

Summer 2012

Cleared For Landing: Airbus, Boeing, and the WTO Dispute over Subsidies to Large Civil Aircraft

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Recommended Citation

Jeffrey D. Kienstra, *Cleared For Landing: Airbus, Boeing, and the WTO Dispute over Subsidies to Large Civil Aircraft*, 32 NW. J. INT'L L. & Bus. 569 (2012).

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Cleared For Landing: Airbus, Boeing, and the WTO Dispute over Subsidies to Large Civil Aircraft

*Jeffrey D. Kienstra**

Abstract: Competition between Airbus and Boeing in the large civil aircraft industry grew contentious as Airbus began to overtake Boeing in its long-held position as the world's leading producer of large civil aircraft. Airbus and Boeing had also each embarked on multi-billion dollar investments into the development of new aircraft, further raising the stakes. The United States and European Communities in turn increasingly scrutinized the subsidies provided by their counterpart to its respective aircraft manufacturer. This conflict over subsidies, which had persisted between the United States and European Communities since the inception of Airbus in 1970, reached a head in 2004 when the United States initiated the dispute resolution process of the World Trade Organization over subsidies provided by the European Communities to Airbus. The European Communities responded by filing a parallel complaint regarding subsidies provided to Boeing by the United States.

After over eight years, the dispute is reaching the conclusion of the WTO dispute resolution process, but whether or how the process will resolve the dispute is still very much in question. More important, though, is how the instant dispute will affect the long-term question of the permissibility of subsidies in the large civil aircraft market. The history of the dispute suggests that the parties will negotiate an agreement addressing their short-term interests but setting the stage for another conflict down the road. Instead, the parties should use the information and bargaining positions provided through the WTO process to negotiate a comprehensive agreement eliminating subsidies to the maximum extent possible. This should protect the parties' immediate interests, avoid the prospect of a trade war, further free trade generally, and provide a framework applicable to the large civil aircraft industry as a whole, including its emerging participants.

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I. INTRODUCTION

In the fall of 2004, as competition in the already highly competitive industry of commercial aircraft escalated between Airbus and Boeing, each with a revolutionary new aircraft under development, the dispute between the European Communities (EC) and the United States over subsidies given to the respective organizations came to a head. On October 6, 2004, the United States unilaterally renounced a trade agreement between the two parties and initiated the World Trade Organization (WTO) dispute resolution process, alleging that the EC violated international trade agreements, primarily by giving launch aid to Airbus.¹ That same day, the

¹ Nils Meier-Kaienburg, *The WTO's "Toughest" Case: An Examination of the Effectiveness of the WTO Dispute Resolution Procedure in the Airbus-Boeing Dispute Over Aircraft Subsidies*, 71 J AIR L. & COM. 191, 201, 205 (2006); Request for Consultations by the United States, *European Communities and Certain Member States—Measures Affecting*

EC filed a separate complaint in the WTO against the United States, alleging that Boeing received prohibited government subsidies in the form of tax breaks and preferential government contracts.² At that time, the dispute was expected to be the biggest and most expensive ever heard under the WTO Dispute Settlement Understanding (DSU).³

Over eight years later, the dispute resolution process is still not complete. Each of the complaints has completed the panel⁴ and appellate⁵ stages, and both parties have claimed compliance with the findings.⁶ Predictably, those claims have been vigorously contested, spawning additional panel and potentially appellate proceedings to determine whether the parties have complied with the WTO's findings and removed the adverse effects of their subsidies.⁷ This enforcement stage could still drag on for some time, and even then, the conclusion of the WTO process could be just the first step in resolving the underlying issues. This dispute, which has festered since Airbus was created in 1970 specifically to compete with the American aircraft industry, has been a particular challenge so far for the WTO, and the effect the WTO process will have on efforts to resolve the

Trade in Large Civil Aircraft, WT/DS316/1 (Oct. 6, 2004) [hereinafter DS316 Request for Consultations].

² Meier-Kaienburg, *supra* note 1, at 207; Request for Consultations by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/1 (Oct. 6, 2004) [hereinafter DS317 Request for Consultations].

³ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. Peter Mandelson, the EU Trade Commissioner, responded to the United States' initiation of the DSU by saying "America's decision will, I fear, spark probably the biggest, most difficult and costly legal dispute in the WTO's history." David Gow, *Snubbed Mandelson Takes Boeing Fight to WTO*, GUARDIAN (May, 31, 2005, 7:05 PM), <http://www.guardian.co.uk/business/2005/jun/01/europeanunion.theairlineindustry>.

⁴ Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (June 30, 2010) [hereinafter DS316 Panel Report]; Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS353/R (Mar. 31, 2011) [hereinafter DS353 Panel Report].

⁵ Report of the Appellate Body, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (May 18, 2011) [hereinafter DS316 AB Report]; Report of the Appellate Body, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶1350(b)–(c), WT/DS353/AB/R (Mar. 12, 2012) [hereinafter DS353 AB Report].

⁶ Communication from the European Union, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/17 (Dec. 1, 2011); Communication from the United States, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/15 (Sept. 23, 2012).

⁷ Recourse to Article 21.5 of the DSU by the United States, Constitution of the Panel, Note by the Secretariat, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/24 (Apr. 25, 2012); Recourse to Article 21.5 of the DSU by the European Union, Request for Consultations, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/16 (Sept. 25, 2012).

dispute is still uncertain.

Part II of this Comment examines the histories of the companies at issue and how competition within the large civil aircraft (LCA)⁸ industry brought about this dispute. Part III introduces the international agreements relevant to the dispute, including the 1979 General Agreement on Tariffs and Trade (GATT),⁹ the bilateral 1992 Agreement on Trade in Large Civil Aircraft between the United States and the EC,¹⁰ and the Agreement on Subsidies and Countervailing Measures (SCM Agreement)¹¹ and DSU that accompanied the creation of the WTO in the Uruguay Round in 1994. Part IV traces the dispute through the WTO dispute settlement process. Part V analyzes the future of the dispute, including difficulties in reaching a negotiated agreement, and the potential resolutions. It suggests that while an agreement addressing only short-term concerns may be the easy and likely resolution, the parties should utilize the unique position that the WTO process, and its accompanying expense of significant time and resources, has afforded them to craft a comprehensive agreement suitable to addressing the future of the LCA industry.

II. THE COMPANIES

A. Boeing

The Boeing Company (Boeing) was incorporated by William Edward Boeing on July 15, 1916, as Pacific Aero Products Company in Seattle, Washington, and became the Boeing Airplane Company a year later.¹²

⁸ LCA are typically defined as aircraft with more than one hundred seats. U.S. INT'L TRADE COMM'N, PUB. 3433, COMPETITIVE ASSESSMENT OF THE U.S. LARGE CIVIL AIRCRAFT AEROSTRUCTURES INDUSTRY, INVESTIGATION NO. 332-414, at xix n.1 (2001), *available at* <http://www.usitc.gov/publications/332/PUB3433.PDF>. LCA currently in production include the Boeing 737 and Airbus A320 in the 100–200 seat range, the Boeing 767 and 787 and Airbus A330 in the 200–300 seat range, the Boeing 777 and Airbus A340 in the 300–400 seat range, and the Boeing 747 and Airbus A380 at 400-plus seats. BOEING COMMERCIAL AIRPLANES, BACKGROUNDER 1–3 (June 2011), http://www.boeing.com/commercial/pdf/BCA_backgrounder.pdf; *Passenger Aircraft*, AIRBUS, <http://www.airbus.com/aircraftfamilies/passengeraircraft/> (last visited Oct. 3, 2012).

⁹ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979 [hereinafter Subsidies Code], *available at* https://www.wto.org/english/docs_e/legal_e/tokyo_scm_e.pdf.

¹⁰ Agreement Between the Government of the United States of America and the European Economic Community Concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft (1992) [hereinafter LCA Agreement], *available at* http://trade.gov/static/aero_lgl_usaeclca.pdf.

¹¹ Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 14, Annex 1A [hereinafter SCM Agreement].

¹² *History, The Beginnings: 1903–1926*, BOEING, <http://www.boeing.com/history/narrative/n003boe.html> (last visited Oct. 3, 2012).

Boeing's initial success in the aircraft industry was driven by its production of military aircraft, but it gained a foothold in the civil aviation industry in the 1950s with its development of the 707, a single-aisle, four engine aircraft, and the United States' first jet airliner.¹³ Boeing continued its growth in the 1960s when it introduced the 737, a short-to-medium-range single-aisle aircraft, which has sold over 6,000 aircraft and is the best selling commercial aircraft in history.¹⁴ The backbone of Boeing's civil aircraft line is the 747, which it introduced in 1969, and which was the largest and most expensive aircraft in the world until the introduction of the Airbus A380 in 2007.¹⁵ Since its introduction, the 747 has been the premier aircraft for long-haul international flights, and has been the world's most profitable commercial aircraft.¹⁶ Boeing has also produced families of aircraft serving a wide range of capacities and ranges between the 737 and 747, including the mid-size single-aisle 757, twin-aisle 767, and long-range twin-aisle 777.¹⁷

Following its merger with McDonnell Douglas Corporation in 1997, Boeing became the last remaining major producer of commercial aircraft in the United States.¹⁸ Currently, Boeing controls nearly one hundred percent of the U.S. civil aviation manufacturing industry, and is the largest exporting manufacturer in the world.¹⁹ In addition to its civil aircraft division, Boeing is the second largest defense company in the world,

¹³ Marc C.S. Mathis, Comment, *Uncivil Aviation: How the Ongoing Trade Dispute Stalemate Between Boeing and Airbus Has Undermined GATT and May Continue to Usher In an Era of International Agreement Obsolescence Under the World Trade Organization*, 13 TULSA J. COMP. & INT'L L. 177, 181–83 (2005); *707 Family*, BOEING, <http://www.boeing.com/commercial/707family/index.html> (last visited Oct. 3, 2012). First delivered on August 15, 1958, to Pan American World Airways, the 707 and Pan Am were the most successful airline-jetliner combinations of their era. Michael Lombardi, *Seventh Heaven, 50 Years Ago, Boeing and Pan Am Revolutionized Travel with the 707*, BOEING FRONTIERS, July 2008, at 8, 8–9, available at http://www.boeing.com/news/frontiers/archive/2008/july/i_history.pdf.

¹⁴ *About the 737 Family*, BOEING, <http://www.boeing.com/commercial/737family/background.html> (last visited Oct. 3, 2012).

¹⁵ Daniel I. Fischer, Comment, *"Super Jumbo" Problem: Boeing, Airbus, and the Battle for the Geopolitical Future*, 35 VAND. J. TRANSNAT'L L. 865, 877 (2002); Mathis, *supra* note 13, at 183.

¹⁶ Fischer, *supra* note 15, at 877.

¹⁷ BOEING COMMERCIAL AIRPLANES, *supra* note 8, at 2–3; U.S. INT'L TRADE COMM'N, PUB. 3143, THE CHANGING STRUCTURE OF THE GLOBAL LARGE CIVIL AIRCRAFT INDUSTRY AND MARKET IMPLICATIONS FOR THE COMPETITIVENESS OF THE U.S. INDUSTRY, INVESTIGATION NO. 332-384, at 3-5 to 3-6 (1998) [hereinafter CHANGING STRUCTURE], available at <http://www.usitc.gov/publications/332/pub3143.pdf>; *Boeing 7-Series: Fast Facts: Boeing 757*, BOEING, <http://www.boeing.com/news/feature/sevenseries/757.html> (last visited Oct. 3, 2012).

