcement_of_U.S._WTO_Rights_in_Large_Civil_Aircraft_Dispute.pdf.
3. See USTR Press Release “United States Wins for the Sixth Time in Airbus Subsidies Dispute.”
4. EU member countries are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.
5. Currency references in this Alert are to US\$.
6. See WTO Dispute Number WT/DS316/ARB.
7. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/us-wins-75-billion-award-airbus>.
8. See 84 FR 55998.
9. List of WTO member countries can be found here: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
10. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).

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