Stiftung
Familienunternehmen

# Trade Conflicts with Side Effects

## Compensation for Innocent Bystanders when Imposing Punitive Tariffs

# Publication details

**Published by**:

Stiftung Familienunternehmen

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Cover image: KnoB | Adobe Stock

ISBN: 978-3-942467-85-8

**Quotation (full acknowledgement):**

Stiftung Familienunternehmen (ed.): Trade Conflicts with Side Effects – Compensation for Innocent Bystanders when Imposing Punitive Tariffs, prepared by Prof. Gabriel Felbermayr, PhD and Prof. Christoph Herrmann, LLM, Munich 2020, www.familienunternehmen.de

# Contents

# Summary of main results

1. The global trade order is currently in the midst of dramatic change. Many states and associations of states, including the European Union, use commercial policy instruments to pursue foreign, industrial, security, environmental or human rights policy interests. These actions often lead to losses for importers and exporters, which, in turn, raises the issue of compensation.
2. In the case of the WTO-authorised additional duties imposed by the United States in response to subsidies to the European aircraft manufacturer Airbus, it is evident that more than one third of German exports to the US affected by these measures are outside the aircraft sector.
3. The losses incurred by German exporters as a result of US customs measures, whether in compliance with or in breach of WTO law, do not give rise to any legal claims for damages or compensation against the United States, the European Union or the Federal Republic of Germany. Thus, the creation of an independent compensation mechanism is required.
4. In addition to sharing the burden, such a compensation instrument has the advantage of giving the EU more credibility in international trade disputes. The establishment of a compensation instrument would therefore also resolve the existing asymmetry with system rivals such as the United States or China, which already have such instruments.
5. The introduction of compensation mechanisms at the national law level would require adjustments to European state aid law. At EU level, one approach is to consider establishing a new fund under secondary law with a structure similar to the European Globalisation Fund.
6. The legal structure of a compensation fund for companies domiciled in the EU that suffer losses in the execution of the Common Commercial Policy through no fault of their own raises WTO legality problems. However, they could be overcome.

# A. Introduction and motivation

The global trade order has come unravelled. Many countries have begun to use commercial policy instruments to pursue foreign policy, security policy, industrial policy, environmental policy or humanitarian goals. Moreover, they seem more willing than in the past to interfere with the rules of the multilateral trading system. The United States under President Trump is sadly paving the way in this respect, but China and the European Union often adopt a similar approach. Examples include the sanctions against Iran or Russia, the withdrawal of the EU's preferential trade arrangements for Cambodia or its readiness to impose trade restrictions in the medical field or through climate tariffs – and thus provoke trading partners into taking reciprocal countermeasures that will harm Europe's export interests.

The intellectual foundation for these policies has been explained by, among others, Robert Blackwill, a Harvard professor and former US ambassador to India, and Jennifer Harris of the Council for Foreign Relations in their book entitled "War By Other Means: Geoeconomics and Statecraft".[1] The authors argue that trade policy measures can achieve goals with less economic effort than other types of policy. These measures are nevertheless associated with considerable costs, albeit of a very different nature than those related to building up potential military threats, for instance.

Under the law of the World Trade Organization (WTO), it is possible under certain conditions to deviate from the bound rates of duty specified in the agreements and from the principles of most-favoured nation, national treatment and other rules. Examples in this context include mainly anti-dumping duties, which are frequently used to address allegations of unfair pricing by foreign companies. Other mechanisms are countervailing duties against subsidies granted by foreign countries and special safeguards, which may be imposed in the case of unforeseen sharp increases in imports. However, WTO law prescribes an exact legal process in such cases, requires the fulfilment of certain conditions and provides remedies that the countries affected can then use to defend themselves against such action. In addition, WTO law recognises exceptions, for example to safeguard human life and protect the health of humans, animals and plants (Article XX of the GATT) as well as in case of threats to national security (Article XXI of the GATT).

Whatever the reason for specific measures taken or whether or not they comply with WTO law, they often result in considerable losses for completely uninvolved sectors. In response to duties on various industrial goods imposed by the United States, China levied counter-tariffs on American soybeans. While US industry sectors benefit from these tariffs (though at the cost of consumers), farmers are suffering.

1 *Blackwill* and *Harris* (2016).

US President Trump compensated farmers for the losses incurred by granting financial aid totalling $12 billion in 2018 and $16 billion in 2019.[2]

In the EU, the dispute with the United States over European subsidies to the aircraft manufacturer Airbus led to the WTO authorising the US to impose countervailing duties on a number of goods imported from the EU. In addition to aircraft and aircraft parts, additional duties of up to 25 per cent are now also levied on goods from a number of other sectors. They include items from the food industry (here especially cheese, olives, meat, various alcoholic beverages, coffee and fruit juices), tool industry and textile industries. Companies in these sectors now face a significant deterioration in their competitive situations in the United States, leading to losses of market share and thus damage to overall added value in Germany, even though these companies have in no way benefited from the subsidies to the aircraft industry. What is more, there are cases where the United States classifies products from Europe (up to now steel and aluminium products, and in future possibly cars) as a national security threat and therefore subjects them to high additional duties. It has generally become impossible for companies to predict whether, when and under what conditions to expect the imposition of measures like these, which impact negatively on their exports.

In the past, this was an infrequent problem, but in future it is likely that trade disputes will more often result in collateral damage to uninvolved sectors, and it raises the question of financial compensation for the companies affected.

For example, on 25 November 2019, the Renew fraction in the European Parliament[3] submitted a motion for a resolution, urging the European Commission *"in accordance with WTO rules and within the limits of the budget, to mobilise rapid support for the sectors worst affected by these tariffs and to consider the use of common agricultural policy (CAP) measures to deal with disturbances in the internal market"*. The members of the European Parliament, also referred to as MEPs, focused primarily on the agricultural sector, for which promotional measures are available, calling *"on the Commission to review the current secondary legislation on the sectoral and horizontal promotion regulations to allow more flexibility in how such promotional campaigns are run in third countries..."*[4]. The arguments raised in the resolution can correspondingly be applied to other sectors affected by US tariffs, such as the tool making or food processing industries (e.g. drinks, dairy products etc.).

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2 https://www.reuters.com/article/us-usa-farmers-subsidies-analysis/us-farmers-still-dependent-on-trade-aid-after-china-deal-idUSKBN20Y1B7 (accessed on 11 May 2020).

3 This group emerged from the Alliance of Liberals and Democrats for Europe (ALDE). Its members include the German parties FDP and Freie Wähler. It is the third-largest fraction of the European Parliament in the current legislative period.

4 https://www.europarl.europa.eu/doceo/document/B-9-2019-0203_DE.pdf (accessed on 11 May 2020).

The issue of compensation raises regulatory and legal questions that have to be categorised and assessed. Do additional duties constitute part of the "normal" economic risk that exporters have to carry in other countries, or does the underlying reason for imposing such duties make a difference? Does compensation for collateral damage entail a moral risk? In times of trade policy conflicts, does Europe need compensation options for its domestic economies so that its foreign trade policy remains viable and manoeuvrable? What are the legal options for offering compensation, and what are the practical issues when calculating compensation payments? How sizeable are the economic losses incurred by innocent bystanders – and thus the potential compensation in the dispute over subsidies granted to Airbus?

The next section provides an initial overview of current and planned customs measures by the United States (chapter B). After that, the current Airbus dispute is described and the extent to which it affects German exporters is quantified (chapter C). This is followed by an assessment of whether German manufacturers or providers of the above-mentioned products and services that have suffered losses are entitled to assert compensation claims against the United States, the European Union or the Federal Republic of Germany, including the legal options and limits for establishing mechanisms for damage compensation at the national and EU levels (chapter D). At the end of this study, some conclusions will be drawn for regulatory and legal policy (chapter E).

# B. Overview of current and planned US customs measures

From a conceptual standpoint, there is a need to distinguish between US interventions that fall outside the global trade order, which essentially exists within the framework of the World Trade Organization's agreements[5], and those based on WTO regulations and procedures. The latter are not classified as trade wars, but merely as trade conflicts.[6] Special duties imposed by the United States, both those that are (potentially) in contravention of WTO law and those compliant with WTO law, can affect not only the export products of European companies that have directly prompted the commercial policy attacks by the US Administration, but also other goods and – in a modified way – services that do not have any objective substantive relation to them.

Under the WTO's tariff reduction regime, the introduction of any new duty constitutes an exception to the rule that requires justification and/or authorisation (section I). For this reason, authorised (retaliatory) tariffs must be distinguished from other additional duties when it comes to the measures the US has taken or is planning to take. While authorised tariffs are in accordance with the Dispute Settlement Understanding[7] (DSU), compliance with WTO law is at least doubtful in the case of the additional duties; they have been neither debated by the dispute resolution committees to date nor authorised by the Dispute Settlement Body (DSB) (sections II and III).

## I. WTO and tariffs in general

Like its predecessor, the General Agreement on Tariffs and Trade (GATT 1947[8]), the Agreement Establishing the WTO (WTO Agreement)[9] sets out in its preamble the objective of a "substantial reduction of tariffs" on the basis of reciprocity and for joint benefit. However, this does not mean that the imposition of import tariffs per se must be considered as incompatible with WTO law. Tariffs remain legitimate means of directing trade, as is revealed in the tariffs only and bound tariffs principles[10] laid down in Articles XI:1 and II:1 of the GATT 1994[11] (GATT). While the former calls for the elimination of quantitative

5 See *Herrmann/Glöckle*, EuZW 2018, 477, 479, who draw a clear distinction between *ius ad bellum* and *ius in bello*.

6 Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994 L 336/1.

7 Understanding on rules and procedures governing the settlement of disputes, OJ 1994 L 336/234.

8 General Agreement on Tariffs and Trade, Federal Law Gazette 1951 II, p. 173.

9 Agreement Establishing the World Trade Organization (WTO), OJ 1994 L 336/3.

10 See details in *Puth/Stranz*, in: Hilf/Oeter (eds.), WTO-Recht, 2nd edition 2011, Section 11 marginal no. 1 et seq.

11 General Agreement on Tariffs and Trade 1994, OJ 1994 L 336/11 (this is based on the Introductory Note to the GATT 1947, but has been modified and supplemented by agreements and resolutions from the Uruguay Round).

restrictions in favour of more transparent tariff-based obstacles to trade in order to ease negotiations of a reduction in customs barriers, the latter stipulates that in their respective schedules of concessions, WTO members must not exceed the maximum rates of duty incorporated into the agreement as mandatory requirements by Article II:7 of the GATT. By the same token, WTO law contains a number of areas where tariff binding can be breached: the most important provisions are found in Article XIX of the GATT in connection with the Agreement on Safeguards,[12] Articles XX and of the XXI GATT (general and security exceptions), the agreement on anti-dumping as well as subsidies and countervailing measures as an extension to Article VI of the GATT[13] and, not least, Article 22 of the DSU (suspension of concessions to enforce rulings handed down to resolve disputes), which should be read as detailing the interpretation and application of Article XXII et seq. of the GATT.

## II. DSU-compliant (retaliatory) tariffs

Following approval by the DSB in the latest stage[14] of the Airbus-Boeing subsidy dispute, which has gone on for over 15 years, retaliatory US tariffs of 10 per cent on certain civil aviation aircraft manufactured in the EU[15] and of 25 per cent on numerous other goods imported from the EU[16] entered into force on 14 October 2019.[17] Due to their enormous and as-yet not fully utilised volume and its sheer extent, they currently represent the most relevant examples of legal tariffs imposed against the EU by the United States.

### 1. DSU as a basis

The basis for these tariffs is found in the DSU, which governs nearly the entire WTO dispute settlement process and is supplemented by other agreements only with regard to individual points. Since the WTO was established, the WTO dispute settlement bodies, consisting of *ad hoc* panels and the Appellate Body, have used processes similar to court-based legal proceedings to safeguard the rights and obligations of members arising from the respective agreements, and have clarified their provisions pursuant to Article

12 Agreement on Safeguards, OJ 1994 L 336/184.

13 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, OJ 1994 L 336/103; Agreement on Subsidies and Countervailing Measures, OJ 1994 L 336/156.