¹⁸ Steven Pearlstein, *Europeans Relent, Back Boeing Merger*, WASH. POST (July 24, 1997), <http://www.washingtonpost.com/wp-srv/business/longterm/boeing/boeing.htm>.

¹⁹ Fischer, *supra* note 15, at 866.

providing military aircraft and defense products and programs for the militaries of the United States and other nations, with the United States government being its largest customer.²⁰

After struggling during the downturn in the aviation industry following September 11, 2001, Boeing affirmed its commitment to developing and producing commercial aircraft when it announced the beginning of development of a new commercial aircraft in 2003.²¹ The 7E7, later named the 787 Dreamliner (787),²² is a mid-sized aircraft meant to replace the 767. It is also the first commercial aircraft to be built more than half with lightweight composite materials, which make up the majority of its tail, wing, and fuselage.²³ A revolutionary development in aircraft design, the light weight of the composite materials allows the 787 to consume twenty percent less fuel than comparably sized aircraft, while also matching the speed and range of larger aircraft.²⁴

Japan's All Nippon Airways placed the initial order of 787s, ordering fifty on April 26, 2004, and Boeing secured orders and commitments for 237 787s in the first year of sales.²⁵ After several years of delays in design and production, Boeing delivered the first 787 on September 26, 2011.²⁶ Boeing has received over 800 orders for the 787, a record for a Boeing aircraft still under development, but its commercial success is not yet guaranteed.²⁷ Some analysts predict that Boeing will need to sell over

²⁰ First Written Submission by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 49, WT/DS353 (July 11, 2007) [hereinafter DS353 EC First Written Submission], available at http://trade.ec.europa.eu/doclib/docs/2007/september/tradoc_136101.pdf.

²¹ Sally B. Donnelly, *Can This Plane Save Boeing?*, TIME, Oct. 20, 2003, available at <http://www.time.com/time/magazine/article/0,9171,1005919-1,00.html>.

²² See *787 Dreamliner: About the 787 Family*, BOEING, <http://boeing.com/commercial/787family/background.html> (last visited Oct. 3, 2012).

²³ Martha Walz, *The Dream of Composites*, R&D MAGAZINE, Nov. 20, 2006, available at <http://www.rdmag.com/Featured-Articles/2006/11/The-Dream-of-Composites/>; George Marsh, *Boeing's 787: Trials, Tribulations, and Restoring the Dream*, REINFORCED PLASTICS (Nov. 9, 2009), <http://www.reinforcedplastics.com/view/9669/boeings-787-trials-tribulations-and-restoring-the-dream/>.

²⁴ *787 Dreamliner: About the 787 Family*, *supra* note 22. This efficiency is crucial to the design of the aircraft, as low operating costs have become increasingly important in airline's decisions to purchase aircraft. CHANGING STRUCTURE, *supra* note 17, at 1-3 to 1-4.

²⁵ Lori Gunter, *Great Expectations*, BOEING FRONTIERS (June 2005), <http://www.boeing.com/news/frontiers/archive/2005/june/cover.html>; Marsh, *supra* note 23.

²⁶ Aubrey Cohen, *Boeing Celebrates Delivery of First 787 Dreamliner*, SEATTLEPI (Sept. 26, 2011, 10:40 AM), <http://blog.seattlepi.com/aerospace/2011/09/26/boeing-celebrates-delivery-of-first-787-dreamliner/>; David Kesmodel & Daniel Michaels, *For Boeing, It's Been a Long, Strange Trip: After Three-Year Delay, Plane Maker Readies 787 Dreamliner Production; But Can It Crank Out 10 Per Month?*, WALL ST. J. (Sept. 23, 2011), <http://online.wsj.com/article/SB10001424053111904563904576585250595434650.html>.

²⁷ Kesmodel & Michaels, *supra* note 26; Kyle Peterson, *First Boeing 787 Delivered; Here Comes the Hard Part*, REUTERS (Sept. 26, 2011, 6:06 AM),

1,000 aircraft before breaking even, and it will need to produce the aircraft at an unprecedented rate in order to get there and to avoid substantial costs for delays and cancellations.²⁸

B. Airbus

In response to American dominance in the commercial aircraft industry, a group of European nations organized in the late 1960s to create a European organization that could rival the American aircraft industry.²⁹ In 1970, Airbus Industrie GIE (Airbus GIE) was formed as a consortium between Aerospatiale of France and a group of Germany's leading manufacturing firms, which became Deutsche Aerospace.³⁰ British Aerospace of the United Kingdom and Construcciones Aeronauticas SA of Spain (CASA) would also later join the consortium.³¹ In this form, Airbus GIE was "a loose association of fully independently cost-centered companies."³² This organizational form underwent a transformation between 2001 and 2004 when the four independent partners became wholly-owned subsidiaries of Airbus SAS, which at that time was eighty percent owned by the European Aeronautic Defense and Space Company (EADS).³³ In 2006, EADS bought out the remaining twenty percent from BAE Systems of the United Kingdom.³⁴ Today, Airbus SAS is incorporated as a "simplified joint stock company," and is a division of EADS.³⁵

Airbus has developed a full line of aircraft across the LCA market,

<http://www.reuters.com/article/2011/09/26/uk-boeing-analysis-idUSLNE78P01U20110926>.

²⁸ Kesmodel & Michaels, *supra* note 26; see Peterson, *supra* note 27.

²⁹ CHANGING STRUCTURE, *supra* note 17, at 3-15; Mathis, *supra* note 13, at 185, 189.

³⁰ Mathis, *supra* note 13, at 183-84; *Company Evolution: The Success Story of Airbus*, AIRBUS, http://www.airbus.com/en/corporate/people/company_evolution (click Dec. 1970 tab of the timeline, *Creation of Airbus Industrie*) (last visited Oct. 3, 2012).

³¹ Ryan E. Lee, Comment, *Dogfight: Criticizing the Agreement on Subsidies and Countervailing Measures Amidst the Largest Dispute in World Trade Organization History*, 32 N.C. J. INT'L L. & COM. REG. 115, 119 (2006). This left the ownership of Airbus composed of 37.9% each by Aerospatiale and Deutsche Aerospace, 20% by British Aerospace, and 4.2% by CASA. *The Success Story of Airbus: Technology Leaders (1977-1979)*, AIRBUS, <http://www.airbus.com/company/history/the-narrative/technology-leaders-1977-1979/> (last visited Oct. 3, 2012).

³² First Written Submission by the European Communities, *European Communities Measures Affecting Trade in Large Civil Aircraft*, ¶ 69, WT/DS316 (Apr. 5, 2007) [hereinafter DS316 EC First Written Submission], available at http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134551.pdf.

³³ *Id.* at ¶ 68.

³⁴ First Written Submission of the United States, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, ¶43, WT/DS316 (Nov. 15, 2006) [hereinafter DS316 US First Written Submission], available at http://www.ustr.gov/webfm_send/816.

³⁵ Mathis, *supra* note 13, at 190.

substantially competing with each of Boeing's aircraft.³⁶ The A320 family, consisting of short-to-medium-range single aisle aircraft competing directly against the Boeing 737, entered service in 1988.³⁷ In 1987, Airbus launched the development of the A330 and A340, wide-body jets competing in markets similar to the 767 and 777.³⁸ The signatures of Airbus' aircraft are its fly-by-wire electronic flight control systems, introduced for the first time in commercial jetliners in the A320, and significant commonality within and across its aircraft families, reducing operations, training, and maintenance costs.³⁹

In overcoming the considerable barriers to entry in the LCA industry⁴⁰ and developing these aircraft, Airbus has depended on significant development financing provided by its member nations,⁴¹ termed "member state financing" by the EC, and "launch aid" by the United States.⁴² Though the precise nature of those measures has been a significant point of contention, the financing is generally debt with payment of interest and principal based on a specified portion of the revenue of each aircraft sold, sometimes followed by additional royalty payments per aircraft, typically giving the lender less upside than equity, but less security than debt.⁴³ Airbus has received this financing from its member states for the development of each of its aircraft,⁴⁴ though the nature and amount has been

³⁶ *Id.* at 189–90; see Lcmortensen, *Airbus and Boeing: Passengers vs Range* (Nov. 20, 2009), http://en.wikipedia.org/wiki/File:Airbus_and_Boeing_Passengers_vs_Range.png.

³⁷ CHANGING STRUCTURE, *supra* note 17, at 3-18; *A320 Family*, AIRBUS, <http://www.airbus.com/aircraftfamilies/passengeraircraft/a320family/> (last visited Oct. 3, 2012).

³⁸ *The Timeline*, AIRBUS, <http://www.airbus.com/company/history/the-timeline/> (click June 1987: A330-300 launch, A340-200 launch, A340-300 launch) (last visited Oct. 3, 2012).

³⁹ *Commonality*, AIRBUS, <http://www.airbus.com/aircraftfamilies/passengeraircraft/commonality/> (last visited Oct. 1, 2012).

⁴⁰ One unique aspect of the LCA industry is that developing and producing aircraft requires monumental up-front investments, with a long lead time before generating revenue. CHANGING STRUCTURE, *supra* note 17, at 2-1; DS316 EC First Written Submission, *supra* note 32, ¶ 27. For example, in 1966, Boeing spent an estimated \$1.2 billion—more than three times its total capitalization at that time—developing the 747. CHANGING STRUCTURE, *supra* note 17, at 2-1 n.15. The size of these investments essentially make the development of each new aircraft a bet-the-company investment. *Id.* at 2-1. This creates enormous barriers to entry in the LCA industry, and makes financing without government intervention exceedingly difficult except for established producers. *Id.* at 2-1 to 2-3; see DS316 EC First Written Submission, *supra* note 32, ¶¶ 27–33.

⁴¹ Mathis, *supra* note 13, at 189–90; CHANGING STRUCTURE, *supra* note 17, at 2-3.

⁴² DS316 EC First Written Submission, *supra* note 32, ¶ 289–90.

⁴³ *Id.* ¶¶ 302–07, 319–23. The United States characterizes launch aid as "long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to repay the loans through a levy on each delivery of the financed aircraft." DS316 US First Written Submission, *supra* note 34, ¶ 4.

⁴⁴ DS316 EC First Written Submission, *supra* note 32, ¶¶ 328, 332, 338, 364–66.

subject to dispute,⁴⁵ and the subject of negotiated limitations.⁴⁶

Airbus has continuously gained market share in the LCA industry, going from fifteen percent in 1987,⁴⁷ to twenty-nine percent in 1996,⁴⁸ to over fifty percent of the global market in 1998—finally overtaking its American competitor.⁴⁹ In 2003, Airbus delivered more new LCA than Boeing for the first time, making it the largest producer of LCA in the world,⁵⁰ and it has maintained that title each year since.⁵¹

In 1994, Airbus announced development of what would become its A380, a super-jumbo jet projected to seat over 600 passengers, in an effort to combat the monopoly Boeing enjoyed in jumbo jets with its 747.⁵² Boeing and Airbus had initially engaged in discussions for joint development of the aircraft, but Boeing withdrew from the project when it decided that the market would not bear such a large aircraft.⁵³ Airbus began production on the A380 in 2000 when it secured commitments for 50 purchases of the new aircraft.⁵⁴ On May 7, 2004, Airbus officially opened the final assembly line of the A380 in Toulouse, France,⁵⁵ and the A380 took its first test flight on April 27, 2005.⁵⁶ As the largest aircraft in history and the first to have double decks along the entire length of the aircraft, the A380 made its first commercial flight on October 25, 2007, and to date, Airbus has recorded 243 orders for this aircraft.⁵⁷

⁴⁵ The United States alleges that Airbus has received highly preferential financing for the development of each of its families of aircraft. DS316 US First Written Submission, *supra* note 34, ¶¶ 4, 49, 50, 52, 55, 70.

