



# Navigating Tariffs

**T**ariffs continue to dominate the headlines. Many companies that tried to avoid tariffs by drawing-down existing inventories are realizing that tariffs may change, but they do not appear to be going away. In this column, I want to talk about (1) a basic background on tariffs, (2) legal challenges to tariffs and the likelihood of tariffs in the future, and (3) some strategies that repair stations and other aircraft parts-users can use to minimize their tariff obligations.

## Background

Tariffs are specifically reserved to Congress under the Constitution. Congress has granted to the President certain delegated authority to enact tariffs in limited circumstances. The President has used this authority to enact broad tariffs on goods from foreign countries in response to trade deficits, as well as broad tariffs on certain countries in response to fentanyl trafficking. In all such cases, the importer is typically responsible for paying the tariff.

Unfortunately, some of our trading partners have implemented their own reciprocal tariffs on U.S. goods in response to these U.S. tariffs. This creates a regulatory regime in which importers are paying various new tariffs on goods that cross borders. For a global industry like aviation, this can reflect a significant set of new costs on the industry.

## Are Tariffs Legal Today?

First of all, let me be clear that I think the current tariffs as they are applied to aircraft parts are illegal. I am not professing an opinion about whether tariffs are a good idea or a bad idea. I am professing an opinion about the interaction between certain recent chapter 99 tariffs and the Agreement on Trade in Civil Aircraft ("ATCA").

This column is not the only place that I have expressed this opinion. I have also stated it in a petition filed with the U.S. government, seeking redress for a client.

When you apply the current tariffs to aircraft parts, you run into the ATCA. Under that agreement, the United States agrees that it will eliminate tariffs on most imported aircraft and aircraft parts. ATCA became a part of U.S. law as a "congressional-executive agreement," and has subsequently been implemented through various acts of Congress.

The duty-free treatment of aircraft is established under both the ATCA and also by implementing legislative language. Because of the way that ATCA has been implemented under federal law, it would take legislation to counter it. Many of the new tariffs have been enacted pursuant to executive orders. In many cases, the legislative grant of power that authorized the President to establish new tariff programs was not broad enough to circumvent ATCA. In summary this means that even if the tariffs (as described above) are legal when applied to other products, I think that they are illegal when applied to aircraft and aircraft parts that are within the protection of ATCA.

Bear in mind that this is part of an open petition, so the United States has not yet agreed to my position. This means that import duties are currently being charged for aircraft parts imports. If I am successful in establishing a precedent that negates application of tariffs to aircraft parts, then the importers who are affected would need to file for a refund.

## Will Tariffs Be Legal Tomorrow?

The Commerce Department has initiated a number of special investigations into various goods. One of those investigations – known as a "section 232 investigation" – targets aircraft, engines, and parts. The investigation is examining the balance of trade related to aircraft and their parts, to identify whether U.S. national security interests are threatened by the current balance of trade.

There are a number of ways that one could find a relationship between commercial aviation and potential national security needs. The finding may be driven by politics (and the Administration's desire for negotiating tools) rather than by true national security interests. As a consequence, you may look at the results and recognize them as undermining national security interests, to the extent it leads to U.S. job loss, shortages of parts used in commercial aircraft that are also used for defense purposes, or a diminution in our ability to safely dispatch aircraft. Don't let these facts distract you from the other potential effects of the section 232 investigation.

It is possible that the section 232 investigation could give the Administration the legal basis that it needs in order to impose sanctions that would limit imports of aircraft parts. I filed comments in response to the 232 investigation into aircraft and parts, and my comments highlighted the existence of the ATCA, and suggested that unless Congress eliminates the ATCA implementing legislation, ATCA prevents application of tariffs to aircraft parts imports. But ATCA does not inhibit non-tariff limits, like numerical limits on volume of imports or other restrictions. So the section 232 investigation could result in new limits imposed on aircraft parts, and if the Administration disagrees with my assessment about tariffs the Administration could apply duties directly to aircraft parts (contrary to the dictates of ATCA).