14 See firstly the proceedings initiated by the US: WT/DS316, EC and Certain Member States – Large Civil Aircraft; and secondly the proceedings initiated by the EU in response: WT/DS/317, US – Large Civil Aircraft; WT/DS/353, US – Large Civil Aircraft (2nd complaint).

15 Meanwhile, the US Administration increased these tariffs to 15 per cent as at 18 March 2020 (see Federal Register, Vol. 85, No. 35/21 February 2020/Notices, 10204).

16 For a complete list, see Federal Register, Vol. 84, No. 196/9 October 2019/Notices, 54245.

17 The EU is expected to receive authorisation in the course of 2020 for planned retaliatory tariffs to enforce the implementation of the DSB ruling in the parallel dispute, US – Large Civil Aircraft (fn. 11). A preliminary list, dated 17 April 2019, of the US imports affected can be found at https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157861.pdf (accessed on 1 March 2020).

3.2 of the DSU in accordance with the customary rules of interpretation of public international law.[18] Until the Appellate Body became dysfunctional on 10 December 2019 as a result of the United States blocking the appointment of judges, members – rather than private individuals resident in member states – had access to a two-tier process, for whose replacement in the short term a number of legal provisional arrangements are currently being considered.[19] At the end of each procedure – subject to a preferable solution achieved by mutual agreement of the disputing parties (see Article 3.7 of the DSU) – are recommendations or decisions by the dispute resolution bodies These recommendations or decisions are ultimately accepted by the DSB, whose functions are performed by the General Council, by way of negative consent, and enter into force *inter partes* (i.e. only between the parties involved). In the context of monitoring the implementation of confirmed panel or Appellate Body reports pursuant to Article 21 et seq. of the DSU, a kind of enforcement process ensues[20] which explicitly recognises the remedy of temporary suspension of (customs) concessions or other obligations as a method of *ultima ratio*, or last resort, by the successful WTO member.

## 2. Authorisation

At this last four-part[21] stage of a dispute settlement process, the latest retaliatory US tariffs in the case under review (EC and Certain Member States – Large Civil Aircraft) were also authorised. As an international organisation, the WTO cannot of its own accord execute the revocation of the violations by the EU and some of its member states (including Germany) of a number of provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) which were established on a binding basis by the DSB. For its part, the United States cast doubt on whether the EU would comply with the DSB recommendations. Against this backdrop, the detailed implementation rules laid down in Articles 21 and 22 of the DSU took effect.[22] In its report, which was confirmed by the Appellate Body in a subsequent appeal, the compliance panel (see Article 21.5 of the DSU) requested by the United States found that the EU was still not fully compliant with the original decision of the DSB, which required the EU to terminate the subsidy practices that were the subject of the complaint or revise them in accordance with the SCM

18 *Weiß*, in: Herrmann/Weiß/Ohler (eds.), Welthandelsrecht, 2nd ed. 2010, Section 10 marginal no. 333.

19 Meanwhile, the EU and a total of 18 other WTO members have agreed to an interim alternative to the *Appellate Body* which permits the continuation of an appeal function, see WTO notification of 30 April 2020, JOB/DSB/1/Add.12.

20 Ibid., Section 10 marginal no. 255 et seq.

21 *Ohlhoff*, in: Prieß/Berrisch (eds.), WTO-Handbuch, 2003, C.I.2. marginal no. 117, divides the process of standards enforcement into negotiations over compensation measures, the application for the approval of sanctions by the DSB, (if appropriate) arbitration proceedings to establish their legality and the ultimate authorisation of sanctions by the DSB.

22 For more on the compliance issue, see e.g. *Kaienburg*, Compliance in High Profile-Fällen der WTO: Legal Case Management am Beispiel des Airbus-Boeing-Falls, 2010; specifically on Article 22 of the DSU: *Shadikhodjaev*, Retaliation in the WTO Dispute Settlement System, 2009.

Agreement.[23] At the same time, the United States' request that temporary retaliatory tariffs (often also referred to as punitive tariffs) pursuant to Article 22 of the DSU or Article 7.9 of the SCM Agreement be instituted against the EU to enforce the law effectively, was ultimately approved in separate arbitration proceedings pursuant to Sections 6 and 7 of Article 22 of the DSU.[24]

Unilateral countervailing duties always relate to unlawfully subsidised goods (see Article 10 et seq. of the SCM Agreement). By contrast, the "suspension of [customs] concessions or other obligations" within the meaning of Article 22.1 of the DSU or "countermeasures" within the meaning of Article 7.9 of the SCM Agreement[25], which should be interpreted similarly to Article 22 of the DSU, gives rise to specific aspects that deviate from this general rule. Moreover, it should be emphasised that the authorisation of such retaliatory tariffs is specifically not intended to serve as a permanent substitute for remedying the legal violations for which countermeasures had previously been taken.[26] Instead, its purpose should be seen, pursuant to the principle of proportionality, in exerting additional pressure on the party that lost in the initial proceedings to implement the binding DSB recommendations.[27] This includes first of all the option to suspend the tariff concessions for the sector (normally goods trading) in which the violations of WTO law were identified. In addition, sanctions can, if required (see Article 22.3 (c) of the DSU), also be imposed in other sectors that fall under a different WTO agreement (cross retaliation). The inevitable consequence is that retaliatory tariffs affect branches of industry that – as in the cases of subsidies in favour of Airbus granted at EU and member state level – are neither directly nor indirectly associated with the unlawful trading practices.

## III. Tariffs that (potentially) contravene WTO law

Tariffs introduced or being planned since 2018 on certain steel and aluminium products (with a rate of duty of 25 or 10 per cent),[28] cars and car parts (imposition and rate not yet resolved)[29] are in a very different category than the DSU-compliant US tariffs in the Airbus-Boeing dispute. This distinction also applies – in response to the digital tax imposed by France – to certain French products (with a rate

23 WTO Panel Report, WT/DS316/RW, EC and Certain Member States – Large Civil Aircraft (Recourse to Article 21.5 of the DSU); WTO Appellate Body Report, WT/DS316/AB/RW, EC and Certain Member States – Large Civil Aircraft (Recourse to Article 21.5 of the DSU).

24 WTO Arbitration Decision, WT/DS316/ARB, EC and Certain Member States – Large Civil Aircraft (Recourse to Article 22.6 of the DSU).

25 As argued by *Pitschas*, in: Prieß/Berrisch, WTO-Handbuch, B.I.12. marginal no. 111.

26 *Weiß*, in: Herrmann/Weiß/Ohler, Welthandelsrecht, Section 10 marginal no. 317.

27 Ibid.

28 According to the latest amendment, they also apply to derivative steel and aluminium products, see Federal Register, Vol. 85, No. 19/29 January 2020/Presidential Doc., 5281.

29 Federal Register, Vol. 84, No. 98/21 May 2019/Presidential Doc., 23433.

of possibly up to 100 per cent)[30]. The common factor underlying all three (planned) measures is that although they have or would have a basis in US law in Section 232 of the Trade Expansion Act of 1962[31] (national security) and Section 301 of the Trade Act of 1974[32] (market access restrictions at the expense of US companies), their compatibility with WTO agreements has not been clarified. This has been critically questioned not only by the EU and its 27 member states, but also in recent literature.[33] To this day, no such (additional) tariffs have been approved by the DSB, nor is it apparent which GATT exceptions or other authorisation mechanisms under WTO law would even be eligible as justification for them.

One illustration of this is the imposition of US import duties on steel and aluminium mentioned earlier. The United States apparently bases them on Article XXI of the GATT, while the EU classifies them as *de facto* safeguards in the context of the countermeasures it has taken in response.[34] Without being able to comment in this study on whether these and other US tariffs are justifiable, it is certain that, in the above three cases, both the EU and companies domiciled in the EU (indirectly through the Enforcement Regulation[35]) have access to response instruments. This fact alone demonstrates another key difference from the situation with authorised retaliatory US tariffs, against which no further remedies are available at all. Here, a dispute settlement process against the United States before the DSB remains a possibility or, as in the case of the additional duties on steel and aluminium which entered into force in March 2018, has already been initiated by the European Commission.[36] If the EU (simultaneously) resorts to unilateral countermeasures, it should be borne in mind that the interests of domestic import companies anticipating a negative impact as a result of EU import tariffs on US products often vary widely. But even for export-oriented companies affected by US import tariffs, neither multilateral WTO dispute resolution nor any kind of unilateral retaliatory action by the EU is suitable for enabling direct compensation for companies that have incurred losses as a result of trade that was redirected owing to tariffs.

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30 Federal Register, Vol. 84, No. 235/6 December 2019/Notices, 66956.

31 Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, as amended.

32 Section 301 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 144, as amended.

33 See (not conclusively) *Lee*, WTR 2019, 481 et seq.; *Zedalis*, JWT 2019, 83 et seq. (each article questioning the United States' increased reliance on Article XXI of the GATT).

34 For more details see *Herrmann/Glöckle*, EuZW 2018, 477, 481 et seq.

35 Regulation (EU) No 654/2014 of the European Parliament and of the Council from 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No. 3286/94 laying down Community procedures in the field of the Common Commercial Policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ 2014 L 189/50.

36 Commission Implementing Regulation (EU) 2018/724 of 16 May 2018 on certain commercial policy measures concerning certain products originating in the United States of America, OJ 2018 L 122/14 (last amended by Commission Implementing Regulation (EU) 2018/886 of 20 June 2018, OJ 2018 L 158/5).

# C. Airbus dispute

## I. Background

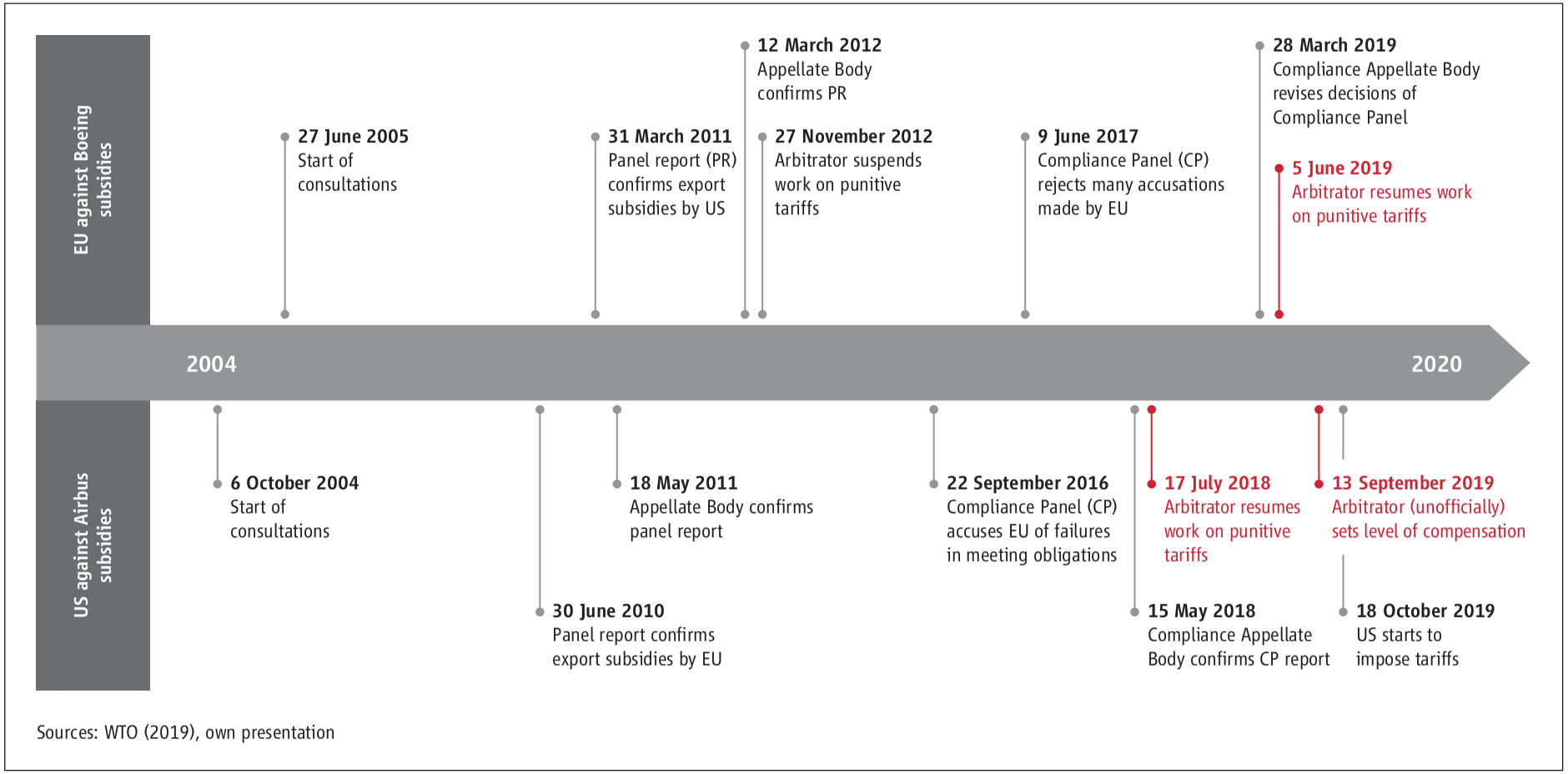
The United States accuses the European Union – in particular the four European countries with Airbus production locations, Germany, France, Spain and the United Kingdom – in over 300 cases of having created an unfair competitive advantage for the Airbus Group at the expense of Boeing. WTO regulations do indeed prohibit export subsidies. These subsidies may include any government measures aimed at making a domestic product more competitive overall in international competition.