⁴⁶ See LCA Agreement, *supra* note 8, art. 4.

⁴⁷ DS316 US First Written Submission, *supra* note 34, ¶ 54.

⁴⁸ CHANGING STRUCTURE, *supra* note 17, at 3-19.

⁴⁹ Lee, *supra* note 31, at 120.

⁵⁰ DS316 US First Written Submission, *supra* note 34, ¶ 74.

⁵¹ Tim Hepher, *Airbus in the Lead, but Boeing Looks Set to Have a Great 2012*, AL ARABIYA NEWS (Dec. 22, 2011), <http://www.alarabiya.net/articles/2011/12/22/184007.html>; David Pearson, *Airbus Keeps Top Spot Over Boeing*, WALL ST. J. (Jan. 18, 2012), http://online.wsj.com/article/SB10001424052970204468004577166423079873112.html?mod=rss_whats_news_us_business.

⁵² See David Bowen, *Airbus Will Reveal Plan for Super-Jumbo: Aircraft Would Seat at Least 600 People and Cost dollars 8bn to Develop*, INDEPENDENT, June 4, 1994, available at <http://www.independent.co.uk/news/business/airbus-will-reveal-plan-for-superjumbo-aircraft-would-seat-at-least-600-people-and-cost-dollars-8bn-to-develop-1420367.html>.

⁵³ Fischer, *supra* note 15, at 877-78; CHANGING STRUCTURE, *supra* note 17, at 6-10, 6-12 n.759.

⁵⁴ *Airbus Jumbo on Runway: Boeing Seen Building Rival to Airbus A380 as Transatlantic [sic] Scrap Intensifies*, CNNMONEY (Dec. 19, 2000, 9:27 AM), <http://money.cnn.com/2000/12/19/europe/airbus/>.

⁵⁵ *The "Wow" Factor . . . and a New Era Dawns (2004-2007)*, AIRBUS, [http://www.airbus.com/company/history/the-narrative/the-wow-factorand-a-new-era-dawns-2004-2007/\(last visited Oct. 10, 2012\)](http://www.airbus.com/company/history/the-narrative/the-wow-factorand-a-new-era-dawns-2004-2007/(last%20visited%20Oct.%2010,%202012)).

⁵⁶ *Id.*

⁵⁷ *A380 Family*, AIRBUS, <http://www.airbus.com/aircraftfamilies/passengeraircraft/>

In addition, in 2004, Airbus announced development of the A350 XWB, a long-range, mid-size, wide-body aircraft intended to compete directly against Boeing's 787 Dreamliner, also making use of lightweight composite materials for the airframe.⁵⁸ The aircraft has faced a stream of delays, but is expected to begin final assembly in 2012 and enter service in 2014,⁵⁹ and has generated 567 orders from 35 customers.⁶⁰

III. THE INTERNATIONAL TRADE AGREEMENTS

Over the course of the competition between Airbus and Boeing, negotiations as to trade in the LCA industry and international trade in general have been ongoing, and have produced three primary agreements that affect the LCA industry and the Airbus–Boeing dispute. First, the GATT Tokyo round in 1979 produced an agreement concerning trade in civil aircraft and a subsidies code. Second, in 1992, the United States and the EC entered a bilateral agreement on trade in Large Civil Aircraft to supplement the GATT agreement. Last, in 1994, the Uruguay round of the GATT created the WTO, which included the SCM Agreement and the DSU.

A. The General Agreement on Tariffs and Trade

The 1979 GATT Tokyo round of multilateral trade negotiations produced, among other agreements, a plurilateral Agreement on Trade in Civil Aircraft (ATCA).⁶¹ The preamble of the agreement noted that the Tokyo round sought to “achieve the expansion and ever-greater liberalization of world trade through, *inter alia*, the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade.”⁶² It also stated that the agreement was meant “to eliminate adverse effects on trade in civil aircraft resulting from governmental support in civil aircraft development, production, and

a380family/ (last visited Oct. 3, 2012); Michael Smith, *Airbus A380 Lands in Sydney on First Commercial Flight*, REUTERS (Oct. 25, 2007, 4:59 AM), <http://www.reuters.com/article/2007/10/25/us-singapore-airlines-a-idUSSP20547320071025>.

⁵⁸ *Airbus to Launch Boeing 7E7 Rival*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/4085631.stm> (last updated Dec. 10, 2004); *A340 XWB*, AIRBUS, <http://www.airbus.com/aircraftfamilies/passengeraircraft/a350xwbfamily/> (last visited Oct. 3, 2012).

⁵⁹ *Airbus Owner EADS Reports Profits Fall and A350 Delays*, BBC NEWS (Nov. 10, 2011, 7:32 AM), <http://www.bbc.co.uk/news/business-15670426>.

⁶⁰ Press Release, Airbus, *Airbus in Illescas Delivers First A350 XWB Wing Lower Cover to Airbus in Broughton* (Sept. 16, 2011), <http://www.airbus.com/presscentre/pressreleases/press-release-detail/detail/airbus-in-illescas-delivers-first-a350-xwb-wing-lower-cover-to-airbus-in-broughton/>.

⁶¹ Mathis, *supra* note 13, at 192; Agreement on Trade in Civil Aircraft, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) (1980) [hereinafter ATCA].

⁶² ATCA preamble.

marketing.”⁶³ Specifically, the agreement called for the elimination of all import duties on civil aircraft and components, and established a Committee on Trade in Civil Aircraft to meet as necessary to consult on matters relating to the agreement.⁶⁴

More importantly, concerning subsidies, the agreement also incorporated the portion of the 1979 GATT relating to subsidies.⁶⁵ This agreement sought to “reduce or eliminate the trade restricting or distorting effects”⁶⁶ of subsidies, yet also recognized that domestic “subsidies are widely used as important instruments for the promotion of social and economic policy objectives.”⁶⁷ Therefore, the agreement prohibited export subsidies but permitted domestic subsidies, subject to assessment of countervailing duties.⁶⁸ The agreement was also limited in its effectiveness because it did not define the term “subsidy,” making it more of “a general declaration of principles than a specific enforceable document.”⁶⁹

The GATT also included an elementary dispute settlement procedure, in place since its inception in 1947.⁷⁰ Under this procedure, a member could request the formation of a panel to hear a dispute, but any member, including the subject of the complaint, could delay or block the process by preventing the establishment of a panel and hindering the selection of panelists or the term of the panel.⁷¹ In addition, panel reports needed a consensus to be adopted, allowing even the losing party to prevent enforcement of the report.⁷²

B. Bilateral Agreement on Trade in Large Civil Aircraft

Because of the obvious deficiencies of the GATT in dealing with subsidies in the civil aircraft industry, and in light of Airbus’ increasing success against Boeing and American manufacturers, the United States soon felt pressure to reach a new agreement limiting subsidies.⁷³ In 1984, the United States began discussions to revise the GATT’s ATCA, hoping to eliminate subsidies to Airbus.⁷⁴ The United States also began bilateral

⁶³ *Id.*

⁶⁴ *Id.* arts. 2, 8.

⁶⁵ *Id.* art 6.

⁶⁶ Subsidies Code preamble, art. 11(1).

⁶⁷ *Id.*

⁶⁸ Mathis, *supra* note 13, at 193.

⁶⁹ Meier-Kaienburg, *supra* note 1, at 198.

⁷⁰ Fischer, *supra* note 15, at 879–80.

⁷¹ Lee, *supra* note 31, at 135.

⁷² Meier-Kaienburg, *supra* note 1, at 204.

⁷³ Fischer, *supra* note 15, at 874; Mathis, *supra* note 13, at 195; Meier-Kaienburg, *supra* note 1, at 198.

⁷⁴ Jennifer A. Manner, *How to Avoid Airbus II: A Primer for Domestic Industry*, 23 CAL. W. INT’L L.J. 139, 144 (1992); Lee, *supra* note 31, at 123–23.

negotiations in 1987 with the EC regarding Airbus' funding.⁷⁵ These discussions stalemated over the percentage of development costs that could be subsidized, until the United States learned of an explicit export subsidy provided to Deutsche Airbus in the form of exchange rate guarantees worth an estimated \$2.5 million on each aircraft delivered in 1990.⁷⁶ The United States brought a GATT action against the EC. A GATT disputes panel found in favor of the United States in January 1992, although the EC blocked adoption of the ruling in the GATT council, precluding the implementation of remedial measures by the United States.⁷⁷

While this first complaint addressed only the particular export subsidy to Deutsche Airbus, the United States also filed a second complaint in May 1991 broadly covering subsidies given to each of the Airbus entities by the member governments since its inception, totaling \$13.5 billion.⁷⁸ Having already blocked one panel report and facing this much more far-reaching complaint, the EC finally relented and agreed to certain limits on subsidies to Airbus in a bilateral agreement with the United States.⁷⁹ Rather than establishing a comprehensive scheme addressing subsidies in large civil aircraft, though, this agreement was merely a concession by the EC to keep the United States from pursuing its GATT case, and was thus limited in its effectiveness.⁸⁰

Still, the bilateral Agreement on Trade in Large Civil Aircraft, signed in July 1992, made some important strides to establishing limits on subsidies.⁸¹ First, the agreement addressed direct subsidies by banning all future production subsidies⁸² and limiting development subsidies at thirty-

⁷⁵ Lee, *supra* note 31, at 124.

⁷⁶ Manner, *supra* note 74, at 145; Shane Spradlin, Comment, *The Aircraft Subsidies Dispute in the GATT's Uruguay Round*, 60 J. AIR L. & COM. 1191, 1207 (1995).

⁷⁷ Spradlin, *supra* note 76, at 1208–09; Manner, *supra* note 74, at 148–49.

⁷⁸ Manner, *supra* note 74, at 150.

⁷⁹ Richard O. Cunningham, *Subsidies to Large Civil Aircraft Production: New WTO Subsidy Rules and Dispute Settlement Mechanism Alter Dynamics of U.S.-E.U. Dispute*, AIR & SPACE LAW, Fall 1999, at 4–5; Spradlin, *supra* note 76, at 1208.

⁸⁰ Cunningham, *supra* note 79, at 5; U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL TRADE: LONG-TERM VIABILITY OF US—EUROPEAN UNION AIRCRAFT AGREEMENT UNCERTAIN 3 (1994) [hereinafter LONG-TERM VIABILITY], available at <http://www.gao.gov/archive/1995/gg95045.pdf>. U.S. representatives saw foregoing a GATT complaint on subsidies to Airbus as the primary consideration they gave to the EU under the treaty, since they did not believe that current or future levels of indirect aid would reach the limits set in the agreement. *Id.* at 15–16, 23–24, 34. The EU placed more value on the limitation of indirect aid, however, and viewed the treaty as a trade-off between their direct aid and the United States' indirect aid. *Id.* at 15–16.

