

UNITED STATES TRADE REPRESENTATIVE INVITES COMMENTS ON PROPOSALS FOR ADDITIONAL DUTIES ON US\$3.1 BILLION OF EU AND UK EXPORTS

Since October 2019 the United States has imposed additional duties on imports from the EU and UK in connection with the WTO Dispute Settlement Body's finding that EU subsidies to Airbus breached WTO rules. On June 23, 2020, the Office of the U.S. Trade Representative (**USTR**) published a request for comment, which contains proposals for additional duties on an estimated US\$3.1 billion of EU and UK exports, including duties of up to 100% on certain products. EU and UK enterprises exporting to the United States, and impacted U.S. businesses, have until 26 July 2020 to comment on USTR's most recent tariff proposals.

This announcement is the most recent development in a series of trade disputes spanning over 15 years, in which the U.S. and the EU accused each other of unfairly subsidising its national champion in the civil aviation sector: Boeing, in the US, and Airbus in the EU. At various times, the WTO Dispute Settlement Body has found violations of WTO rules by both the EU and the US.

On April 12, 2019, the U.S. Trade Representative announced the initiation of an investigation to enforce U.S. rights in the WTO dispute against the EU. In October 2019, USTR imposed retaliatory duties on products of certain EU Member States. In accordance with the Trade Act of 1974¹, USTR is required to review the list of products subject to retaliatory duties every 180 days. On June 23, 2020, the U.S. Trade Representative announced its latest review and solicited comments from interested parties.

USTR asks for comments on whether current retaliatory duties should be maintained at their current level and on USTR's proposal to impose retaliatory duties on additional EU and UK products. In addition, USTR is considering imposing ad valorem duties of up to 100 percent on an additional list of products from France, Germany, Spain, and the United Kingdom.

Exporters of EU and UK products covered by existing retaliatory duties or the new duties proposed in the announcement of 23 June, and U.S.-based

Key issues

- In October 2019, the WTO authorised the United States to impose retaliatory duties to an annual value of US\$7.5 billion on trade from the European Union and certain states (Germany, France, Spain, and the UK).
- The U.S. Trade Representative is required to review the list of products subject to retaliatory duties every 180 days.
- USTR has now sought comments from interested parties on the list of products subject to retaliatory duties, and whether retaliatory duties should also be charged on additional goods.
- To be assured of consideration, comments should be submitted to USTR by **26 July 2020**.

¹ Section 306(b)(2)(B) of the Trade Act 1974 requires USTR to periodically revise the list of products subject to retaliatory duties: revisions must be made 120 days after USTR first takes action, and every 180 days thereafter unless certain conditions are met. Before making revisions, section 306(d) requires the U.S Trade Representative to seek public comments.

importers of these products, should consider making a submission in connection with the review. Comments must be submitted to USTR by 26 July 2020.

BACKGROUND

The U.S. has been authorized by the WTO to impose retaliatory duties of up to US\$7.5 billion per year on imports from EU countries and the UK, a figure equivalent to approximately 2% of the EU's total annual exports to the U.S. This amount equates to the damage the U.S. is calculated to have incurred because of the challenged Airbus subsidies.

Although the EU subsidies were granted in the aerospace sector, under WTO law retaliatory duties may be imposed in any sector. Politically sensitive sectors are often chosen to encourage the offending country to remove its subsidies. Alongside the aerospace sector, the agriculture and consumer goods and retail sectors bear the greater share of the U.S. retaliatory duties – specifically goods such as olives, tools and whisky.

To date, the U.S. has only imposed additional duties worth around half of the amount it is authorised to impose by the WTO. The U.S. therefore has latitude to increase these duties, and/or include additional products within their scope. It now appears likely to do so.

The U.S. appears to be deploying a trade tactic known as "carousel retaliation", by which punitive tariff rates are rotated on different groups of goods in order to increase uncertainty for exporters.

The EU filed an appeal against the WTO compliance panel's report on 6 December 2019, however the WTO Appellate Body fell below its quorum of three members that same month, and remains unable to hear appeals of WTO panel decisions.² An arbitration panel's decision on the value of retaliatory duties permitted to be imposed by the EU in a parallel case involving U.S. subsidies to Boeing is expected later in 2020. This was originally expected in May or June, but has been delayed due to the impact of the COVID-19 pandemic.

Products currently subject to additional duties in the investigation

The U.S. has been authorised by the WTO to take retaliatory measures in the form of:

- (a) suspension of tariff concessions and related obligations to the EU under the General Agreement on Tariffs and Trade 1994; and/or
- (b) suspension of commitments and obligations contained in the U.S.'s GATS services schedule with regard to all services, except for financial services.