This may sound abstract, but it takes on very concrete form in the case of Airbus: for example, the WTO found that the City of Hamburg had made the Mühlenberger Loch site available to Airbus for the production of the A-380 aircraft for too long a period and on too favourable terms. In the latest negotiating rounds, there was moreover a focus on aid referred to as start-up financing. What this means is that countries such as Germany grant the Airbus Group billions of euros in loans that must only be repaid if the venture is financially successful. This pertains to aircraft models A-330, A-350 and A-380. By granting this start-up financing, European governments shift the business risk from Airbus to taxpayers, thus indirectly legitimising the punitive tariffs on European products. The WTO determined that Airbus had derived tremendous benefit from these measures: at the very least, they helped the Group bring the above-mentioned aircraft series to market. In addition, they allowed Airbus to gain greater market share in civil aviation in markets such as Europe, Korea and China.

For its part, the European Union is conducting proceedings in response to export subsidies to Boeing by the US government. As Figure 1 shows, this case has also been dragging on for 15 years now. The proceedings focus mainly on tax breaks for Boeing and the fact that the company has access to NASA research institutions and various US government ministries.

Following arbitration proceedings, the WTO authorised the United States on 13 September 2019 to impose countervailing duties on European products. The outcome of the arbitration has only partially met the United States' demands: of the €10 billion requested, Washington may only levy duties on an import volume of around €7 billion ($7.5 billion). The duties are intended to counter the losses incurred especially by Airbus competitor Boeing as a result of the export subsidies. In the course of the proceedings, schedules of products that were to be affected by the tariffs were circulated repeatedly, with the Office of the US Trade Representative issuing shortlists of products on 12 April (USTR 2019a) and 5 July (USTR 2019b) 2019. Current WTO rules stipulate that duties must first be applied to products from the aviation industry itself, thus it is not surprising that all the lists featured aircraft, aircraft parts and helicopters.

**Figure 1: Comparison of WTO arbitration proceedings**




Sources: WTO (2019), own presentation

## II. Additional duties imposed by the United States

On 2 October 2019, the World Trade Organization authorised the United States to impose additional duties worth almost €7 billion ($7.5 billion). In response, the US Trade Representative also specified the products on which the United States would actually impose tariffs on 18 October 2019 and the rates of duty to be applied.[37] The WTO accepted this schedule on 14 October 2019, thus paving the way for additional US duties. For aircraft weighing more than 30 tonnes, additional duties of 10 per cent applied from 18 October 2019, while other products on the final schedule are subject to additional duties of 25 per cent. This means that the United States is far from exploiting its full potential, since WTO law would allow it to impose duties of up to 100 per cent. Tariffs on aircraft have meanwhile been increased to 15 per cent, while those on other products have remained at 25 per cent. They could, however, be raised at any time without the need for any further consultation with the WTO.

Overall, the United States has not only adhered to the WTO's specifications, it has not even exploited their full potential, making the suggestion all the more serious that Europe should immediately retaliate with countermeasures. For example, an enforcement of previous arbitration awards that have nothing to do with the WTO's proceedings involving Airbus and Boeing would certainly be interpreted by the United States as an escalation of the conflict. It makes more sense to wait for the arbitration award to be made by the WTO in the parallel proceedings against Boeing next year. If the WTO then allows the EU to impose its own retaliatory tariffs, Europe will be able to introduce duties on products from the US aviation industry. This possibility alone should pose a major threat to the United States, because Boeing sells significantly more aircraft in Europe than Airbus does in the US, and this particular US trade surplus would be endangered. It should therefore be assumed that an agreement will be reached at the beginning of next year, when the EU receives approval in principle from the WTO to impose countervailing duties against the United States. President Trump will, however, not miss the opportunity to impose further duties during this short period of time.

Table 1 shows the product categories affected by the new US tariffs, the trading volume attributable to the EU 28 and to Germany, the share of goods on which the new tariffs have been imposed as a percentage of all goods in the four-digit category, and the share of the EU 28's volume attributable to Germany. The table also provides an approximate indication of whether the sector affected has significant small and medium-sized enterprise (SME) activity. The table is arranged in such a way that the product categories most affected by German exports to the United States appear first. It shows figures for 2019, although it must be taken into account that these figures have already been influenced by the new tariffs, because they have been in force since October 2019.

37 USTR (Office of the United States Trade Representative) (2019). Notice of Determination and Action Pursuant to Section 301: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice_of_Determination_and_Action_Pursuant_to_Section_301-Large_Civil_Aircraft_Dispute.pdf (accessed on 5 October 2019).

First, it is evident that the trade volume of almost €8.4 billion affected by US tariffs exceeds the amount approved by the WTO (€7 billion) by almost 20 per cent; the US Administration is certainly aware of this. The implementing instructions note at the lowest product level (10-digit level) that the new tariffs are not to be applied to all goods, although they do not specify which exceptions should be made and on what conditions. As a result, it is not clear how the US Customs Administration is planning to distinguish between, for example, German hand tools on which duties are to be imposed and those from other EU member states. The customs law of a customs union such as the European Union does not really provide for such a case, because there is no proof of origin relating to the individual member states.[38] In addition, the United States has the right to exempt individual products from duties and add other new products. Use of this process, known as carousel retaliation, has been threatened several times already in trade disputes between the European Union and the United States, for example in the context of the banana and beef dispute, although the threats have never been acted on.[39] In the Airbus dispute, the schedule of products was amended for the first time in mid-March 2020, but only for utterly irrelevant products. The measures taken by the United States thus create considerable uncertainty. Firstly, despite detailed schedules of duties, it is not clear whether or not a specific export transaction is affected. Secondly, the rate of duty is not fixed and can be unilaterally varied (and in particular increased) by the United States. This uncertainty produces legal disputes which in turn create even more uncertainty. It is well documented in the empirical literature that this uncertainty has a more restrictive impact on trade than the tariffs themselves.[40]

Table 1 shows that the most important product category subject to the new tariffs is the aircraft category (product category 8802), which involves US imports from the EU with a volume of €3,045 million. That is 36 per cent of the total volume of €8,391 million. Germany accounts thereby for 39 per cent of the EU value, i.e. €1,197 million, or 63 per cent of total German exports to the United States affected by the new tariffs. This means that 90 per cent of the trading volume in this product category is affected; only 10 per cent (or €133 million) of Germany's exports to the United States in this category remain unscathed. At EU level, this proportion is significantly higher (52 per cent).

From Germany's perspective, the second most important product category affected by additional US duties is that of motorised hand-held tools (category 8467). Almost the entire burden on the EU in this category is carried by Germany. Unlike aircraft, the affected industry has a large number of companies in different size categories.

38 Worldwide, an EU origin is, however, not normally recognized in non-preferential rules of origin.

39 https://www.globaltrademag.com/carousel-retaliation-tariff-uncertainty-on-another-ride/ (accessed on 11 May 2020).

40 See *Limao/Handley* (2015).

The third most affected product category from Germany's point of view is that of liqueurs and spirits, with an export volume of €114 million. However, the EU's total affected export volume is many times higher, at €2,000 million. Again, small and medium-sized companies bear a prominent share of the impact.

In the next product category (bulldozers, angledozers and diggers), Germany again accounts for a higher-than-average proportion: exports worth almost €95 million are affected.

Table 1 shows the other product categories suffering under additional US duties. Germany is disproportionately affected here as well, especially in the area of industrial goods, although foods also play an important role.

**Table 1: Product categories affected by US Airbus duties, 2019**

| Four-digit product category | | SME-relevant? | EU 28 | | Germany | | |
|---|---|---|---|---|---|---|---|
| | | | Trading volume, € million | Share of four-digit cat. | Trading volume, € million | Share of four-digit cat. | Share of EU |
| 8802 | Other aircraft (for example, helicopters, aeroplanes); spacecraft (including satellites) and suborbital and spacecraft launch vehicles | NO | 3,045.49 | 48% | 1,196.94 | 90% | 39% |
| 8467 | Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motors | YES | 132.35 | 21% | 128.35 | 43% | 97% |
| 2208 | Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 per cent vol.; spirits, liqueurs and other spirituous beverages | YES | 1,969.54 | 33% | 113.83 | 93% | 6% |
| 8429 | Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers | YES | 209.64 | 12% | 94.50 | 22% | 45% |
| 2204 | Wine of fresh grapes, including fortified wines; grape must other than that of heading 2009 | YES | 1,373.59 | 32% | 79.76 | 93% | 6% |
| 1905 | Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products | YES | 108.20 | 12% | 65.69 | 46% | 61% |

| Four-digit product category | | SME-relevant? | EU 28 | | Germany | | |
|---|---|---|---|---|---|---|---|
| | | | Trading volume, € million | Share of four-digit cat. | Trading volume, € million | Share of four-digit cat. | Share of EU |
| 9002 | Lenses, prisms, mirrors and other optical elements, of any material, mounted, as parts of or fittings for instruments or apparatus, other than such elements of glass not optically worked | YES | 37.53 | 17% | 37.53 | 25% | 100% |
| 0406 | Cheese and curd | YES | 546.23 | 59% | 35.54 | 91% | 7% |
| 2101 | Extracts, essences and concentrates, of coffee, tea or maté, and preparations with a basis of these products or with a basis of coffee, tea or maté; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof | YES | 20.21 | 28% | 20.21 | 70% | 100% |
| 8203 | Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar hand tools | YES | 17.53 | 38% | 17.53 | 81% | 100% |
| 8505 | Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetisation; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads | YES | 17.16 | 9% | 17.16 | 21% | 100% |
| 0901 | Coffee, whether or not roasted or decaffeinated; coffee husks and skins; coffee substitutes containing coffee in any proportion | YES | 16.01 | 6% | 16.01 | 17% | 100% |
| 4911 | Other printed matter, including printed pictures and photographs | YES | 22.32 | 11% | 12.12 | 28% | 54% |
| 8205 | Hand tools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools or water-jet cutting machines; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks | YES | 7.68 | 6% | 7.68 | 17% | 100% |
| 1601 | Sausages and similar products, of meat, meat offal or blood; food preparations based on these products | YES | 29.62 | 89% | 6.63 | 100% | 22% |

| Four-digit product category | | SME-relevant? | EU 28 | | Germany | | |
|---|---|---|---|---|---|---|---|
| | | | Trading volume, € million | Share of four-digit cat. | Trading volume, € million | Share of four-digit cat. | Share of EU |
| 8211 | Knives with cutting blades, serrated or not (including pruning knives), other than knives of heading 8208, and blades thereof | YES | 5.95 | 8% | 5.95 | 12% | 100% |
| 0405 | Butter and other fats and oils derived from milk; dairy spreads | YES | 209.90 | 93% | 5.09 | 100% | 2% |
| 4901 | Printed books, brochures, leaflets and similar printed matter, whether or not in single sheets | YES | 15.46 | 4% | 4.04 | 9% | 26% |
| 0404 | Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter | YES | 3.45 | 18% | 3.45 | 35% | 100% |
| 2009 | Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter | YES | 9.43 | 4% | 2.24 | 43% | 24% |
| 8201 | Spades, shovels, mattocks, picks, hoes, forks and rakes; axes, bill hooks and similar hewing tools; secateurs and pruners of any kind; scythes, sickles, hay knives, hedge shears, timber wedges and other tools of a kind used in agriculture, horticulture or forestry | YES | 0.75 | 4% | 0.75 | 18% | 100% |
| 2008 | Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included | YES | 51.68 | 40% | 0.69 | 7% | 1% |
| 8468 | Machinery and apparatus for soldering, brazing or welding, whether or not capable of cutting, other than those of heading 8515; gas-operated surface tempering machines and appliances | YES | 0.51 | 2% | 0.51 | 5% | 100% |
| | **Total** | | **8,391.35** | | **1,873.77** | | **22%** |

Source: Office of the United States Trade Representative (USTR), US Census, own calculations. Only those product categories are listed in which Germany's exports to the United States exceed €500,000.