⁸¹ Michael J. Levick, Comment, *The Production of Civil Aircraft: A Compromise of Two World Giants*, 21 TRANSP. L.J. 433, 452 (1993).

⁸² LCA Agreement, *supra* note 8, art. 3. Production includes “all manufacturing, marketing and sales activities” other than development costs. LCA Agreement Annex II, ¶ 4. The Agreement did grandfather in existing production subsidies, however. *Id.* art. 3.

three percent of a new plane's total development costs.⁸³ These development subsidies were allowed only in the form of loans, where they could be expected to be repaid within seventeen years.⁸⁴ They were additionally required to be repaid in that timeframe at an interest rate no less than the cost of borrowing to the government.⁸⁵

In regard to indirect subsidies, the Agreement capped permissible levels of benefit received indirectly through government contracts at three percent of the industry-wide turnover and four percent of the turnover for each individual manufacturer.⁸⁶ Indirect benefits were defined as any “identifiable reduction in costs of large civil aircraft resulting from government-funded research and development in the aeronautical area.”⁸⁷

The Agreement also sought transparency by requiring the regular exchange of information relating to subsidies.⁸⁸ Along those same lines, the agreement called for the parties to meet at least twice a year “to ensure the correct functioning of the Agreement”⁸⁹ and allowed either party to request consultations relating to the functioning of the agreement.⁹⁰ However, the agreement provided no remedy for breach, so the only recourse for non-compliance was abrogation of the agreement.⁹¹ In addition, while the

⁸³ *Id.* art. 4; Levick, *supra* note 81, at 452. Development costs include design, testing, equipment development, flight testing, and prototype manufacturing costs. LCA Agreement Annex II, ¶ 3.

⁸⁴ LCA Agreement, *supra* note 8, art. 4.

⁸⁵ *Id.*

⁸⁶ Levick, *supra* note 81, at 452.

⁸⁷ LCA Agreement, *supra* note 8, art 5.3. The Agreement also expanded on this definition in Annex II, which defines “indirect government support” as “[F]inancial support provided by a government . . . for aeronautical applications, including research and development, demonstration projects and development of military aircraft, which provide an identifiable benefit to the development or production of one or more specific large civil aircraft programmes.” *Id.* Annex II, ¶ 5.

⁸⁸ *Id.* art. 8.

⁸⁹ *Id.* art. 11.

⁹⁰ *Id.* art. 11.

⁹¹ *Id.* art. 10. This immediately called into question the viability of the agreement, though the parties saw the benefits of the agreement, namely, “constraints on direct support provided to Airbus, in the case of the United States, and a reduction in the threat of trade action in the case of the EC,” as reasonable incentives for compliance. LONG-TERM VIABILITY, *supra* note 80, at 3. Disagreements over interpretation of the agreement began nearly immediately following the agreement, however, particularly as to the definitions of production subsidies and indirect subsidies. *Id.* at 19–21, 23–28. As to indirect subsidies, the EC calculated indirect benefits by totaling the total amount of government appropriations for aeronautics research and development, without regard for what benefits, if any, flowed to LCA, while the U.S. methodology was to ask LCA manufacturers to self-identify what benefits they received for specific existing LCA through government-sponsored research and development. *Id.* at 23–27. Using these methods, the EC calculated indirect subsidies by the United States at between 4.4% and 5.8% in 1992, in excess of the agreed limits, *id.* at 25, while the United States calculated that zero indirect benefits were realized during that time.

parties agreed not to initiate trade actions with respect to subsidies in conformity with the Agreement so long as it is in force,⁹² they retained their rights and obligations under the GATT 1947 and any successor agreements,⁹³ so when the United States later abrogated the agreement, the GATT agreements, and not the bilateral agreement, governed the dispute in the WTO.⁹⁴

C. Uruguay Round Agreements

Following the bilateral agreement, the parties continued discussions to try to create a new agreement addressing large civil aircraft under the GATT as part of the Uruguay Round.⁹⁵ However, disagreements began immediately, as the United States wanted to set the 1992 agreement as a baseline and build on its commitments, while the EC preferred to eliminate the 1992 agreement, or alternatively, to exempt civil aircraft from the Subsidies Code.⁹⁶ The parties grew even further apart during 1993 as each attempted to strengthen their respective subsidy programs.⁹⁷ As the deadline approached without progress on the civil aircraft agreement, neither party was willing to let this one industry derail the GATT agreements that covered trillions of dollars in annual world trade.⁹⁸ A compromise eventually won out under which the 1992 agreement would remain in force and the civil aircraft industry would remain subject to the GATT Subsidies Code.⁹⁹ The parties also agreed to a one-year standstill during which neither side would challenge subsidies to allow for further negotiations.¹⁰⁰

Consequently, when the GATT Uruguay round was signed on

Id. at 26.

⁹² LCA Agreement, *supra* note 8, art. 10.2.

⁹³ *Id.* preamble.

⁹⁴ DS316 Panel Report, *supra* note 4, at ¶¶ 7.89, 7.98, 7.100. This interpretation was not without dispute, though. *See id.*

⁹⁵ Meier-Kaienburg, *supra* note 1, at 201; LONG-TERM VIABILITY, *supra* note 80, at 42.

⁹⁶ Spradlin, *supra* note 76, at 1210.

⁹⁷ *Id.* at 1210–11. The U.S. LCA industry sought additional indirect governmental aid, such as increased funding for the U.S. Export–Import Bank, while France unveiled additional funding for industrial production. *Id.*; *Civil Aircraft Needs Continued Coverage Under Subsidies Code, U.S. Industry Says*, 9 INT’L TRADE REP. (BNA) No. 10, at 1386 (Aug. 12, 1992); *French Trade Official Says Airbus’ Fears in GATT Talks Are Unjustified*, 10 INT’L TRADE REP. (BNA) No. 10, at 1687 (Oct. 6, 1993).

⁹⁸ Spradlin, *supra* note 76, at 1212; Gow, *supra* note 3.

⁹⁹ Spradlin, *supra* note 76, at 1213–14; LONG-TERM VIABILITY, *supra* note 80, at 42. Though LCA as a whole were included under the SCM Agreement, two footnotes were added exempting LCA from certain avenues to establishing “serious prejudice,” as a concession to the EU, and research and development for LCA were also excepted from the protected category of Non-Actionable Subsidies. SCM Agreement art. 6.1 n.15, n.16, art. 8.2 n.24; LONG-TERM VIABILITY, *supra* note 80, at 45–47.

¹⁰⁰ Spradlin, *supra* note 76, at 1213–1214.

December 15, 1994, it did not include a new agreement on civil aircraft.¹⁰¹ However, the Uruguay round produced the SCM Agreement and the DSU, each of which affects the LCA industry.

1. Agreement on Subsidies and Countervailing Measures

The SCM Agreement made an important improvement on the GATT by defining “subsidies.”¹⁰² Under the SCM Agreement, a subsidy exists where “there is a financial contribution by a government” and “a benefit is thereby conferred.”¹⁰³ Financial contribution is broadly construed as meaning “money or anything else of value provided to a manufacturer or exporter at a cost less than would have been charged in a commercial transaction.”¹⁰⁴ This includes measures such as exchange rate guarantees, debt forgiveness, export credits, and equity infusions, and any capital or development supports provided on terms more favorable than terms available from commercial lenders.¹⁰⁵ In addition, this can also include indirect support such as benefits from government or defense contracts.¹⁰⁶

The SCM Agreement splits subsidies into three classifications, referred to as the “traffic light approach.”¹⁰⁷ Under this approach, one class of subsidies is permissible (“green light”), a second class is actionable only upon showing of adverse effects on free trade (“yellow light”), while the third class is prohibited almost entirely (“red light”).¹⁰⁸

Export subsidies, defined as “subsidies contingent, in law or in fact, . . . upon export performance,”¹⁰⁹ or “upon the use of domestic over imported goods,”¹¹⁰ fall under the class of Prohibited Subsidies (“red light”).¹¹¹ The SCM Agreement provides an illustrative list of export subsidies that includes the “provision by governments of direct subsidies to a firm or an industry contingent upon export performance” in addition to other items such as exchange rate guarantees or other measures that give preference to exports over domestic products.¹¹² These prohibited subsidies are actionable without a showing of adverse effects, and the dispute resolution process is accelerated when contesting these subsidies.¹¹³

¹⁰¹ Meier-Kaienburg, *supra* note 1, at 199; LONG-TERM VIABILITY, *supra* note 80, at 42.

¹⁰² Mathis, *supra* note 13, at 200.

¹⁰³ SCM Agreement art. 1.1.

¹⁰⁴ Cunningham, *supra* note 79, at 6.

¹⁰⁵ *Id.*

¹⁰⁶ Meier-Kaienburg, *supra* note 1, at 202–03.

¹⁰⁷ *Id.* at 203.

¹⁰⁸ *Id.*

¹⁰⁹ SCM Agreement art. 3.1.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* Annex I.

¹¹³ *Id.* arts. 3, 4.

To fall under the category of Actionable Subsidies (“yellow light”), the subsidy must be a specific subsidy¹¹⁴ and cause adverse effects to the interests of another member, including “(a) injury to the domestic industry of another Member; (b) nullification or impairment of benefits accruing directly or indirectly to other Members . . . ; [or] (c) serious prejudice to the interests of another Member.”¹¹⁵ A specific subsidy is any subsidy where “the granting authority . . . explicitly limits access to a subsidy to certain enterprises,” or where the subsidy has that effect in fact.¹¹⁶ Serious prejudice is found when the subsidy displaces or impedes imports into the subsidizing country or a third country market, when the subsidy causes significant price undercutting, suppression, depression, or lost sales, or when the subsidy increases the world market share of the subsidizing country.¹¹⁷

2. Dispute Settlement Understanding

The Uruguay round also produced the DSU, which was an important improvement on the dispute resolution process under GATT. Unlike the GATT process, under which a single party could block the adoption of a panel report, the DSU requires a consensus to reject a panel report, making the presumption in favor of adjudication.¹¹⁸ Like the GATT process, though, the DSU is primarily aimed at conciliation and is targeted more towards facilitating the process than creating a resolution.¹¹⁹

The dispute resolution process begins under the DSU when a Member State files a Request for Consultations.¹²⁰ The request must identify the measures at issue and the legal basis for the complaint.¹²¹ During this consultation stage, the parties are to meet and attempt to resolve the dispute on their own.¹²² This stage is meant to take no more than sixty days.¹²³

If the parties fail to reach an agreement, the complaining party can then request that the Dispute Settlement Body (DSB) establish a panel to adjudicate the dispute.¹²⁴ The defendant party can block the formation of a panel once, but the DSB will establish a panel upon request at its second

¹¹⁴ *Id.* art. 1.2.

¹¹⁵ *Id.* art. 5.

¹¹⁶ *Id.* art. 2.1.

¹¹⁷ *Id.* art. 6.3.

¹¹⁸ Meier-Kaienburg, *supra* note 1, at 204.

¹¹⁹ Mathis, *supra* note 13, at 199.

¹²⁰ *Understanding the WTO: Settling Disputes: A Unique Contribution*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Oct. 3, 2012) [hereinafter *Settling Disputes*]; Meier-Kaienburg, *supra* note 1, at 211; *see* DSU art. 4.

¹²¹ DSU art. 4.4.

¹²² *Id.* art. 4; Lee, *supra* note 31, at 136–37; *Settling Disputes*, *supra* note 120.