The retaliatory measures imposed by the U.S. targeted the four countries found to have directly subsidised Airbus (France, Germany, Spain, and the UK). Alongside a headline 10% import duty on large civilian aircraft exported from France, Germany, Spain, and the UK, the U.S. measures also affect a wide range of other products including:

- Spanish olives, olive oil, and pork;

² See the Clifford Chance briefing, [The WTO's Interim Appeal Arbitration Arrangement - A Bridge Over Troubled Waters?](#)

- German machine parts and coffee; and
- British woollens and whiskies.

In addition, USTR has included a number of key exports from all EU-27 states and the UK in the scope of these measures, including cheeses, fruit, shellfish, and dairy products.

A complete list of the products currently subject to additional duties is available at Annex I of the [June 23 notice](#).

The June 2020 proposals

The 23 June notice published by USTR contains proposals (at Annex III) for new duties of up to 100% on 30 types of products from France, Germany, Spain, and the United Kingdom, which amounted to approximately \$3.1 billion of U.S. imports in 2018. USTR has not previously proposed the imposition of additional duties on these products, which include amongst others:

- chocolate, puddings, malt and biscuits;
- beer, gin, and vodka; and
- trucks and electric heaters.

Annex II of the 23 June notice sets out a range of further UK and EU products that may be made subject to additional duties. These products are not currently subject to additional duties, but were included as potential candidates for additional tariffs in earlier rounds of consultations, including amongst others:

- helicopters;
- printed material;
- pasta, chocolate, pastes and purees; and
- leather; carpets, yarn and ski suits.

The notice also indicates that USTR is considering increasing the level of duty charged on products that are already subject to retaliatory duties (above). If implemented, the measures would place a greater tariff burden upon the agriculture and consumer goods and retail sectors.

Will Brexit impact the United Kingdom's exposure to these measures?

The UK formally left the EU on 31 January 2020 but de facto remains within the EU's Customs Union until 1 January 2021 – the end of the 'transition period' provided for by the UK/EU Withdrawal Agreement. Because the level of annual permitted tariff retaliation approved by the WTO (US\$7.5 billion) is calculated on an EU-wide basis, the allocation of these measures to the UK following 1 January 2021 is unsettled as a matter of WTO law and raises novel questions.

It is notable that while the EU has led the WTO defence of the Airbus case, the UK (as a WTO member in its own right) is technically also a named party to the case. For that reason, post-transition period, the UK will still have an adverse ruling recorded against it for non-compliance with the WTO's decision. This is an issue likely to be of relevance in the UK's negotiation with the U.S. of a post-Brexit free trade agreement.

Participating in the Consultation

The USTR began to accept comments on 26 June 2020. To be assured of consideration, comments should be submitted to USTR by 26 July 2020. Submissions should be made through USTR's online comment portal: <https://comments.ustr.gov/s/>.

Box 1: USTR invites interested persons to address the following questions

1. Whether maintaining or imposing additional duties on a specific product of one or more current or former EU member States would be appropriate to enforce U.S. WTO rights or to obtain the elimination of the EU's WTO-inconsistent measures, and/or would likely result in the implementation of the DSB recommendations in the Large Civil Aircraft dispute or in achieving a mutually satisfactory solution.
2. Whether maintaining or imposing additional duties on specific products of one or more current or former EU member States would cause disproportionate economic harm to U.S. interests, including small or medium-size businesses and consumers.

(Source: [USTR](#))

Clifford Chance's Global Trade Team would be happy to provide further information about this consultation, or to assist clients in making submissions in connection with the review.

The Clifford Chance Global Trade Team

As political forces reshape the complex rules of international trade, our Trade and Investment Policy Unit offers unparalleled insights into how policy developments affect cross-border business. The Unit brings together Clifford Chance experts from across our global network. Together, we advise States and companies on all aspects of trade and investment law and policy, including free trade agreements, WTO law, export controls, customs rules, FCPA and Bribery Act issues, sanctions, national security review and investment protection.

CONTACTS

Janet Whittaker
Senior Counsel

T +1 202 912 5444
E janet.whittaker
@cliffordchance.com

Jessica Gladstone
Partner

T +44 207006 5953
E jessica.gladstone
@cliffordchance.com

Phillip Souta
Head, UK Public Policy

T +44 20 7006 1097
E phillip.souta
@cliffordchance.com

Jeremy Stewart
Lawyer (New Zealand)

T +44 207006 4502
E jeremy.stewart
@cliffordchance.com

Oliver Carroll
Lawyer

T +44 207006 2146
E oliver.carroll
@cliffordchance.com

Roland Scarlett
Lawyer

T +44 207006 2191
E roland.scarlett
@cliffordchance.com

Fraser Eccles
Trainee Solicitor

T +44 207006 1906
E fraser.eccles
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2020

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Dubai •
Düsseldorf • Frankfurt • Hong Kong • Istanbul •
London • Luxembourg • Madrid • Milan •
Moscow • Munich • Newcastle • New York •
Paris • Perth • Prague • Rome • São Paulo •
Seoul • Shanghai • Singapore • Sydney •
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.