The section 232 provisions seem to provide the Administration with more options than the existing balance-of-trade-based and fentanyl-based tariffs. The section 232 investigations take longer, and require certain findings, but even if the current tariffs are struck down, the section 232 investigations could provide the Administration with new options that may interfere with aircraft parts imports. This investigation will be carefully watched by the aviation industry because it has the potential to inhibit global aviation.

## Strategies for Minimizing Obligations

Repair stations import aircraft parts under a variety of circumstances. Some of those transaction models can provide relief from tariffs if they are declared the right way. And if they were incorrectly declared, then you should consider working with an attorney to seek a correction that would lead to a refund.

Chapter 98 of the Harmonized Tariff System provides a number of special tariff codes that can be used to reduce or alter the duties applied to certain types of imports.

One common form of business is where a U.S. repair stations obtains components intended to be repaired from a non-U.S. customer. These goods are considered to be imported, even if the import is intended to be temporary. The origin of the goods becomes important – even though they are coming from a non-U.S. customer, they may be U.S. origin parts if they were produced in the United States. If the goods are U.S. origin (and have not been advanced in value), then they can typically be imported

under HTSUS heading 9801. For example, if the aircraft parts are U.S. goods that are classified under heading 8807 (a common classification often used as a default for aircraft parts that do not have a more specific classification), then the tariff code for their return would be 9801.00.1079, and they would return as duty-free imports.

If a repair station temporarily imports goods that are the product of a foreign nation, with the intention to repair and then export them back to the customer, then these parts may be imported under HTSUS heading 9813. This is the temporary-in-bond provision, and you will likely have to complete some paperwork associated with the transaction and the bond provisions. Typically, you will need to return (export) the component within one year to avoid paying a tariff. This period can be extended.

Another common business model is where a U.S. repair stations removes a component and sends to another shop for work. If that "other shop" is outside the United States then the initial send is an export, and the subsequent receipt is an import. The U.S. repair station must assess whether the initial export is required to be licensed, and whether there is a license exception that applies. The receipt may be characterized as an import. But you don't necessarily have to pay duty on the full value of the unit. Instead, the duty will typically be based on the invoice price of the work that was done abroad. These provisions specifically fall within the new tariffs. So if you are sending the component for repair in a country where there is an across-the-board 10% duty rate, then the 10% duty rate would apply to the value of the repair.

As an example, let's say you have a component worth \$170,000 that

is a product of the United States so it is normally not subject to duty. You send it to France for repair. Remember that the duty rate on products of France is currently 10% (this number is scheduled to be increased in July, unless negotiations change the plans). The repair is invoiced at \$10,000. When you import it back into the United States, you will declare it to be subject to tariff code 9802.00.5060 and you will pay a chapter 99 tariff on the work done in France equal to 10% of the invoiced value of the repair (which was \$10,000). 10% of \$10,000 yields a duty of \$1,000.

There are other ways to approach tariffs. The Administration intends tariffs to influence sourcing to create a preference for U.S.-sourced goods. If you are looking for U.S. sourced alternative aircraft parts, then you should be focused on FAA-PMA parts, which are parts manufactured under FAA design-and-production approvals. As products of the United States, they are often available domestically, and even if they need to be imported from a foreign warehouse, the import is typically duty-free because they are products of the United States.

Another strategy that we've been implementing for clients is to create a foreign trade zone (FTZ). When goods enter the FTZ, they are not yet entered into the customs zone of the United States. This means that if they are subsequently exported then they have never entered the U.S. customs zone and no duty was required to be paid. This is especially useful for a business that is frequently importing and exporting goods, as it allows the business to decide on the ultimate disposition of the goods before making a decision on whether to incur an import duty (for U.S. disposition), or to export the goods to a non-U.S. customer. **AM**



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