¹²³ DSU art. 4.7; *Settling Disputes*, *supra* note 120.

¹²⁴ DSU art. 4.7; Lee, *supra* note 31, at 136–37; *Settling Disputes*, *supra* note 120.

meeting barring a consensus against appointing the panel.¹²⁵ Because there are no permanent panels, a new panel is created for each dispute.¹²⁶ The parties to the dispute may decide on the members of the panel, but if they cannot agree they can request that the Director-General choose the panelists.¹²⁷ A panel is supposed to be formed within forty-five days of the request, and the panel is supposed to complete its work and issue its report within six months.¹²⁸ This means that the time from a request for consultations to the issuance of a panel report is to be no more than one year.¹²⁹

A party may appeal a panel report to the Appellate Body (AB).¹³⁰ A three-member panel chosen for each case from the seven-member AB, a permanent body, hears the appeals.¹³¹ However, factual determinations by the original panel are not subject to appeal, as only issues of law and legal interpretations may be raised on appeal.¹³² Within thirty days of a decision by the appellate panel, or within sixty days of a panel decision if there is no appeal, the DSB will adopt the report unless a consensus rejects it.¹³³

Upon a finding of a violation, the panel or the AB will recommend that the infringing nation bring its measures into conformity with the applicable obligations, and may, but is not required to, make suggestions as to how to implement the recommendations.¹³⁴ Following the adoption of a panel or AB report, the DSU expects “prompt compliance” with the panel’s recommendations and rulings.¹³⁵ Absent a separately negotiated resolution, “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned.”¹³⁶ Within thirty days of the adoption of a report, the offending party is to “inform the DSB of its intentions in respect of implementation of the recommendations and ruling of the DSB.”¹³⁷ The party has “a reasonable period of time” in which to comply.¹³⁸

In the absence of a negotiated agreement or full compliance,¹³⁹ the

¹²⁵ DSU art. 6.1; Settling Disputes, *supra* note 120.

¹²⁶ Lee, *supra* note 31, at 137–38; *see* DSU art. 8.

¹²⁷ DSU art. 8.7; Lee, *supra* note 31, at 136–37; Settling Disputes, *supra* note 120.

¹²⁸ DSU art. 12.8; Settling Disputes, *supra* note 120.

¹²⁹ DSU art. 20; Settling Disputes, *supra* note 120.

¹³⁰ DSU art. 17.4; Settling Disputes, *supra* note 120.

¹³¹ DSU art. 17.1; Settling Disputes, *supra* note 120.

¹³² DSU art. 17.6; Settling Disputes, *supra* note 120; Lee, *supra* note 31, at 139–40.

¹³³ DSU arts. 16.4, 17.14; Settling Disputes, *supra* note 120.

¹³⁴ DSU art. 19.1.

¹³⁵ *Id.* art. 21.1; Meier-Kaienburg, *supra* note 1, at 225; Settling Disputes, *supra* note 120.

¹³⁶ DSU art. 3.7.

¹³⁷ *Id.* art. 21.3.

¹³⁸ *Id.*

¹³⁹ If there is a dispute as to whether a party has fully complied with the

DSU allows for compensation and retaliation,¹⁴⁰ but these measures are meant solely to bring the offending party into compliance with its obligations and do not provide retrospective relief.¹⁴¹ If the party is not compliant within a reasonable period of time, it can enter negotiations to “develop[] mutually acceptable compensation.”¹⁴² Compensation in this context means a trade benefit granted by the losing party to the prevailing party to prospectively counter the nullification or impairment caused by the nonconforming measure.¹⁴³ However, because this only comes up in the case of a noncompliant party yet requires the assent of that party, it is rare in practice.¹⁴⁴

If no agreement is reached, the prevailing party “may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”¹⁴⁵ The DSB will accept the request to suspend concessions absent a consensus against it.¹⁴⁶ The level of the suspension of concessions is to be “equivalent to the level of the nullification or impairment,” meaning prospective rather than past nullification or impairment, and may only be held in place until the offending party becomes compliant.¹⁴⁷ The suspended concessions should be as closely linked to the sector subject to the complaint as possible, but can apply to obligations in other sectors under the same agreement, or under other agreements if necessary.¹⁴⁸ Such measures can be effective in exerting pressure on noncompliant parties, but also adversely affect the retaliating party by making the imports subject to retaliation more expensive to its own consumers.¹⁴⁹ These measures can also burden industries that are not directly involved in the particular dispute and that derived no benefit from the subsidies.¹⁵⁰

D. Negotiations Following the Uruguay Round

Following the Uruguay Round, the United States felt increased

recommendations, the parties can refer the matter to the original panel for a determination. DSU art. 21.5.

¹⁴⁰ DSU arts. 3.7, 22; Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO*, 8 J. INT'L ECON. L. 101, 102 (2005).

¹⁴¹ Bronckers & van den Broek, *supra* note 140, at 102–03; *see* DSU arts. 3.7, 22.

¹⁴² DSU 22.2.

¹⁴³ Carlos M. Vazquez & John H. Jackson, *Some Reflections on Compliance with WTO Dispute Settlement Decisions*, 33 LAW & POL'Y INT'L BUS. 555, 560 (2002).

¹⁴⁴ Bronckers & van den Broek, *supra* note 140, at 103.

¹⁴⁵ DSU art. 22.2.

¹⁴⁶ *Id.* art. 22.6.

¹⁴⁷ *Id.* arts. 22.4, 22.8; Vazquez & Jackson, *supra* note 143, at 560.

¹⁴⁸ DSU art. 22.3.

¹⁴⁹ Bronckers & van den Broek, *supra* note 140, at 102–04.

¹⁵⁰ *Id.*

pressure to limit LCA subsidies as Airbus continued to have success against Boeing and steadily gained market share.¹⁵¹ In 2003, Airbus delivered more new aircraft than Boeing for the first time.¹⁵² In addition, Airbus had two aircraft in development: the A380, which would compete directly against the 747, Boeing's flagship aircraft, and the A350 XWB, which would compete directly against the 787, Boeing's revolutionary new midsize aircraft.¹⁵³ These threats to two of Boeing's most important assets, along with Airbus' generally increasing market share, heightened concerns about subsidies and set the stage for a confrontation.¹⁵⁴ The parties engaged in negotiations in the fall of 2004 in order to modify the 1992 Bilateral Agreement, but were unable to make headway.¹⁵⁵

IV. THE DISPUTE IN THE WTO

A. The Complaints

With these negotiations at a standstill, the United States chose to abrogate the Bilateral Agreement on October 6, 2004, citing violations by the EC.¹⁵⁶ That same day, it initiated the WTO DSU process by requesting consultations with the EC.¹⁵⁷ The EC responded by filing its own request for consultations, alleging that the United States violated the SCM Agreement by granting subsidies to Boeing in the form of state tax breaks and government contracts.¹⁵⁸

The Request for Consultations by the United States focused primarily on launch aid, defined as the provision of financing for the design and

¹⁵¹ Robert J. Carbaugh & John Olienyk, *Boeing-Airbus Subsidy Dispute: A Sequel*, 4 GLOBAL ECON. J. Issue 2, Article 6, at 3 (2004), available at http://www.relooney.info/0_New_10.pdf.

¹⁵² *Id.*

¹⁵³ Fischer, *supra* note 15, at 878–79; *Airbus to Launch Boeing 7E7 Rival*, *supra* note 58; see *supra* Part II.B.

¹⁵⁴ *Boeing v Airbus: See You In Court*, ECONOMIST, (Mar. 23, 2005) [hereinafter *Boeing v. Airbus*], <http://www.economist.com/node/3793314>; Nina Pavcnik, *Trade Disputes in the Commercial Aircraft Industry*, 25 WORLD ECON. 733, 733 (2002); see Fischer, *supra* note 15, at 878–79.

¹⁵⁵ Carbaugh & Olienyk, *supra* note 151, at 3; *Boeing v Airbus*, *supra* note 154.

¹⁵⁶ Press Release, Office of the U.S. Trade Representative, U.S. Files WTO Case Against EU Over Unfair Airbus Subsidies (Oct. 6, 2004), available at http://ustraderep.gov/Document_Library/Press_Releases/2004/October/US_Files_WTO_Case_Against_EU_Over_Unfair_Airbus_Subsidies.html. The EC does not recognize the validity of the United States' withdrawal from the Bilateral LCA Agreement, maintaining that it did not violate the agreement, so the United States had no right to renounce it. DS316 EC First Written Submission, *supra* note 32, ¶¶ 124–30.

¹⁵⁷ DS316 Request for Consultations, *supra* note 1, at 1.

¹⁵⁸ DS317 Request for Consultations, *supra* note 2, at 1.

development of aircraft to the Airbus companies by the Member States.¹⁵⁹ The complaint alleged that these loans were provided at no-interest or below-market interest rates, and with repayment contingent on the success of the aircraft being funded, making projects possible that would not otherwise be commercially feasible.¹⁶⁰ The United States alleged that this financing accounted for one hundred percent of the development costs of the A300 family, up to ninety percent for the A320, sixty to ninety percent for the A330 and A340, and one third of the development costs for the A380.¹⁶¹

In addition, the Request for Consultations alleged that Airbus received government grants and government-provided goods and services to develop, expand, and upgrade Airbus manufacturing sites for the development and production of the A380.¹⁶² It also alleged Airbus received grants and financing on preferential terms for research and development, both directly and through the European Investment Bank (EIB).¹⁶³ Finally, the complaint alleged that Airbus benefitted from the assumption and forgiveness of debts, and infusions of equity and grants by the EC and Member States.¹⁶⁴

The alleged subsidies applied to the entire line of Airbus aircraft.¹⁶⁵ The United States calculated the value of these subsidies for the A380 alone at approximately \$6.5 billion.¹⁶⁶ These included approximately \$4 billion in launch aid, a €700 million (\$900 million) subsidized loan from the EIB, in addition to €751 million (\$966 million) from Hamburg, €200 million (\$257 million) from Toulouse, and £19.5 million (\$31.2 million) from the Welsh Assembly for various industrial facilities for the A380, plus hundreds of millions of Euros in grants for research and development.¹⁶⁷

The Request for Consultations by the EC, meanwhile, focused on state and local tax subsidies and indirect subsidies to Boeing through various government contracts.¹⁶⁸ Specifically, the EC alleged that Boeing received

¹⁵⁹ DS316 Request for Consultations, *supra* note 1, at 1. The EC refers to these types of measures as Member State financing. See DS316 EC First Written Submission, *supra* note 32, ¶ 290.

¹⁶⁰ DS316 Request for Consultations, *supra* note 1, at 1–2.

¹⁶¹ DS316 US First Written Submission, *supra* note 34, ¶¶ 49, 52, 55, 70.

¹⁶² DS316 Request for Consultations, *supra* note 1, at 2.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ DS316 US First Written Submission, *supra* note 34, ¶ 7; Press Release, Office of the U. S. Trade Representative, U.S. Files WTO Case Against EU Over Unfair Airbus Subsidies (Oct. 6, 2004), available at http://ustraderep.gov/Document_Library/Press_Releases/2004/October/US_Files_WTO_Case_Against_EU_Over_Unfair_Airbus_Subsidies.html.

¹⁶⁷ DS316 US First Written Submission, *supra* note 34, ¶ 7.