Table 5 in the Annex provides a complete overview of German products affected by the US tariffs. It reveals that the new tariffs are often levied on goods that were already subject to significant pre-existing duties. This applies in particular to agricultural products and foods, as well as tools and metal products. The total of existing and additional duties makes any US business *de facto* impossible for the products affected.

## III. Economic effects of additional US duties

A quantitative trading model is used below to calculate the effects of the new US duties on the sectors concerned.[41] This can only be done for relatively highly aggregated sectors, because the required information, such as input-output tables, is not available at product level. The model used also takes account of the macroeconomic effects of the additional duties. For example, they lead to a slight depreciation in the value of the euro, which provides additional opportunities for exports to the United States in sectors that are not directly affected by the new tariffs. The model includes the services sector, which is not subject to any duties, and which comprises around 40 countries and regions in total. Compensatory responses can thus be demonstrated: for example, it is conceivable that higher duties on aircraft from Europe may lead to China or Russia gaining market share in the United States. What the model cannot show, however, is the extent to which European companies can expand their production in the United States in response to the tariffs. Airbus, for example, has a production facility in Mobile, Alabama. Aircraft parts are not subject to additional duties, thus Airbus can relocate final assembly from Europe to North America without losing market share. However, this is often not a feasible option for small and medium-sized companies.

**Table 2: Sectoral effects of punitive US tariffs on German exports to the United States**

| Sector | | Exports in 2018 | Exports in 2019 | | Difference | Growth rate |
|---|---|---|---|---|---|---|
| | | Data | excl. punitive tariffs, estimate | incl. punitive tariffs, simulation | | |
| | | € million | € million | € million | € million | per cent |
| Agricultural commodities | C01 | 344.3 | 360.8 | 362.5 | 1.7 | 0.46 |
| Forest commodities | C02 | 104.4 | 109.4 | 109.9 | 0.5 | 0.43 |
| Fisheries | C03 | 0.9 | 0.9 | 0.9 | 0.0 | 0.41 |
| Mining | C04 | 50.2 | 52.7 | 53.6 | 1.0 | 1.80 |
| **Food products, beverages and tobacco** | **C05** | **2,123.6** | **2,225.9** | **1,906.6** | **–319.3** | **–16.75** |

41 *Aichele/Felbermayr/Heiland* (2016).

| Sector | | Exports in 2018 | Exports in 2019 | | Difference | Growth rate |
|---|---|---|---|---|---|---|
| | | Data | excl. punitive tariffs, estimate | incl. punitive tariffs, simulation | | |
| | | € million | € million | € million | € million | per cent |
| Textiles, wearing apparel, leather | C06 | 916.4 | 960.5 | 963.3 | 2.8 | 0.29 |
| Wood and wood products | C07 | 299.7 | 314.1 | 315.1 | 0.9 | 0.29 |
| Paper | C08 | 2,014.5 | 2,111.5 | 2,120.9 | 9.4 | 0.44 |
| Printed matter, media | C09 | 19.7 | 20.7 | 20.7 | 0.0 | 0.15 |
| Refinery products | C10 | 507.8 | 532.3 | 535.8 | 3.6 | 0.66 |
| Chemical products | C11 | 12,876.7 | 13,496.9 | 13,547.1 | 50.1 | 0.37 |
| Pharmaceutical products | C12 | 6,493.6 | 6,806.3 | 6,834.6 | 28.3 | 0.41 |
| Rubber and plastic | C13 | 2,659.4 | 2,787.5 | 2,799.3 | 11.8 | 0.42 |
| Non-metallic minerals | C14 | 1,296.9 | 1,359.4 | 1,363.6 | 4.2 | 0.31 |
| Metals | C15 | 4,568.6 | 4,788.7 | 4,801.9 | 13.3 | 0.28 |
| **Fabricated metal products** | **C16** | **4,567.9** | **4,788.0** | **4,751.5** | **–36.4** | **–0.77** |
| Electronic and optical equipment | C17 | 6,864.2 | 7,194.8 | 7,194.1 | –0.7 | –0.01 |
| Electrical equipment | C18 | 5,849.4 | 6,131.1 | 6,147.5 | 16.4 | 0.27 |
| **Machinery** | **C19** | **20,904.5** | **21,911.4** | **21,769.4** | **–142.0** | **–0.65** |
| Road vehicles | C20 | 33,687.8 | 35,310.3 | 35,421.7 | 111.3 | 0.31 |
| **Other vehicles** | **C21** | **2,859.3** | **2,997.1** | **2,583.4** | **–413.6** | **–16.01** |
| Furniture | C22 | 4,331.7 | 4,540.3 | 4,549.1 | 8.9 | 0.19 |
| **Total** | | **113,341.5** | **118,800.5** | **118,152.6** | **–648.0** | **–0.55** |

Source: Simulation results, Felbermayr and Stamer (2019), own analysis and presentation.

Table 2 demonstrates the effects of the new tariffs on German exports to the United States. They are *ceteris paribus* effects, meaning that only a change in the duty burden is assumed while all other factors remain the same. The results of the simulation should therefore not be interpreted as a forecast of export figures, but as the comparison of two situations that differ only with regard to the duties (and adjustments required as a result of these duties).

In total, Germany's goods exports are expected to decline by €648 million as a result of the additional duties, thus representing 0.55 per cent of the figure that would have been expected for 2019 without these tariffs. Note the assumption that the additional duties have been in force since 1 January 2019. This

is counterfactual of course, but it enables the presentation of annual effects and feeds a large number of actually observed figures into the model.

First of all, the export value for 2019 that would have been generated without additional duties is estimated. Next, the assumption is made that the additional duties have been in force in full for the whole of 2019. Since the sectors in the model are much more broadly defined than those in Table 1, the sectoral export values shown in Table 2 include a high proportion of goods that are not affected by additional duties: for example, sector "C21, Other vehicles" includes aircraft as well as aircraft parts or rail vehicles and ships.

The simulation indicates that exports to the United States are expected to decline by €414 million owing to the additional duties in this very sector, C21; that is a decline of 16 per cent. The effect is expected to be slightly more significant in the "Food products, beverages and tobacco" sector, which could contract by 17 per cent or €320 million. For machinery, the expected decrease is €142 million (–0.65 per cent) and for fabricated metal products, €36 million (–0.77 per cent). Other sectors, by contrast, could benefit to a small extent from the induced depreciation in the value of the euro over the dollar, above all the high-export chemical and road vehicles sectors.

Table 3 shows the 20 sectors in their exporting countries with the largest export losses, while Table 4 depicts the 20 export country-sector combinations with the largest export gains. This table incorporates not only Europe, but the whole world, including the home market of US companies,

and reveals that the sharpest falls in exports are found in the UK's "Food products, beverages and tobacco" sector, where the simulation predicts a loss of 33 per cent.[42] The reason for this is the significance of Scottish whisky in these trade relations. Ireland is affected in a very similar way. The focus on whisky could be seen as a reaction to European counter-tariffs imposed in June 2018, which made US bourbon subject to special tariffs in response to Trump's duties on steel and aluminium. Tariffs like these improve the relative competitive position of US manufacturers compared with EU manufacturers in the US market, thus allowing the offsetting of market share lost in the EU. On the other hand, there is a particularly high degree of vertical integration in the food industry: when it comes to whisky and some other foods, production is concentrated within one country and these tariffs thus target value creation in the affected country very precisely. In the case of aircraft, the situation is less clear-cut: every Airbus also includes components from the United States. For example, the proportion of domestic value added

42 Since the dispute settlement proceedings were conducted against the European Union and its member states Germany, France, Spain and – at the time – the United Kingdom, the authorisation of retaliatory tariffs is expected to remain valid even after the UK's exit from the EU on 1 February 2020 or the end of the (extendible) transition period under the Withdrawal Agreement (currently 31 December 2020). The question is, however, to what extent the United States will be required to allocate the volumes of retaliatory tariffs.

in French aircraft exports accounts for about half of the export value (TiVA database OECD, D30 (other transport equipment), series EXGR_DVASH).

**Table 3: The 20 exporting country-sector combinations suffering the largest losses in exports to the United States**

| Exporter | | Sector | Per cent | € million |
|---|---|---|---|---|
| 1 | GBR | Food products, beverages and tobacco | –33.3 | –769.4 |
| 2 | IRL | Food products, beverages and tobacco | –21.0 | –740.8 |
| **3** | **DEU** | **Other vehicles** | **–16.0** | **–413.6** |
| 4 | FRA | Other vehicles | –8.2 | –406.6 |
| 5 | United States | Mining | –0.1 | –381.2 |
| 6 | FRA | Food products, beverages and tobacco | –13.2 | –325.0 |
| **7** | **DEU** | **Food products, beverages and tobacco** | **–16.7** | **–319.3** |
| 8 | ESP | Food products, beverages and tobacco | –24.2 | –295.2 |
| 9 | ITA | Food products, beverages and tobacco | –5.7 | –183.0 |
| **10** | **DEU** | **Machinery** | **–0.7** | **–142.0** |
| 11 | GBR | Machinery | –0.8 | –39.0 |
| **12** | **DEU** | **Fabricated metal products** | **–0.8** | **–36.4** |
| 13 | United States | Pharmaceutical products | 0.0 | –29.1 |
| 14 | DNK | Food products, beverages and tobacco | –6.9 | –23.8 |
| 15 | GBR | Textiles, wearing apparel, leather | –2.6 | –11.6 |
| 16 | United States | Chemical products | 0.0 | –10.7 |
| 17 | ESP | Agricultural commodities | –8.9 | –8.9 |
| 18 | NLD | Food products, beverages and tobacco | –0.7 | –7.1 |
| 19 | KOR | Road vehicles | 0.0 | –4.8 |
| 20 | FIN | Food products, beverages and tobacco | –6.4 | –3.6 |

Source: Simulation results, Felbermayr and Stamer (2019), own analysis and presentation.

The third most important export country-sector combination is the German "Other vehicles" sector, which was already included in Table 2, closely followed by the same sector in France, where, in absolute terms, the losses are similar to those incurred by Germany. However, in relation to the total sectoral exports, the loss in France is only about half as high as in Germany. The US mining sector comes fifth. Its sales in the home country (exports to the United States) fall quite significantly, because the appreciation in the value of the dollar makes foreign commodities (especially crude oil) more competitive.

Third countries are also affected, but to a much smaller extent, due to global value chains. If the new US tariffs increase the price of input products from the United States that are used in production, for example in Korea, this may lead to a decline in Korean exports to the United States.