¹⁶⁸ DS317 Request for Consultations, *supra* note 2; DS353 EC First Written Submission, *supra* note 20, ¶ 23.

just under \$5 billion in benefits from the states of Washington and Kansas relating to the 787 Dreamliner and \$25 million from the State of Illinois and City of Chicago for the relocation of its headquarters.¹⁶⁹ In addition, the complaint alleged Boeing received over \$16 billion in indirect subsidies in the form of research and development and procurement contracts with the National Aeronautics and Space Administration, the Department of Defense, and the National Institute of Standards and Technology, an agency of the U.S. Department of Commerce.¹⁷⁰ These contracts amounted to subsidies to LCA, as alleged by the EC, by foregoing or waiving patent rights and granting exclusive or early access to data, trade secrets, and other knowledge resulting from the government-funded research.¹⁷¹ Finally, the complaint alleged that Boeing benefitted in the amount of over \$2 billion from special tax treatment for “Foreign Sales Corporations” under the Internal Revenue Code.¹⁷² These alleged subsidies totaled \$23.7 billion.¹⁷³

B. The Procedure

The parties held the consultations as to these complaints as required under the DSU on November 4 and 5, 2004.¹⁷⁴ These consultations did not bring about a resolution, but just prior to moving forward with the DSU process, on January 11, 2005, the parties were able to agree to a framework for additional negotiations.¹⁷⁵ The agreement set as its objective “to secure a comprehensive agreement to end subsidies to large civil aircraft producers.”¹⁷⁶ The parties agreed to both a subsidies standstill and a

¹⁶⁹ DS317 Request for Consultations, *supra* note 2, at 1; DS353 EC First Written Submission, *supra* note 20, ¶ 23.

¹⁷⁰ DS317 Request for Consultations, *supra* note 2, at 1–2; DS353 EC First Written Submission, *supra* note 20, ¶ 23.

¹⁷¹ DS317 Request for Consultations, *supra* note 2, at 1–3. For example, the EC alleged that Boeing’s extensive use of composite materials in the 787 was made possible by decades of research funded by the U.S. government for the express purpose of increasing the competitiveness of the U.S. aeronautics industry. DS353 EC First Written Submission, *supra* note 20, ¶ 13.

¹⁷² DS317 Request for Consultations, *supra* note 2, at 2–3; DS353 EC First Written Submission, *supra* note 20, ¶ 23.

¹⁷³ DS353 EC First Written Submission, *supra* note 20, ¶ 2.

¹⁷⁴ Request for the Establishment of a Panel by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, 1, WT/DS316/2 (May 31, 2005); Request for the Establishment of a Panel by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, 1, WT/DS317/2 (May 31, 2005).

¹⁷⁵ Press Release, Office of the U. S. Trade Representative, United States Takes Next Step in Airbus WTO Litigation (May 30, 2005), *available at* http://www.ustr.gov/archive/Document_Library/Press_Releases/2005/May/United_States_Takes_Next_Step_in_Airbus_WTO_Litigation.html [hereinafter United States Takes Next Step].

¹⁷⁶ EU/US Agreement on Terms for Negotiation to End Subsidies for Large Civil

litigation standstill, and set three months for negotiations.¹⁷⁷ However, the EC backed away from the goal of ending subsidies and instead considered granting billions in new launch aid subsidies for the development of the A350.¹⁷⁸ Both parties therefore moved forward in the DSU process, requesting the establishment of panels and the commencement of Annex V procedures¹⁷⁹ on May 31, 2005.¹⁸⁰

Several procedural complications arose at this point, further complicating the process and separating the timing of the two separate proceedings. The DSB considered each of the requests for the establishment of a panel at its meeting on June 13, 2005, at which both the United States and the EC objected to the establishment of the panels, as was their right under the DSU.¹⁸¹ The United States further objected at that meeting that the Request for the Establishment of a Panel by the EC improperly exceeded the scope of its Request for Consultations and that the additional alleged measures could therefore not be the subject of panel proceedings.¹⁸²

At its meeting on July 20, 2005, the DSB established separate panels for the two proceedings, designated as DS316 for the complaint by the United States and DS317 for the complaint by the EC.¹⁸³ The parties were unable to agree on the members of the panels as to either dispute, so they

Aircraft, Jan. 11, 2005, available at http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_120976.pdf.

¹⁷⁷ Press Release, European Comm'n, EU/US Agreement on Terms for Negotiation to End Subsidies For Large Civil Aircraft (Jan. 11, 2005), available at http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_120978.pdf; Press Release, Office of the U.S. Trade Representative, Statement of U.S. Trade Representative Robert B. Zoellick Regarding U.S.–EU Agreement on Terms for Negotiation to End Subsidies for Large Civil Aircraft (Jan. 11, 2005), available at http://www.ustr.gov/archive/Document_Library/Press_Releases/2005/January/January_11,_2005_Statement_of_US_Trade_Representative_Robert_B_Zoellick_Regarding_US-EU_Agreement_on_Terms_for_Negotiation.html.

¹⁷⁸ United States Takes Next Step, *supra* note 175; Opening Statement of the United States, First Meeting of the Panel, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 10, WT/DS316 (Mar. 20, 2007), available at http://www.ustr.gov/webfm_send/826.

¹⁷⁹ Annex V of the SCM Agreement, titled Procedures for Developing Information Concerning Serious Prejudice, is the equivalent of the discovery process for the WTO. See SCM Agreement Annex V.

¹⁸⁰ Request for the Establishment of a Panel by the United States, *supra* note 174; Request for the Establishment of a Panel by the European Communities, *supra* note 174.

¹⁸¹ DS316 US First Written Submission, *supra* note 34, ¶ 11.

¹⁸² Request for Consultations by the European Communities, Addendum, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/1/Add.1 (June 27, 2005).

¹⁸³ Constitution of the Panel Established at the Request of the European Communities, Note by the Secretariat, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/4 (Oct. 25, 2005); Constitution of the Panel Established at the Request of the United States, Note by the Secretariat, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/4 (Oct. 25, 2005).

each requested that the Director-General determine the composition of the panels, which he did for both panels on October 17, 2005.¹⁸⁴

The EC officially requested consultations on the additional issues that the United States had objected to as outside the scope of the previous consultations,¹⁸⁵ and those consultations were held on August 3, 2005, but again failed to resolve the matter.¹⁸⁶ The United States persisted in its objection to the scope of the panel proceeding and refused to comply with the Annex V procedures as to the items it considered outside the scope of the Request for Consultations or improperly identified in the original panel request.¹⁸⁷ The EC requested that the DS317 Panel rule authoritatively on the Panel's scope, but the Panel declined to do so.¹⁸⁸ Because of this, the EC subsequently requested that the DSB establish an additional panel as to its new request for consultations.¹⁸⁹ On February 17, 2006, the DSB established a panel regarding this new request, now designated as DS353, and on November 22, 2006, the Deputy Director-General constituted the panel at the request of the EC.¹⁹⁰ With this new panel established, the EC did not continue to pursue the DS317 complaint.¹⁹¹

The DS353 Panel held its meetings in September 2007 and January 2008.¹⁹² The Panel notified the parties on four occasions that, "in light of the substantive and procedural complexities of this dispute," it would not be able to complete its work within the six month timeframe called for by the DSU,¹⁹³ before officially issuing its Final Report on March 31, 2011.¹⁹⁴

¹⁸⁴ Constitution of the Panel Established at the Request of the European Communities, Note by the Secretariat, *supra* note 183; Constitution of the Panel Established at the Request of the United States, Note by the Secretariat, *supra* note 183.

¹⁸⁵ Request for Consultations by the European Communities, Addendum, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/1/Add.1 (June 27, 2005).

¹⁸⁶ Request for the Establishment of a Panel by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, 1, WT/DS317/5 (Jan. 20, 2006).

¹⁸⁷ DS353 EC First Written Submission, *supra* note 20, ¶ 52.

¹⁸⁸ Request for the Establishment of a Panel by the European Communities, *supra* note 186.

¹⁸⁹ *Id.* at 2.

¹⁹⁰ Constitution of the Panel Established at the Request of the European Communities, Note by the Secretariat, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS353/3 (Dec. 4, 2006).

¹⁹¹ DS353 EC First Written Submission, *supra* note 20, ¶ 53; Communication from the Chairman of the Panel, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/6 (Apr. 13, 2006).

¹⁹² WT/DS353—*Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, EUR. COMMISSION, http://trade.ec.europa.eu/wtodispute/show.cfm?id=354&code=1#_eu-submissions (last updated Oct. 19, 2011).

¹⁹³ Communication from the Chairman of the Panel, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/4 (May 18, 2007); Communication from the Chairman of the Panel, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/5 (July 11, 2008); Communication from the Chairman of the Panel, *United States—Measures Affecting Trade in Large Civil*

Both parties filed appeals,¹⁹⁵ and after holding hearings in August and October 2011, the AB issued its report on March 12, 2012.¹⁹⁶ The DSU adopted the recommendations and rulings on March 26, 2012, bringing the substantive portion of the DS353 dispute to a close.¹⁹⁷

Meanwhile, the complaint by the United States against the EC and Airbus has proceeded somewhat quicker, notwithstanding some procedural complications of its own. Following the establishment of a panel in DS316, the EC raised objections to the Annex V process based on the scope of the panel request, similar to the United States' objections in DS317.¹⁹⁸ In response to the EC's request for a preliminary ruling on this objection, the United States filed an additional request for consultations on January 31, 2006,¹⁹⁹ and subsequently requested a panel for that request.²⁰⁰ The United States requested that the same panel address the matters raised in this additional request,²⁰¹ but the Deputy Director-General did not name the existing DS316 panelists to the new Panel, designated as DS347.²⁰² Because this separate panel proceeding would be duplicative, the United

Aircraft (Second Complaint), WT/DS353/6 (Dec. 16, 2009); Communication from the Chairman of the Panel, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/7 (July 7, 2010).

¹⁹⁴ DS353 Panel Report, *supra* note 4.

¹⁹⁵ Notification of an Appeal by the European Union under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and under Rule 20(1) of the *Working Procedures for Appellate Review*, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/8 (Apr. 1, 2011); Notification of an Other Appeal by the United States under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and under Rule 23(1) of the *Working Procedures for Appellate Review*, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/10 (Apr. 28, 2011).

¹⁹⁶ Communication from the Appellate Body, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/11 (July 6, 2011); DS353 AB Report, *supra* note 5.

¹⁹⁷ Appellate Body Report and Panel Report, Action by the Dispute Settlement Body, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/13 (Mar. 26, 2012).

¹⁹⁸ DS316 EC First Written Submission, *supra* note 32, ¶ 15.

¹⁹⁹ Request for Consultations by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/1/Add.1 (Jan 31, 2006).

²⁰⁰ Request for the Establishment of a Panel by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/6 (Apr. 10, 2006).

²⁰¹ Request by the United States for a Decision of the Dispute Settlement Body, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/5 (Apr. 10, 2006).

²⁰² See Constitution of the Panel Established at the Request of the United States, Note by the Secretariat, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS347/5 (July 24, 2006).