**Table 4: The 20 exporting country-sector combinations with the largest gains in exports to the United States**

| Exporter | Sector | Per cent | € million |
|---|---|---|---|
| **United States** | **Food products, beverages and tobacco** | **0.3** | **2,596.4** |
| **United States** | **Other vehicles** | **0.5** | **1,010.4** |
| United States | Agricultural commodities | 0.2 | 686.4 |
| RoW | Mining | 0.3 | 293.0 |
| United States | Fabricated metal products | 0.1 | 215.2 |
| United States | Machinery | 0.0 | 164.8 |
| United States | Metals | 0.1 | 147.8 |
| United States | Electronic and optical equipment | 0.1 | 145.5 |
| DEU | Refinery products | 0.3 | 111.3 |
| United States | Paper | 0.0 | 77.8 |
| United States | Rubber and plastic | 0.0 | 76.2 |
| **RoW** | **Food products, beverages and tobacco** | **0.4** | **74.9** |
| CHN | Electronic and optical equipment | 0.1 | 70.7 |
| United States | Refinery products | 0.0 | 67.6 |
| DEU | Chemical products | 0.4 | 50.1 |
| RoW | Refinery products | 0.2 | 47.8 |
| RoW | Electronic and optical equipment | 0.1 | 44.3 |
| CAN | Mining | 0.0 | 43.4 |
| CAN | Food products, beverages and tobacco | 0.4 | 41.9 |
| United States | Furniture | 0.0 | 41.5 |

Source: Simulation results, Felbermayr and Stamer (2019), own analysis and presentation. RoW means "rest of world" (mostly smaller countries that are not specifically reported in the model).

The results show very clearly that the additional duties imposed by the United States lead to significant revenue losses for German manufacturers in the United States. The sectoral effects reported are often driven by a small number of SME-type companies. Studies relating to the planned but failed Transatlantic Trade and Investment Partnership (TTIP) have revealed that, at the detailed product level, only few German companies export to the United States, which means the losses caused by the tariffs are concentrated on a small number of companies.

The option to modify the schedule of products subject to additional duties and increase the rate of duty from the current 15 to 25 per cent to 100 per cent at any time means that the dispute creates considerable uncertainty for all exporters to the United States. The result is a reduction in export activity, although this is hard to quantify precisely because a causal link cannot be established.

With respect to the export country-sector combinations with the largest export gains in the United States, it should be mentioned that the new duties on European products benefit primarily US manufacturers. For example, the model shows an increase in sales for the US "food products, beverages and tobacco" sector of around €2,596 million. US aircraft manufacturing is benefiting in the amount of approximately €1,010 million.

## IV. Regulatory assessment/classification in times of the coronavirus crisis

Rarely is cross-border cooperation more important than during a pandemic; as the Greek root of this word indicates, it is a problem that affects "all the people". Unfortunately, the pandemic has gripped a world in which multilateral institutions such as the World Trade Organization have already been in crisis for some time; the problem discussed above with the WTO's Appellate Body is an eloquent, but by no means isolated, example.

At the beginning of March 2020, Germany and France briefly imposed new restrictions on exports of face masks and other medical equipment, thereby disregarding the rules of the European Single Market. The neighbouring countries of Switzerland and Austria protested vehemently to Brussels. The European Commission saved the situation by allowing export controls against third countries and in return enforcing their removal in intra-European trade.[43] Although this measure could very well be covered by applicable WTO law, it puts pressure on Europe's trading partners, which have followed the European example and also introduced export controls. Evenett (2020) provides evidence of more than 50 countries that have already introduced such measures. He criticises the strategy of using export restrictions to improve the domestic availability of medical equipment in the short term, labelling it a "sicken-thy-neighbour policy". Indeed, the introduction of such restrictions does not change the underlying problem of an international shortage of production capacity for certain medical products that are currently in high demand. On the contrary, these kinds of measures prevent production from being organised collaboratively in a way that maximises output.

Germany and the European Union should strongly advocate that existing tariffs and trade barriers, especially in connection with critical medical products, be reduced as quickly and significantly as possible and

43 See *Glöckle*, Export restrictions under scrutiny – the legal dimensions of export restrictions on personal protective equipment, EJIL talk, 7 April 2020, https://www.ejiltalk.org/export-restrictions-under-scrutiny-the-legal-dimensions-of-export-restrictions-on-personal-protective-equipment/ (accessed on 11 May 2020).

that new export restrictions be banned (Bown 2020 and Gonzalez 2020). This is all the more important given that many countries, including Russia, India and Turkey, have imposed export restrictions in other important areas such as grain supply. Food shortages in developing countries that rely on imported foodstuffs could lead to bottlenecks there, with the potential of causing more deaths than Covid-19.

In Germany, many observers regard the expected sharp downturn in global trade as proof that the country's strong focus on global markets and production networks has made the economy more vulnerable. Various quarters suggest that globalisation should be scaled back cautiously as a way of achieving greater resilience, and although it is not a foregone conclusion, it is conceivable that sectoral specialisation brought about by the international division of labour may increase the volatility of macroeconomic output. On the other hand, if the shocks are country-specific rather than sectoral, international trade acts as a kind of insurance, and macroeconomic volatility declines as the cost of trading decreases. Recent literature demonstrates that, in quantitative terms, country-specific shocks are much more significant than sectoral shocks, making the insurance function more critical. As for the coronavirus pandemic, this is clearly a systemic shock that affects all countries and sectors of the economy: any stabilising function can be attributed to international trade only in that different countries are affected at different times and in different intensities. These arguments do not permit the conclusion that a less developed international division of labour would make it easier to deal with the shock at the national level.

The microeconomic literature on disaster-induced shocks to individual suppliers demonstrates that, although such shocks spread in production networks and cause considerable losses for customers, especially in the case of specific input, companies that have a well diversified global supplier structure are more resilient.

These considerations also apply in the medical sector, which has particularly been in focus throughout the entire crisis. The rightful call for greater supply security is not achieved by renationalising production, but by diversifying procurement systems more strongly and increasing local stocks of products.

The crisis shines a spotlight on an aspect of globalisation that has been almost completely sidelined by the World Trade Organization. Cross-border mobility of individuals is essential to ensure the functioning of global trade, and in particular of value creation networks throughout the world, but now precisely this form of globalisation that has brought the virus from China to Europe and the United States. For example, it was carried to Germany by business travellers working for German companies such as Webasto in the Chinese province of Hubei, and the northern Italian fashion industry's close ties with China could be the reason for the early spread of the virus in Lombardy. Even if such causal links are difficult to prove, it is to be expected that many countries will perform more stringent health checks at their borders in the future. This may lead to delays, slow down immigration processes, and endanger the functioning of global value chains. International tourism, for which the WTO's service agreement stipulates only a

small number of rules, would come under particular pressure, which would be devastating for countries that primarily rely on income associated with this industry.

The World Health Organization (WHO) does specify rules that are embedded in international law "to prevent [and] protect against the international spread of disease in ways [...] which avoid unnecessary interference with international traffic and trade". These regulations cannot, however, be compared to the rules the World Trade Organization has laid down for goods trading in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which specifies notification and transparency requirements as well as clearly defined legal processes aimed at ensuring that SPS measures are proportionate, non-discriminatory and complied with. Such rules will become important in future for international passenger transport. It seems therefore of key importance to ensure that public health aspects are better integrated into WTO law, especially in connection with the service trade.

Europe should be particularly interested in developing such rules, not just because the continent is, and should remain, relatively open, but because a key outcome must also be the establishment of good rules for the external borders of the Schengen Area, which could suffer long-lasting damage as a result of the crisis. Any failure by EU member states to create confidence in the quality of the controls for the external borders could lead to the erosion of the Schengen Area and thus of the internal market, and could ultimately result in significant economic costs. To prevent this, the EU should provide funds for expanding public health controls – as it does, for instance, for the Frontex programme to protect the Area's external borders from illegal crossings.

Cooperation between the United States, China and the European Union is essential in all areas requiring multilateral solutions. Disputes over subsidies to aviation companies represent more than an irritation in this context. The crisis could, however, cause paradigm change in several countries. After all, governments, above all in the United States and EU member states, have launched aid programmes of unprecedented scale for companies facing difficulties, yet much of this government aid meets the WTO's legal definition of subsidies. This fundamentally alters the debate; the previous positions on trade policy have involved China and the "West" (European Union and United States) facing each other with relatively irreconcilable differences, but this could change. The outcome could be a new set of rules that offers WTO members greater flexibility in granting subsidies and could therefore also contribute to de-escalating the Airbus-Boeing dispute.

# D. Legal claims to compensation for companies that have incurred losses

From the perspective of affected German companies whose export products to the United States are subject to DSU-compliant retaliatory tariffs or other additional duties that (potentially) contravene WTO law, although these companies were not party to the emergence of the underlying trade dispute between the United States and the EU and its member states, the effects described above raise the question of whether they may be entitled to claim compensation from the United States, the European Union or the Federal Republic of Germany itself based on official liability or liability for denial damage (*Aufopferung*).

## I. Legal claims against the United States

The principle of sovereign immunity embedded in customary international law already prevents companies that have incurred losses from suing the United States for compensation, at least in domestic court.[44] Since the imposition of customs duties is an act of statehood (*acta iure imperii*), German courts simply do not have the necessary jurisdiction. Based on the overriding interest of the preservation of sovereignty interests between states, it therefore follows *a limine* that German state liability law cannot be applied to (alleged) infringements of a legal good of a third country.[45]

Although companies are free to sue for compensation in a US court, the practical chances of success are extremely limited. This is firstly attributable to the empirical legal fact that courts will naturally be reluctant to award claims in favour of third-country plaintiffs that are traceable to actions of state bodies to which they themselves belong. Another fact to consider is that all tariffs thus far have been deemed legal under US foreign trade law. In any case, there is no doubt whatsoever about the legality of the retaliatory tariffs authorised by the DSB. The question of whether US tariffs contravene WTO law does not constitute a sufficient basis for attacking measures implemented by the US Administration. In this respect, the United States takes a similarly restrictive approach to the problem of the "direct effect" of WTO agreements and the DSB's rulings based on them as the European Court of Justice (ECJ) does within the EU (see section II immediately below).[46]

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44 For fundamental information on this principle, see *Herdegen*, Völkerrecht, 18th ed. 2019, Section 37 marginal no. 1 et seq.

45 For more details on this issue as a whole, see *Baldus/Grzeszick/Wienhues*, Staatshaftungsrecht, 2nd ed. 2018, p. 154 et seq.

46 For a comparison of ECJ case law and the respective treatment in the United States, Japan and China, see *Herrmann/Streinz*, Die EU als Mitglied der WTO, in: v. Arnauld (ed.), Europäische Außenbeziehungen, EnzEuR, 2014, Vol. 10, Section 11 marginal no. 123 et seq.

## II. Legal claims against the European Union

### 1. For losses incurred as a result of US tariffs that (potentially) contravene WTO law

Compensation claims under EU law on the basis of Article 340 (2) of the TFEU will have to be rejected, at least as regards the additional US duties that (potentially) contravene WTO law outlined above (B.III). From the outset, there is no legally relevant conduct of EU bodies that could form a starting point for the required breach of EU law.[47]

### 2. For losses incurred as a result of retaliatory US tariffs that comply with WTO law

An issue that requires a more differentiated, although likewise ultimately negative, response is that of liability under EU law for losses incurred as a result of EU breaches of WTO law (loss caused by the act of contravention) or – as in the *Airbus-Boeing* case – as a result of the failure to implement, or to do so correctly, the legally binding recommendations issued in a ruling of the DSB (where the adverse economic impact arises from the fact that the complainant is authorised by the DSB to impose retaliatory tariffs).[48] It is inextricably linked to the controversy over the direct effect of world trade law in the EU's legal system, which the ECJ has consistently rejected in case law[49], even after the establishment of the WTO; at best it accepts its effect in narrowly defined exceptional circumstances, which are not relevant here[50].

a) Liability for unlawful acts

This has direct consequences for potential extra-contractual liability based on Article 340 (2) of the TFEU, because it requires a breach of EU law. The ECJ rejects the direct effect of WTO agreements. As a result, individuals cannot invoke its provisions and it generally refuses to benchmark acts of EU bodies against WTO law. The absence of a usable act of contravention is ultimately an insurmountable obstacle to liability.[51] In this way, the ECJ harmonises protection under primary and secondary law. Specifically, this means that in the *Airbus-Boeing* constellation it would make no difference whatsoever whether a (hypothetical) competitor at the time had proceeded directly against the EU subsidies in contravention of WTO law in favour of the aircraft manufacturer by bringing an action for annulment in accordance

47 For a detailed discussion of the individual requirements, see *Steiner*, Die außervertragliche Haftung der Europäischen Union nach Art. 340 Abs. 2 AEUV für rechtswidriges Verhalten, 2015, p. 77 et seq.

48 *Herrmann/Streinz*, Die EU als Mitglied der WTO, Section 11 marginal no. 144, incl. many case law references.

49 For fundamental information on the rejection of the direct effect of the GATT 1947, see ECJ joined cases 21-24/72 [1972], 1219 – International Fruit Company et al.; on the transferred application of said case law on the GATT to WTO law, which is relevant here, see ECJ C-149/96 [1999], I-8425 – Portugal/Council.

50 Different view: *Weiß*, EuR 2005, 277, 287 et seq., which calls for the application, with the necessary modifications, of the *Nakajima* doctrine to cases where a DSB ruling has been incorrectly implemented.

51 ECJ C-104/97 P [1999], I-6983 marginal nos. 19-22 – Atlanta.

with Article 263 (4) of the TFEU, or whether companies from other industries were to sue today in accordance with Article 340 (2) of the TFEU for compensation for the export losses suffered as a result of US retaliatory duties.

b) Liability for lawful acts

For this reason, the General Court of the European Union (GCEU) considered liability for lawful acts (claim to denial damage) because, unlike Article 340 (2) of the TFEU, this does not require the claimant to prove any contravention of EU law. Instead – assuming that such an unwritten liability even exists – "unusual" and "special" damage would have to be demonstrated.[52] The GCEU and – in confirmation – the ECJ have meanwhile ruled in the *FIAMM* case that, even for economic operators in other sectors, losses resulting from the suspension of concessions within the meaning of Article 22 of the DSU were not a special sacrifice, but a "normal risk" – the manifestation of which would have to be calculated by any exporter domiciled in the EU that sold its products in third countries.[53]

The significance of the *FIAMM* ruling is reflected firstly in the conclusion, which seems obvious based on the above findings, that the ECJ assumes that companies operating in the EU's domestic market in principle have to expect that EU bodies might act in contravention of WTO law.[54] Secondly – and more far-reaching – in appeal proceedings following an overall assessment to compare the legal practices of the member states, the ECJ came to the conclusion that, at least as EU law stands now, there are generally no regulations governing extra-contractual liability of the EU for the lawful performance of its activities.[55] With reference to the ongoing development of the EU's legal system and case law, the ECJ identifies the possibility that it may make an assessment to the contrary in the future, but the legal barriers to such a change seem high.[56] This is unaffected by the fact that, based on the judgement handed down in 2008, a Charter of Fundamental Rights was established in the Lisbon Treaty, because its guidance had already considered implications for fundamental rights in the *FIAMM* case in the context of protecting general legal principles.[57]

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52 See GCEU T-184/95 [1998], II-667 marginal no. 59 – Dorsch Consult (incl. other case law references).

53 GCEU T-69/00 [2005], II-5393 marginal nos. 205 and 208 – FIAMM et al.; ECJ joined cases C-120/06 P and C-121/06 P [2008], I-6513 marginal no. 186 – FIAMM et al.

54 This raises the question of whether this is compatible with the European Union's objectives as laid down in Article 3 of the TEU; paragraph 5 sentence 2 of the Treaty calls for "strict observance [...] of international law".

55 ECJ joined cases C-120/06 P and C-121/06 P [2008], I-6513 marginal no. 176 – FIAMM et al.

56 For a slightly more optimistic view, see *Haack*, EuR 2009, 667, 673 et seq.

57 ECJ joined cases C-120/06 P and C-121/06 P [2008], I-6513 marginal no. 182 et seq. – FIAMM et al.

## III. Legal claims against the Federal Republic of Germany

### 1. For losses incurred as a result of US tariffs that (potentially) contravene WTO law

Similar to the situation under EU law (see II.2.a above), in the absence of relevant sovereign acts of a German official, a claim of state liability under national law pursuant to Section 839 (1) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) in conjunction with Article 34 sentence 1 of the German Basic Law (*Grundgesetz*, GG) in relation to US tariffs that (potentially) contravene WTO law (see II.2 above) can also be ruled out.

### 2. For losses incurred as a result of retaliatory US tariffs that comply with WTO law

An issue that has attracted little interest in practice and scientific research thus far is whether cases of losses attributable to retaliatory tariffs within the meaning of Article 22 of the DSU may give rise to liability of the German state.[58] First of all, it must be noted in this context that the Federal Republic of Germany is itself a member of the WTO and can therefore be a respondent in dispute settlement proceedings – and thus (also) be responsible for the implementation of binding DSB recommendations directed at it. This is illustrated in the example of the *Airbus-Boeing* case ("EC and *Certain Member States*"[59]), in which subsidies granted by not only by the EU but also by Germany were classified as a violation of the SCM Agreement, not only in this initial dispute but also during the implementation phase in which the United States received authorisation to suspend concessions. As recently as in December 2019, a second Compliance Panel again criticised the inadequate implementation of the DSB recommendations, including in particular the contraventions committed by the Federal Republic of Germany.[60]

#### a) Liability for unlawful acts

Nonetheless, a state liability claim pursuant to Section 839 of the BGB in conjunction with Article 34 of the GG would have to be ruled out in these constellations. The German courts have indeed approached the problem of direct applicability of world trade law with greater flexibility than the ECJ in individual instances in the past:[61] their affirmation of a suitable act of violation does not seem to have been excluded

58 *Weiß*, EuR 2005, 277, 300 addresses this issue briefly, but with regard to an act of the Federal Republic of Germany predetermined by EU law (enforcement of EU secondary law in contravention of WTO law).

59 Emphasis by author.

60 By way of example, see WTO Panel Report, WT/DS316/RW2 marginal no. 8.1, EC – Large Civil Aircraft (Second Recourse to Art 21.5 DSU): "In relation to whether the [EU and Certain Member States] have complied with the obligation to 'withdraw the subsidy', we find that the [EU] has failed to demonstrate that: the [***] amendment to the German A350XWB LA/MSF loan agreement has withdrawn the German A350XWB LA/MSF subsidy […]."

61 See *Herrmann/Streinz*, Die EU als Mitglied der WTO, Section 11 marginal no. 140 et seq.

from the outset.[62] But the facts constituting liability were nevertheless not satisfied because there was no official duty pertaining to a third party: German dogmatics, unlike the practice of the ECJ, clearly distinguish between "applicability" and "enforceability" (in the sense of conferring individual rights) and, according to the vast majority of views, the latter is not the objective of the WTO agreements.[63]

b) Liability for lawful acts

Apart from specific provisions in police and security law and in threat prevention law, German state liability law recognises only two variants of liability for denial damage, which are now enshrined in customary law (each with three narrowly defined sub-categories).[64] In addition to a general claim for denial damage, which can only be made if there has been interference in the area of protection of an intangible legal right protected by Article 2 (2) of the GG and is therefore not relevant in the present case, there are special claims to denial damage in cases of interference with property rights. In contrast to traditional targeted expropriation, the institution of expropriating interference is characterised by the fact that the individual has suffered special denial damage as an atypical, unforeseen side effect of a sovereign legal act.[65]

With respect to the retaliatory US tariffs imposed on certain German goods imports during the *Airbus-Boeing* dispute, the existence of special denial damage that is both imponderable and unreasonable could very well be argued.[66] However, significantly greater difficulties arise in connection with two preceding requirements of this claim for liability. Closer investigation would be required firstly of the issue of the immediacy of the interference with rights and secondly as to whether the area of protection pertaining to guaranteed property rights pursuant to Article 14 of the GG has been encroached upon. "Immediacy" in this context means that the interference must be specifically attributable to sovereign acts.[67] If we link the retaliatory US tariffs to the inadequate implementation of the recommendations of the DSB, for which Germany is (in part) responsible, the objection could be raised that, although Germany was jointly responsible for causing the late approval of the suspension of customs concessions,

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62 This would, however, require that in certain areas not determined by internal EU powers (such as state liability law), it would be up to the courts of the member states to decide whether they recognise that WTO agreements and DSB rulings have direct effect. So far, the ECJ seems to assume to the contrary that its interpretative sovereignty (i.e.: no direct effect), even in purely national case constellations, extends as far as the EU's external powers with regard to the individual WTO agreements.

63 See different view held by *Schwartmann*, Private im Wirtschaftsvölkerrecht, 2005, p. 158 et seq., incl. references to the prevailing opinion.

64 For a summary classification, see *Kramer*, Allgemeines Verwaltungsrecht und Verwaltungsprozessrecht, 3rd ed. 2017, Section 16 marginal no. 454.

65 See details in *Ossenbühl/Cornils*, Staatshaftungsrecht, 6th ed. 2013, p. 325 et seq.

66 In this context, the EU law approach to determining "unusual" and "special" damage developed by *Held*, Die Haftung der EG für die Verletzung von WTO-Recht, 2005, p. 312 et seq. could be transferred to German dogmatics.

67 BeckOGK/*Dörr*, 1 December 2019, Section 839 of the BGB marginal no. 1148.

an evaluative attribution of the consequences of the losses severs the intrinsic connection between inadequate implementation and export losses as a result of the US Administration's decision on which particular products would be affected by additional duties from the subsequent authorisation pursuant to Article 22.7 of the DSU, which made it possible to levy such duties in the first place. A more structural problem is posed by the limit of the concept of property laid down in the Basic Law, which gives constitutional protection to each and every property right granted by legislators, but fails to capture the underlying physical property.[68] There are similarities with the *FIAMM* case, where the ECJ refused to accept that the guarantee of property extends to market shares and earning opportunities.[69] According to the Federal Court of Justice (*Bundesgerichtshof*, BGH), too, Article 14 of the GG protects what has been earned (the result of activity), while Article 12 of the GG generally protects the prospects of earning (the occupation as such).[70] It has always refused to extend the judicially developed established guarantees to the "entrepreneurial freedom" guaranteed in parts of Article 12 and Article 2 (1) of the GG.[71]

68 Ibid., marginal no. 1143 with numerous other references.

69 ECJ joined cases C-120/06 P and C-121/06 P [2008], I-6513 marginal no. 185 – FIAMM et al.

70 BGHZ 111, 349 (357 et seq.); BVerfGE 30, 292 (334 et seq.).

71 With specific reference to interferences equal to expropriation and denial damage BGHZ 132, 181 (188).

# E. Possibilities of loss compensation

EU and national legislation do not provide for legal compensation claims based on official liability or liability for denial damage for companies that have suffered losses as a result of DSU-compliant retaliatory tariffs or (potentially) unlawful US tariffs but are not involved in the underlying trade conflict. Thus the question arises as to whether compensation may be permissible on a non-judicial basis. In responding to this question, a distinction must be made between options for action at the level of the Federal Republic of Germany on the one hand and at the level of EU (secondary) law on the other.

## I. Options available to member states

In the case of a compensation solution limited to companies domiciled in Germany, national law does not give rise to any significant obstacles, since neither formal federal laws[72] such as the German Budgetary Principles Act (*Haushaltsgrundsätzegesetz*, HGrG) and the Federal Budget Code (*Bundeshaushaltsordnung*, BHO) nor Article 114 (2) sentence 1 of the GG or the business-relevant provisions of the Basic Law considered as a whole are inconsistent with such state intervention.