States asked on October 6, 2006, that the panel suspend its work,²⁰³ and later allowed the DS347 panel to lapse²⁰⁴ after the DS316 panel found in favor of the United States in regard to the EC's objection to the temporal scope of the proceeding.²⁰⁵

With the proceedings set in motion, the Panel held its first meeting with the parties in March 2007 and its second meeting in July 2007.²⁰⁶ Just as in the parallel proceedings, the DS316 Panel notified the parties on four occasions that, due to the "substantive and procedural complexities" involved in the dispute, it would not be possible for the Panel to complete its work within six months of its composition,²⁰⁷ before publicly releasing its final report on June 30, 2010.²⁰⁸ The EC and United States each filed appeals,²⁰⁹ and after hearings in November and December 2010, the AB circulated its report on May 18, 2011.²¹⁰ The DSB adopted the AB report and the panel report, as modified by the AB report, at its meeting on June 1, 2011.²¹¹

²⁰³ Communication from the Chairman of the Panel, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS347/6 (Oct. 10, 2006) The decision by the United States to pursue its original complaint, DS316, while the EC ultimately pursued its refiled complaint, DS353, is what caused the two actions, originally filed on the same day, to be separated by almost a year.

²⁰⁴ Lapse of Authority for the Establishment of the Panel, Note by the Secretariat, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS347/7 (Oct. 9, 2007).

²⁰⁵ DS316 EC First Written Submission, *supra* note 32, ¶ 22.

²⁰⁶ DS316 Panel Report, *supra* note 4, ¶ 1.13.

²⁰⁷ Communication from the Chairman of the Panel, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/7 (Apr. 13, 2006); Communication from the Chairman of the Panel, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/9 (Dec. 14, 2007); Communication from the Chairman of the Panel, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/10 (Oct. 20, 2008); Communication from the Chairman of the Panel, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/11 (Dec. 7, 2009).

²⁰⁸ DS316 Panel Report, *supra* note 4.

²⁰⁹ Notification of an Appeal by the European Union under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the *Working Procedures for Appellate Review*, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/12 (July 23, 2010); Notification of an Other Appeal by the United States under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23(1) of the *Working Procedures for Appellate Review*, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/13 (Aug. 20, 2010).

²¹⁰ DS316 AB Report, *supra* note 5.

²¹¹ Appellate Body Report and Panel Report, Action by the Dispute Settlement Body, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/16 (June 6, 2011).

C. The Panel and AB Findings

1. *The DS316 Panel and AB Findings*

In the DS316 Panel Report, released on June 30, 2010, the panel found a substantial amount of subsidies to Airbus.²¹² The panel held that each of the challenged launch aid measures was a specific subsidy under the SCM Agreement.²¹³ The Panel further held that fourteen of the seventeen challenged provisions of infrastructure and infrastructure-related grants were specific subsidies, including the provision of manufacturing sites in Hamburg and Toulouse, a runway extension at the Bremen Airport in Germany, and grants from Germany and Spain for manufacturing and assembly facilities.²¹⁴

In addition, the Panel held in favor of the United States in regard to each of the French equity infusions, the majority of the challenged research and technological development funding, and the German government's transfer of its ownership in Deutsche Airbus to the Daimler Group.²¹⁵ It did not find, however, that any of the challenged loans by the EIB, though subsidies, were specific subsidies.²¹⁶

Of each of these measures that the Panel found to be specific subsidies, the Panel found only the launch aid provisions by three of the four Airbus nations to the A380 to be in the category of prohibited subsidies as export subsidies.²¹⁷ The remaining launch aid subsidies were not held to be contingent on either law or fact upon anticipated export performance, so they were not held to be prohibited subsidies.²¹⁸ These remaining launch aid subsidies and the rest of the specific subsidies therefore required a showing of adverse effects to be actionable. In this regard, the Panel found that the subsidies had caused adverse effects of serious prejudice to the United States' interests under Article 6.3 of the SCM Agreement by displacing imports and exports and causing significant lost sales.²¹⁹ The Panel noted that "Airbus' market share is directly attributable to its ability to sell and deliver to the European Communities and relevant third country markets, LCA which it would not have had available but for the subsidies which supported the launch of every model of Airbus LCA."²²⁰ While these adverse effects were sufficient to make the subsidies actionable, the Panel

²¹² DS316 Panel Report, *supra* note 4.

²¹³ *Id.* ¶ 8.1(a)(i).

²¹⁴ *Id.* ¶ 8.1(b).

²¹⁵ *Id.* ¶¶ 8.1(c), (d), (e).

²¹⁶ *Id.* ¶ 8.3(b).

²¹⁷ *Id.* ¶ 8.1(a)(ii).

²¹⁸ *Id.* ¶ 8.3(a).

²¹⁹ *Id.* ¶¶ 8.2, 8.4.

²²⁰ *Id.* ¶ 7.1985.

did not find that the subsidies caused adverse effects of price undercutting, suppression, or depression under Article 6.3(c) of the SCM Agreement, or injury to the United States' domestic industry under Article 5(a) of the SCM Agreement.²²¹

The Panel also rejected several of the United States' challenges of launch aid subsidies for the development of the A350. The panel did not find that any of the nations had committed to launch aid for the A350 as of July 2005.²²² In addition, the Panel rejected the claim that the history of launch aid provisions to Airbus aircraft constituted an unwritten launch aid program.²²³ These findings are important because they mean that if the United States wishes to challenge launch aid for the A350, it will have to initiate new proceedings, taking additional time and possibly giving Airbus a competitive advantage in the meantime, instead of immediately applying countervailing measures as it could have if the measures were determined to be part of this proceeding.

The panel concluded by recommending that “the subsidizing Member granting each subsidy found to be prohibited withdraw it without delay,”²²⁴ and that “the Member granting each subsidy found to have resulted in such adverse effects ‘take appropriate steps to remove the adverse effects or . . . withdraw the subsidy.’”²²⁵ However, it declined to “make any suggestions concerning steps that might be taken to implement those recommendations.”²²⁶ Though the parties sharply disagreed in the press over the extent to which the report favored each party's positions,²²⁷ the total amount of illegitimate subsidies adds up to \$18 billion by the United States' calculations—more than any WTO panel has found in any previous dispute.²²⁸

Both parties filed appeals.²²⁹ The EC²³⁰ objected to various

²²¹ *Id.* ¶ 8.4.

²²² *Id.* ¶ 8.3(a)(i).

²²³ *Id.* ¶ 8.3(a)(iv).

²²⁴ *Id.* ¶ 8.6.

²²⁵ *Id.* ¶¶ 8.7.

²²⁶ *Id.* ¶ 8.8.

²²⁷ Each party has asserted that the Panel favored them on approximately seventy percent of their claims. Press Release, Airbus, Airbus Alerts on Counter Case on Boeing Subsidies while WTO Panel Rejects US Claims, (June 30, 2010), available at <http://www.airbus.com/presscentre/pressreleases/press-release-detail/detail/airbus-alerts-on-counter-case-on-boeing-subsidies-while-wto-panel-rejects-us-claims/>; *DS 316 WTO Panel Subsidy Findings—Win/Loss Analysis*, BOEING, http://www.boeing.com/aboutus/govt_ops/docs/wto/Win_and_Loss_Analysis.pdf.

²²⁸ Oral Statement of the United States at the First Oral Hearing, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 2, AB-2010-1/DS316 (Nov. 11, 2010), available at http://www.ustr.gov/webfm_send/2392.

²²⁹ Notification of an Appeal by the European Union under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, *European*

conclusions of the Panel, primarily relating to whether the launch aid, infrastructure measures, and equity infusions constituted specific subsidies, and whether those measures were export subsidies or had caused serious prejudice.²³¹ The United States appealed the Panel's conclusions that no launch aid program existed that would bring future launch aid to the A350 into the scope of the complaint, and that the launch aid did not constitute prohibited export subsidies except for the A380.²³²

The AB panel upheld the Panel's conclusion that the launch aid measures were specific subsidies, but reversed its conclusion that launch aid for the A380 constituted an export subsidy, and limited the findings of serious prejudice based on displacement.²³³ The AB also reversed Panel conclusions as to some of the infrastructure and research and development measures,²³⁴ but upheld findings that certain capital investments and research and development programs were specific subsidies.²³⁵ In addition, the AB rejected the United States' arguments that certain launch aid measures were prohibited export subsidies and held that allegations of a de facto launch aid program were outside the terms of reference of the Panel.²³⁶ The AB concluded by recommending that the EC bring its measures, as found by the Panel and modified by the AB, into conformity with its obligations under the SCM Agreement.²³⁷

On December 1, 2011, the EC notified the DSB that it had "taken appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the DSB's recommendations and rulings," and that it had removed all subsidies and adverse effects covered by the DSB's rulings.²³⁸ Specifically, it stated that it had "secured repayment of [Member State Financing (MSF)] loans and terminated MSF agreements,

Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft, WT/DS316/12 (July 21, 2010); Notification of an Other Appeal by the United States under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23(1) of the Working Procedures for Appellate Review, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/13 (Aug. 19, 2010).

²³⁰ Upon the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, the European Union (EU) replaced and succeeded the EC before the WTO. DS316 AB Report, *supra* note 5, at 1 n.1. For continuity sake, though, I refer to the EC rather than the EU.

²³¹ *Id.* ¶ 571.

²³² *Id.* ¶ 572.

²³³ *Id.* ¶ 1414(e), (f), (j), (m), (n).

²³⁴ *Id.* ¶ 1414(g), (s).

²³⁵ *Id.* ¶ 1414(f), (h).

²³⁶ *Id.* ¶ 1415.

²³⁷ *Id.* ¶ 1418.

²³⁸ Communication from the European Union, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/17 (Dec. 1, 2011).

increased fees and lease payments on infrastructure support to accord with market principles, and ensured that capital contributions and regional aid subsidies . . . are no longer capable of causing adverse effects.”²³⁹ The United States disputed, however, that these measures brought the EC into compliance, and requested authorization from the DSB to take countermeasures totaling between \$7 and \$10 billion per year in the form of a suspension of concessions under GATT and the General Agreement on Trade in Services (GATS).²⁴⁰ The United States also accompanied this request with a request for consultations to facilitate resolving the dispute,²⁴¹ and the WTO later referred the matter back to the original panel, at the United States’ request, to determine compliance.²⁴²

2. *The DS353 Panel and AB Findings*

The DS353 Panel circulated its final report on March 31, 2011.²⁴³ As to subsidies from state and local governments, the Panel found that some of the measures from Washington, Kansas, and Illinois, and municipalities therein constituted specific subsidies, including tax breaks from Washington and Kansas, and a headquarters relocation incentive package from Illinois and the City of Chicago.²⁴⁴ As to the indirect subsidies, the Panel found that various NASA aeronautics research and development programs constituted specific subsidies to Boeing in the amount of \$2.6 billion.²⁴⁵ The Panel also determined that some of the U.S. Department of Defense research and development programs constituted specific subsidies.²⁴⁶ Of the \$45 billion spent by the Department of Defense with Boeing over the contested time period, the EC estimated that \$2.4 billion constituted specific subsidies to LCA, while the United States put that number at less than \$308 million.²⁴⁷ The Panel rejected both numbers, but was unable to reach an estimate of its own as to the value of these subsidies.²⁴⁸ The Panel also rejected allegations of various other subsidies,

²³⁹ *Id.* ¶ 4.

²⁴⁰ Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/18 (Dec. 9, 2011).

²⁴¹ Recourse to Article 21.5 of the DSU by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/19 (Dec. 9, 2011).

²⁴² Recourse to Article 21.5 of the DSU by the United States, Constitution of the Panel, Note by the Secretariat, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/24 (Apr. 25, 2012).

²⁴³ DS353 Panel Report, *supra* note 4.