Strict limits are, by contrast, established by EU state aid law stipulated in Articles 107 et seq. of the TFEU. Even if the compensation payments were calculated exactly to recompense exclusively for losses suffered as a result of the retaliatory tariffs in the US export market, they would nevertheless constitute preferential treatment within the meaning of Article 107 (1) of the TFEU and trigger the general prohibition laid down there.[73] This is because a financial benefit would be identifiable in the mere fact that the payments would put the recipient companies in a position as if the damaging event, i.e. the retaliatory US tariffs, had never occurred. Consequently, the European Commission has to be notified of compensation payments as new aid, unless they are exempted by the *de minimis* rule, which specifies a maximum amount of €200,000 that an individual company is allowed to receive in a three-year period.[74] If the payments exceed this threshold, Article 108 (3) of the TFEU requires them to be approved by the European Commission. Yet the Commission refused to approve them: paragraphs 2 and 3 of Article 107 of the TFEU were not applicable because, apart from a small number of special cases which have to date been irrelevant in practice, its regime of exceptions is "blind" in relation to third-country practices.

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72 *Gesetz über die Grundsätze des Haushaltsrechts des Bundes und der Länder*, Federal Law Gazette 1969 I, p. 1273; *Bundeshaushaltsordnung*, Federal Law Gazette 1969 I, p. 284.

73 The situation would only be different if German state liability law made the compensation payments mandatory so that the criterion of voluntary behaviour did not apply.

74 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ 2013 L 352/1.

## II. Options at EU level

If the aim was therefore to find an EU supranational solution, two regulatory approaches would essentially be available. One option would be to amend the secondary law (General Block Exemption Regulation, GBER[75]) or soft law[76] acts that set out the details of discretionary exemptions to the effect that they permit measures to be taken by member states to compensate for retaliatory tariffs imposed by third countries under circumstances to be defined in detail. Another option would be to establish a compensation fund for the entire European Union by way of an EU regulation (see Article 288 (1) and (2) of the TFEU).

### 1. Amendment to soft law to bring it in line with Article 107 (3) (b) alternative 1 of the TFEU

First of all, there is the option of recourse to Article 107 (3) (b) alternative 1 of the TFEU (important projects of common European interest – IPCEI), which requires extensive interpretation and has been widely discussed since the National Industrial Strategy 2030[77] was initiated. The European Commission laid down the interpretation and application of this clause in the *IPCEI* Communication of June 2014[78]. The prominent mention of the EU's competitiveness suggests that the European Commission uses the industrial policy effect of an *IPCEI* as the primary factor in assessing whether a matter is eligible for approval. This does not constitute any obstacle in the case of compensation for export losses in a third-country market, if it is specifically aimed at preserving or restoring this competitiveness. It should, however, be noted that the communication requires the involvement of normally more than one member state and makes clear that the (socio-)economic value added by the *IPCEI* must not be limited to the aid recipient or individual (sub-)sectors.[79]

It could be argued with regard to the former criterion that the retaliatory tariffs affect companies from all member states and each member state should theoretically have an interest in offsetting them. However, the latter criterion would not be met, since the likelihood of positive EU-wide and cross-sector spill-over effects on companies other than those that receive the aid as compensation seems rather remote. In terms of legal policy, sharp differences in budget flexibility between member states make it unrealistic in any event that the *IPCEI* Communication will be modified in this regard: if the compensation was exclusively or largely financed from the budgets of the individual member states, meaning with no or only minimal

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75 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ 2014 L 187/1 (last amended by Regulation (EU) 2017/1084 of 14 June 2017, OJ 2017 L 156/1).

76 These are non-binding frameworks, guidelines, declarations and notices aimed at giving the Commission's decision-making practice greater transparency while at the same time enhancing legal certainty through self-commitment.

77 See *Federal Ministry for Economic Affairs and Energy*, Industrial Strategy 2030 (revised November 2019), p. 31.

78 Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2014 C 188/4.

79 See e.g. marginal no. 17 of the *IPCEI* Communication.

co-funding from EU resources, this could potentially threaten the EU's aim of solidarity and cohesion among member states (see Article 3 (3) of the TEU). While member states such as Germany would be in a position to fully or partially compensate for prohibitive retaliatory US tariffs imposed on certain exports of domestic companies by invoking Article 107 (3) (b) of the TFEU, fiscal constraints may make it impossible for other, smaller member states to consider this as an option.

### 2. Establishment of a new fund or expansion of an existing fund at EU level

The "deep-pockets" problem[80] means that preference should be given to proposals of a more proactive role for the EU, i.e. a secondary law compensation mechanism, which has on occasion been discussed in the past, both in practice[81] and in the literature[82]. Specifically with regard to compensation payments for collateral damage caused by commercial policies, such as the US sanctions in the *Airbus-Boeing* case, the introduction of permanent framework legislation or *ad hoc* interventions in favour of the companies affected should be considered on the basis of the extensive powers of external action provided for in Article 207 (1) of the TFEU or the jurisdictional provisions on industry laid down in Article 173 (3) subparagraph 1 sentence 2 of the TFEU. Embedding such a mechanism in EU law – rather than the legal systems of the member states – would ensure at the same time that the funds can be accessed without discrimination and without distorting the internal market. Another argument in its favour is that EU aid would not be subject to the EU's aid supervision system, but only to the limits set in WTO agreements (more on this in III below).

However, applications for funds from the European Globalisation Adjustment Fund (EGF)[83] seem to have smaller chances of success from the perspective of member states. Pursuant to Article 1 (2) of the EGF Regulation, the purpose of this fund is to demonstrate solidarity towards, and to support, workers made redundant and self-employed persons whose activity has ceased as a result of major structural changes in world trade patterns due to globalisation or as a result of the financial and economic crisis. Despite

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80 This usage can be attributed to the former Commissioner for Competition, *Joaquín Almunia*, Doing more with less – State aid reform in times of austerity: Supporting growth amid fiscal constraints, Speech given at King's College, London, 11 January 2013.

81 See calls by the European Parliament at the time for the establishment of a "compensation fund for European companies that fall victim to the legitimate application of a common trade policy" [our translation] (Bulletin Quotidien Europe of 4/5 May 1999, no. 7458, p. 10).

82 See discussion dedicated to this line of argument in *Bronckers/Goelen*, LIEI 2012, 399, 410 et seq.

83 Regulation (EU) No 1309/2013 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014-2020) and repealing Regulation (EC) No 1927/2006, OJ 2013 L 347/855.

the European Commission's recent extensive interpretation of its scope,[84] it cannot be assumed that the fund will be suitable for cushioning financial difficulties of a company domiciled in the EU as a result of retaliatory tariffs attributable to a trade conflict. Although such actions may indeed lead to (mass) redundancies or even insolvencies, the fact that they were caused by the EU's deliberate non-compliance with a legally binding ruling of the DSB means that – unlike an increase in competitive pressure in a specific (sub-)sector due to comparative cost advantages for non-EU third countries – they can hardly be interpreted as a factual phenomenon of the increasing globalisation of world trade.

## III. Restrictions on compensation under WTO law

If a compensation mechanism were to be established at EU level, the details would need to consider not only the political tensions with the trading partner imposing the retaliatory tariffs, which may believe the effectiveness of its sanctions has been diminished, but above all the provisions of WTO law. They arise to a lesser extent from the DSU itself, but rather from Articles 3 and 5 of the SCM Agreement.

### 1. Compatibility with the DSU

Contrary to suggestions in some quarters,[85] compensation payments would not undermine the purpose of retaliatory tariffs in contravention of WTO law, because they would not change its force and effect. From a factual standpoint, they would only shift the pressure exerted on the EU to restore compliance. In the absence of compensation payments, this pressure primarily manifests itself in the form of export losses that worsen the EU's balance of trade. Although compensation payments, if granted, could (partially) offset the latter effect, there would be an undiminished interest in ceasing the retaliatory tariffs to remove the additional burden on public finances. The legal arguments raised against incompatibility with the DSU rightly suggest that the DSU is silent on the issue of DSU compatibility of such a mechanism and that its Article 3.2 stipulates that it is prohibited to construct obligations other than those explicitly provided for in the agreements covered by the DSU.[86]

### 2. Compatibility with the SCM Agreement

As explained above (in D.III.2), since subsidies granted on the basis of such a compensation mechanism specifically do not constitute the fulfilment of a state liability or a denial damage claim to which the recipients are entitled against the EU, they would not only constitute a financial contribution within the meaning of Article 1.1(a) of the SCM Agreement but would be the equivalent of conferring a benefit

84 Decision (EU) 2018/1093 of the European Parliament and of the Council of 4 July 2018 on the mobilisation of the European Globalisation Adjustment Fund following an application from France — EGF/2017/009 FR/Air France, OJ 2018 L 200/44, issued as a – politically controversial – response to the effects of subsidies granted by third countries to airlines, particularly in the Middle East.

85 See e.g. *Weiß*, EuR 2005, 277, 295.

86 See convincing arguments in *Bronckers/Goelen*, LIEI 2012, 399, 413 et seq., who also rule out recourse to Article XXIII of the GATT (non-violation complaint).

within the meaning of Article 1.1(b) of the Agreement.[87] Consequently, a subsidy would be deemed to exist in each case where, due to its limitation to companies domiciled in the EU that have suffered losses as a result of retaliatory tariffs without any involvement in the underlying trade conflict, that subsidy would have to be categorised as "specific" pursuant to 2.1(a) of the SCM Agreement.

Critical is the ensuing question as to whether the compensation would constitute an export subsidy within the meaning of Article 3.1 of the SCM Agreement, which is prohibited *per se*, or a contestable subsidy within the meaning of Article 5 of the SCM Agreement. It should noted at the outset that it is impossible to make universally applicable statements in this context, because allocation to one or the other category depends too much on the specific circumstances of each individual case – especially the exact working of the EU secondary law act and how it is applied in practice. In principle, the total prohibition contained in Article 3.1 of the SCM Agreement will always apply where the granting of a subsidy depends *de iure* or even only *de facto* on the recipient's export performance.[88] If the compensation were to be directly based on the latter in order to align the amount of subsidy as closely as possible with the volume of import tariffs to be managed by the respective export company, the risk of contravention would be greater than in a case where the subsidies are based in more abstract terms on the fact that export opportunities have been lost.

Although the EU's compensation payments would in any case constitute contestable subsidies within the meaning of Article 5 (a) to (c) of the SCM Agreement, the risk that another member could meet the strict justification requirements for the existence of a serious loss caused by the subsidy (Article 5 (c) in conjunction with Article 6 of the SCM Agreement) seems ultimately manageable, in part given the abrogation of the criteria for prejudice in Article 6.1 of the SCM Agreement and the restrictive use of this variant of "adverse effects" in the decision-making practice of the *Appellate Body*[89]. Therefore, even in the unlikely case that the EU's payments were adequate to fully compensate for the prohibitive retaliatory US tariffs and thus restore the market access conditions that prevailed before they were imposed, there are no indications in the *Airbus-Boeing* case that they could additionally bring about a change in the allocation of market share to US or third-country markets.[90]

87 See an arguably different view in *Bronckers/Goelen*, LIEI 2012, 399, 415 et seq.

88 *Herrmann*, in: Herrmann/Weiß/Ohler, Welthandelsrecht, Section 14 marginal no. 694.

89 For details, see *Coppens*, WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints, 2014, p. 149 et seq. incl. many references.

90 Similarly cautious: *Bronckers/Goelen*, LIEI 2012, 399, 417: "theoretically possible".

# F. Conclusions and recommendations

1. With regard to the commercial policy measures against the EU already taken or planned by the US Administration, a strict distinction must be made between retaliatory duties authorised by the DSB or additional duties justified on the basis of WTO/GATT exceptions, and (potentially) illegal additional duties that have no or, at best, an unclear basis in WTO agreements.

2. As the case of WTO-authorised additional duties imposed by the United States in response to subsidies to the European aircraft manufacturer Airbus has shown, more than one third of German and around two thirds of European exports to the US affected by this move are outside the aircraft sector. Especially the food sector has been adversely affected, and here primarily beverages such as liqueurs, whisky or wine. In Germany, the impact also extends to the toolmaking industry. The volume of German exports to the United States that are directly affected is almost two billion euros.

3. The option to modify the schedule of products subject to additional duties and increase the rate of duty from the current 15 to 25 per cent to 100 per cent at any time means that the dispute has created considerable uncertainty for all exporters to the United States. The result is a reduction in export activity, although this is hard to quantify precisely because a causal link cannot be established.

4. Trade disputes within and outside the WTO framework are on the rise around the world. The EU itself is also making increasing use of commercial policy instruments to pursue its interests in foreign, industrial, security, environmental and human rights policies. This raises the probability that European exporters – who are often affected randomly and coincidentally – will face difficulties. They are the ones who face losses – and yet the EU's commercial policy measures benefit either the European Union as a whole or selected other industries or sectors, raising the issue of compensation by national governments or the EU itself.

5. The substantial losses incurred by German exporters as a result of US customs measures, whether in compliance with or in breach of WTO law, do not result in any claims for damages or compensation based on state liability (illegality liability) or denial damage (legitimacy liability) against the United States, the European Union or the Federal Republic of Germany.

6. Thus the instrument of compensation would have the advantage of giving the EU more credibility in international trade disputes or when using commercial policy instruments to pursue other objectives. The establishment of a compensation instrument would also resolve the existing asymmetry with system rivals such as the United States or China, which already have such instruments.

7. For this reason, the use of independent compensation mechanisms based on national or EU law should be considered. The first option (a basis in national law) requires modifications to the soft law that clarifies Article 107 (3) of the TFEU, i.e. the IPCEI Communication. Because of the limited scope of the existing European Globalisation Fund, the second option (a basis in EU law) assumes the establishment of a new EU fund under secondary legislation.

8. If, for reasons of cohesion and competition, the European alternative is preferred to a national solution, the technical legal structure of a compensation fund for companies domiciled in the EU

that suffer losses in the execution of the Common Commercial Policy through no fault of their own would have to observe the limits of WTO law – which can be considered surmountable.

# G. Appendix

**Table 5: US punitive tariffs at product level**

| Product | | Value of exports (2019), € million | WTO tariff per cent | Additional duty, per cent |
|---|---|---|---|---|
| 8802400040 | New passenger aeroplanes, weight > 15,000 kg | 946.534 | 0 | 15 |
| 8802400070 | New passenger aeroplanes, other, weight > 15,000 kg | 250.411 | 0 | 15 |
| 2208700030 | Liqueurs in containers < 4 l | 113.649 | 0 | 25 |
| 2204215055 | White wine (excluding ice wine) | 67.138 | 6.3 c/l | 25 |
| 8429521010 | Diggers | 58.789 | 0 | 25 |
| 8467290090 | Electromechanical tools for working in the hand | 48.962 | 0 | 25 |
| 1905310049 | Sweet biscuits | 47.776 | 0 | 25 |
| 9002119000 | Camera lenses | 37.525 | 2.3 | 25 |
| 8467290080 | Electropneumatic hammers | 31.454 | 0 | 25 |
| 8429521030 | Diggers | 26.081 | 0 | 25 |
| 8467290010 | Electric grinders for working in the hand | 22.542 | 0 | 25 |
| 1905320049 | Waffles and wafers | 17.530 | 0 | 25 |
| 2101112126 | Instant coffee | 16.635 | 0 | 25 |
| 0901210045 | Coffee | 13.679 | 0 | 25 |
| 0406904600 | Emmental cheese | 13.357 | 6.4 | 25 |
| 4911914040 | Pictures | 11.704 | 0 | 25 |
| 8467290035 | Other electric grinders for working in the hand | 10.348 | 0 | 25 |
| 2204215040 | Red wine | 9.610 | 6.3 c/l | 25 |
| 8505110070 | Permanent magnets | 9.461 | 2.1 | 25 |
| 8205400000 | Screwdrivers and base metal parts thereof | 7.684 | 6.2 | 25 |
| 8203206060 | Metal pliers | 6.639 | 12 cents/doz. + 5.5% | 25 |
| 1601002090 | Other pork sausages | 6.625 | 0.8 c/kg | 25 |
| 0406909500 | Cheese mixtures | 6.577 | 10 | 25 |
| 8429521050 | Diggers | 6.514 | 0 | 25 |
| 8467195090 | Pneumatic tools for working in the hand | 6.454 | 0 | 25 |
| 8203206030 | Metal pliers | 6.053 | 12 cents/doz. + 5.5% | 25 |
| 8505110090 | Permanent magnets made from metal | 5.059 | 2.1 | 25 |

| Product | | Value of exports (2019), € million | WTO tariff per cent | Additional duty, per cent |
|---|---|---|---|---|
| 8467290040 | Electric screwdrivers for working in the hand | 5.006 | 0 | 25 |
| 0405101000 | Butter | 4.711 | 12.3 c/kg | 25 |
| 0406405400 | Blue-veined cheese | 4.641 | 15 | 25 |
| 8211930035 | Folding knives | 4.237 | 3 cents each + 5.4% | 25 |
| 4901100040 | Other printed matter | 3.651 | 0 | 25 |
| 0404100500 | Whey protein concentrates | 3.453 | 8.5 | 25 |
| 0406909900 | Other cheeses and substitutes | 3.176 | 8.5 | 25 |
| 8203406000 | Pipe cutters | 2.941 | 3.3 | 25 |
| 8429525090 | Mechanical shovels | 2.601 | 0 | 25 |
| 2101112131 | Instant coffee, decaffeinated | 2.561 | 0 | 25 |
| 0406305100 | Gruyère cheese | 2.494 | 6.4 | 25 |
| 2204215060 | Other grape wines | 2.448 | 6.3 c/l | 25 |
| 0406901600 | Edam and Gouda cheese | 2.045 | 15 | 25 |
| 0901210065 | Other coffee, roasted | 2.042 | 0 | 25 |
| 0406909700 | Cheese substances, cow's milk | 1.841 | $1.509/kg | 25 |
| 8505110050 | Samarium-cobalt magnets | 1.755 | 2.1 | 25 |
| 8467290015 | Electric grinders for working in the hand | 1.707 | 0 | 25 |
| 8203300000 | Metal scissors | 1.509 | 0 | 25 |
| 2009898039 | Other unfermented vegetable juices | 1.449 | 0.2 c/l | 25 |
| 8211945000 | Blades for knives | 1.266 | 1 cent each + 5.4% | 25 |
| 2101112129 | Other instant coffees, not decaffeinated | 1.015 | 0 | 25 |
| 2009898031 | Other vegetable juices | 0.773 | 0.2 c/l | 25 |
| 8505110030 | Ceramic permanent magnets | 0.766 | 2.1 | 25 |
| 8201406010 | Axes | 0.744 | 6.2 | 25 |
| 2008600060 | Other cherries | 0.673 | 6.9 cents/kg + 4.5% | 25 |
| 8467191000 | Tools for working in the hand, pneumatic, suitable for metal working | 0.647 | 4.5 | 25 |
| 8429521040 | Other diggers | 0.519 | 0 | 25 |
| 0406904800 | Other Emmental cheeses | 0.491 | $1,877/kg | 25 |
| 8514204000 | Industrial microwave ovens | 0.478 | 4 | 25 |
| 8467290070 | Electric grass cutters | 0.447 | 0 | 25 |
| 0403109000 | Other yoghurts | 0.442 | 17 | 25 |
| 8211930060 | Other cutters | 0.441 | 3 cents each + 5.4% | 25 |
| 4901100020 | Reproduction prints | 0.386 | 0 | 25 |

| Product | | Value of exports (2019), € million | WTO tariff per cent | Additional duty, per cent |
|---|---|---|---|---|
| 8203202000 | Base metal tweezers | 0.385 | 4 | 25 |
| 0405102000 | Other butter | 0.379 | $1.541/kg | 25 |
| 1905310029 | Sweet biscuits, frozen | 0.360 | 0 | 25 |
| 4911914020 | Printed posters | 0.334 | 0 | 25 |
| 2204215050 | Organic white wine | 0.316 | 6.3 c/l | 25 |
| 8468901000 | Machinery and apparatus, hand-directed or -controlled, used for welding | 0.295 | 2.9 | 25 |
| 0901220045 | Coffee, decaffeinated | 0.287 | 0 | 25 |
| 0811908080 | Other frozen fruit and nuts | 0.280 | 14.5 | 25 |
| 0406108800 | Other cheeses and substitutes | 0.275 | $1.509/kg | 25 |
| 0406109500 | Fresh cheese | 0.251 | 8.5 | 25 |
| 8468801000 | Machinery and apparatus for welding | 0.218 | 2.9 | 25 |
| 1602419000 | Hams and cuts thereof | 0.206 | 1.4 c/kg | 25 |
| 8467290055 | Electric milling machines for working in the hand | 0.205 | 0 | 25 |
| 8467195060 | Tools for working in the hand, pneumatic, used in construction or mining | 0.188 | 0 | 25 |
| 0406908200 | Other cheese mixtures | 0.187 | 10 | 25 |
| 2208700060 | Liqueurs in containers > 4 l | 0.182 | 0 | 25 |
| 8467290025 | Electric grinders for working in the hand | 0.170 | 0 | 25 |
| 2204215015 | White wine, < $1.05/l | 0.158 | 6.3 c/l | 25 |
| 0406901200 | Other Cheddar cheeses | 0.158 | $ 1.227/kg | 25 |
| 4908100000 | Transfers (decalcomanias) | 0.129 | 0 | 25 |
| 8505110010 | Alnico permanent magnets | 0.119 | 2.1 | 25 |
| 8467290085 | Electric scissors for working in the hand | 0.109 | 0 | 25 |
| 8467195030 | Tools for working in the hand, pneumatic, suitable for greasing | 0.088 | 0 | 25 |
| 4911912040 | Lithographs | 0.054 | 0 | 25 |
| 2204215035 | Organic red wine | 0.051 | 6.3 c/l | 25 |
| 2204215028 | Ice wine | 0.035 | 6.3 c/l | 25 |
| 0406905600 | Cheeses made from sheep's milk | 0.034 | 0 | 25 |
| 8467290065 | Electric planes for working in the hand | 0.024 | 0 | 25 |
| 2009896590 | Other cherry juice | 0.016 | 0.5 c/l | 25 |

| Product | | Value of exports (2019), € million | WTO tariff per cent | Additional duty, per cent |
|---|---|---|---|---|
| 4911913000 | Lithographs | 0.015 | 0 | 25 |
| 1509102050 | Olive oil | 0.014 | 5 c/kg | 25 |
| 2008702020 | Peach preparations | 0.014 | 17 | 25 |
| 0811908095 | Other fruit and nut preparations | 0.010 | 14.5 | 25 |
| 4911912020 | Lithographic posters | 0.009 | 0 | 25 |
| 1905320029 | Waffles and wafers, frozen | 0.009 | 0 | 25 |
| 2007997000 | Berry jellies | 0.007 | 1.4 | 25 |
| 1905310041 | Sweet biscuits, not frozen, containing peanuts | 0.007 | 0 | 25 |
| 1905320041 | Waffles and wafers, not frozen, containing peanuts | 0.006 | 0 | 25 |
| 1509102030 | Organic olive oil | 0.006 | 5 c/kg | 25 |
| 0406308900 | Processed cheeses made from cow's milk | 0.006 | 10 | 25 |
| 2008600040 | Other sweet cherries | 0.005 | 6.9 cents/kg + 4.5% | 25 |
| 1601002010 | Pork sausages, canned | 0.004 | 0.8 c/kg | 25 |
| 2204215005 | Red wine, < $1.05/l | 0.004 | 6.3 c/l | 25 |
| 8201406080 | Other chopping tools | 0.003 | 6.2 | 25 |
| 8211930031 | Multi-purpose knives | 0.003 | 3 cents each + 5.4% | 25 |
| 0406907800 | Other cheese preparations (Cheddar) | 0.003 | $ 1.227/kg | 25 |
| 0901210035 | Organic coffee, not decaffeinated | 0.002 | 0 | 25 |
| 2008979094 | Other fruit and nut preparations | 0.002 | 14.5 | 25 |
| 0901210055 | Other organic coffee, not decaffeinated | 0.002 | 0 | 25 |
| **Total** | | **1873.771** | | |

Source: Office of the United States Trade Representative (USTR), US Census, Own calculations.

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ISBN: 978-3-942467-85-8