²⁴⁴ *Id.* ¶¶ 7.302, 7.303, 7.819, 7.939.

²⁴⁵ *Id.* ¶ 7.1110.

²⁴⁶ *Id.* ¶ 7.1210.

²⁴⁷ *Id.* ¶¶ 7.1203, 7.1204.

²⁴⁸ *Id.* ¶¶ 7.1205–7.1207, 7.1210.

including research and development contracts from the Department of Commerce, allocation of intellectual property rights, and worker training grants.²⁴⁹

The Panel also found that Boeing received prohibited export subsidies under FSC tax benefits in the amount of \$2.199 billion, but declined to make a recommendation as to those because they were subject to a previous WTO adjudication.²⁵⁰ As to the remaining specific subsidies, the Panel found that some, but not all, of the measures caused the adverse effects of serious prejudice to the interests of another member by displacement, significant price suppression, and significant lost sales.²⁵¹ The Panel concluded by recommending that the United States “take appropriate steps to remove the adverse effects or . . . withdraw” these subsidies.²⁵²

U.S. representatives proclaimed victory, claiming that the Panel’s findings of \$3 billion in new subsidies,²⁵³ compared to the \$24 billion in alleged subsidies, “amounts to a massive rejection” of the EC’s case,²⁵⁴ one that “pales in comparison to the WTO’s earlier findings that Airbus benefited from illegal subsidies.”²⁵⁵ Meanwhile, representatives on the EC’s side asserted that the cited subsidies resulted in at least \$45 billion in lost sales to Airbus, and have reiterated a desire to return to negotiations to settle the dispute.²⁵⁶

The EC and the United States each appealed the report.²⁵⁷ The United

²⁴⁹ *Id.* ¶¶ 7.1257, 7.1312, 7.1375.

²⁵⁰ *Id.* ¶¶ 7.1429, 8.6, 8.7.

²⁵¹ *Id.* ¶ 7.1854, 7.1855.

²⁵² *Id.* ¶ 8.9.

²⁵³ This number appears to exclude the benefits from FSC tax credits, which the United States claims were separately resolved, and also appears to omit benefits from Department of Defense contracts, which the Panel determined to be subsidies, but did not quantify. *See* Press Release, Boeing, Boeing Response to Public Reports Regarding the WTO’s Interim Decision in DS 353 (Sept. 15, 2010), <http://boeing.mediaroom.com/index.php?s=43&item=1423>.

²⁵⁴ *Id.*

²⁵⁵ Dominic Gates, *WTO’s Boeing Ruling Could Fuel Subsidy Debate, Make Settlement More Difficult*, SEATTLE TIMES (Sept. 15, 2010), http://seattletimes.nwsourc.com/html/business/technology/2012903753_boeingwto16.html.

²⁵⁶ Aubrey Cohen, *Exec: Illegal Boeing Subsidies Cost Airbus \$45 Billion in Sales*, SEATTLEPI BLOGS (Sept. 21, 2010), http://blog.seattlepi.com/aerospace/archives/222174.asp?from=blog_last3; Aubrey Cohen, *Europen [sic] Source: Boeing Subsidies Enough to Spur Negotiations*, SEATTLE PI BLOGS (Sept. 15, 2010, 1:44 PM), <http://blog.seattlepi.com/aerospace/archives/221488.asp>.

²⁵⁷ Notification of an Appeal by the European Union under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/8 (Apr. 1, 2011); Notification of an Other Appeal by the United States under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23(1) of the Working Procedures for Appellate Review, *United*

States appealed the Panel's findings that certain state and local tax benefits and aspects of Boeing's NASA and Department of Defense contracts constituted subsidies.²⁵⁸ It also appealed the Panel's conclusions as to the adverse effects of these measures.²⁵⁹ The EC appeal, filed the day after the public release of the Panel report, argued that the Panel erred in finding that certain transfers of patent rights and purchases of services did not constitute subsidies, and that the Panel should have considered the aggregate effect of the subsidies in determining their adverse effects.²⁶⁰ In its report, the AB upheld most of the Panel's determinations as to the existence of subsidies, though with minor modifications.²⁶¹ It also upheld most of the Panel's findings regarding adverse effects, also with modifications in each direction.²⁶² The AB report closed by recommending that the United States remove the adverse effects or withdraw the subsidies.²⁶³ Once again, both parties claimed decisive victory. Airbus derided the 787 Dreamliner as the "Subsidy-liner," while the United States claimed that the decision established "that European subsidies to Airbus are far larger—by multiples—and more distortive than anything that the United States does for Boeing."²⁶⁴

Six months after the DSB's adoption of the panel and appellate reports on March 23, 2012, the United States proclaimed that it had "fully complied with the recommendations and rulings of the Dispute Settlement Body in this dispute."²⁶⁵ It stated that NASA and the Department of Defense had revised each of the contracts found to be in violation of the SCM

States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint), WT/DS353/10 (Apr. 28, 2011);.

²⁵⁸ Notification of an Other Appeal by the United States under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23(1) of the Working Procedures for Appellate Review, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶¶ 1–9, WT/DS353/10 (Apr. 28, 2011).

²⁵⁹ *Id.* ¶ 10.

²⁶⁰ Notification of an Appeal by the European Union under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶¶ 2–3, WT/DS353/8 (Apr. 1, 2011).

²⁶¹ DS353 AB Report, *supra* note 5.

²⁶² *Id.* ¶ 1350(d).

²⁶³ *Id.* ¶ 1352.

²⁶⁴ Christopher Drew & Nicola Clark, *In Appeal, W.T.O. Upholds a Decision Against Boeing*, N.Y. TIMES (Mar. 12, 2012), <http://www.nytimes.com/2012/03/13/business/global/trade-group-upholds-ruling-on-boeing-subsidies.html>; Editorial, *Deuling WTO Interpretations Beg for Boeing–Airbus Settlement*, SEATTLE TIMES (Mar. 20, 2012, 3:31 PM), http://seattletimes.nwsourc.com/html/editorials/2017800239_edit21wto.html.

²⁶⁵ Communication from the United States, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/15 (Sept. 23, 2012).

Agreement, had revised or terminated other policies and programs, and that the state and local measures were no longer in effect.²⁶⁶ It additionally stated that through these actions, “any adverse effects of the subsidies in question have ceased to exist.”²⁶⁷ The EC thought otherwise. On September 27, 2012, it requested authorization to impose countermeasures against the United States in the amount of \$12 billion annually to address continuing subsidies and the continuing adverse effects of the covered subsidies.²⁶⁸ It also requested consultations with the United States, the first step in adjudicating compliance with the WTO’s rulings.²⁶⁹

Thus, although the substantive portions of the dispute resolution process have concluded for both the DS316 and DS353 disputes, the enforcement stage of the proceedings is just getting underway, meaning the ultimate conclusion, if any, could still be years away.

V. THE FUTURE OF THE DISPUTE

Having evaded a meaningful and comprehensive trade agreement in the civil aircraft industry for over four decades now, a resolution will not be achieved easily, and the resulting agreement is not likely to be painless for any party. With both companies developing new aircraft meant for direct competition, the incentives are extremely high to remove any competitive advantage the opposing party’s subsidies may afford it. The resolution of the WTO processes may provide the parties with useful tools to resolve the dispute, such as hard information as to each other’s subsidies programs, and possibly the threat of trade retaliation if the party does not comply with the panel recommendations. Still, many factors will continue to work against a comprehensive agreement to eliminate, or at least more stringently limit, subsidies.

A. Challenges to Reaching a Resolution

First, there is a basic difference of ideas between Europe and the United States on the role of government in the market that has manifested itself throughout the history of the dispute.²⁷⁰ While Boeing began through entrepreneurship and has grown largely absent direct government aid, Airbus has been the product of government intervention from the very

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Recourse to Article 22.2 of the DSU, and Articles 4.10 and 7.9 of the SCM Agreement, by the European Union, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/17 (Sept. 27, 2012).

²⁶⁹ Recourse to Article 21.5 of the DSU by the European Union, Request for Consultations, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/16 (Sept. 25, 2012).

²⁷⁰ Meier-Kaienburg, *supra* note 1, at 195–97.

beginning.²⁷¹ Resolving the dispute may require setting aside, or at least putting on the table, each party's traditional understanding and philosophy as to the role of government in industry. This difference is also reflected in the types of subsidies the parties have provided, with Europe giving direct subsidies to Airbus in the form of launch aid and the United States subsidizing Boeing more indirectly through government contracts and tax breaks.²⁷² This difference in the two parties' approaches will create an additional obstacle to an agreement because the different types of subsidies and the different effects they have on the market prevent a direct comparison between the two parties' subsidies. Instead, the differences will allow additional room for argument as to the comparative effects and permissibility of the respective programs and will require the parties to haggle over the limitations to be set on each form of subsidy rather than setting a single standard applicable to both parties.²⁷³

In addition, the importance and prominence of the LCA industry to both parties will cause them to jealously guard any advantage they can secure. Civil aviation is the largest export industry in the United States, and Boeing is the largest exporting manufacturer in the United States and the world.²⁷⁴ Airbus also occupies a similar stature in Europe.²⁷⁵ Even a slight advantage, when multiplied by the massive size of the LCA industry, could lead to significant economic benefits for the subsidizing party, so neither the United States nor the EC will lightly give up any advantage it can gain. Aside from competitive advantages, though, Airbus' success has obviated the need for continued subsidies to overcome the barriers to entry in the civil aircraft industry,²⁷⁶ and has greatly diminished the difference between the terms of the launch aid and the financing that it would be able to obtain in an arms-length transaction on the open market,²⁷⁷ which may help facilitate a resolution.

In addition to domestic economies, each party has defense issues to consider in resolving the dispute. With many of the challenged subsidies to

²⁷¹ See *supra* Part II.

²⁷² Meier-Kaienburg, *supra* note 1, at 196–97; see *supra* Part IV.

²⁷³ See *EU/US Agreement on Terms for Negotiation to End Subsidies for Large Civil Aircraft: Questions and Answers*, EUR. COMMISSION (Jan. 11, 2005), http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134261.pdf.

²⁷⁴ Meier-Kaienburg, *supra* note 1, at 195–96.

²⁷⁵ *Id.*

²⁷⁶ *An Ill-Timed Spat: A Transatlantic Row (Again) Over Aircraft Subsidies Could Jeopardise the Global Trade Talks*, ECONOMIST (Mar. 23, 2005), <http://www.economist.com/node/3789454>; Phillip Swagel, *Boeing vs. Airbus: An Examination of the Issues*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES. (Mar. 16, 2005), <http://www.aei.org/EMStaticPage/1028?page=Summary>; see also CHANGING STRUCTURE, *supra* note 17, at 2-1 to 2-2 (emphasizing access to capital as a critical barrier to entry in the LCA market).

²⁷⁷ Swagel, *supra* note 276.

Boeing involving defense and government contracts,²⁷⁸ the United States may be hesitant to restructure its defense spending to comply with the WTO rulings. Both companies also have substantial military components, and the spillover effect of the subsidies on military contracts may also come into play.²⁷⁹

One additional complication to resolving the dispute is that the LCA industry may not be limited to the Airbus–Boeing duopoly for much longer. As many as five other nations have ambitions in the LCA industry, beginning at the small end with single-aisle aircraft, including China, Russia, Japan, Canada, and Brazil.²⁸⁰ Regional jet makers, primarily Canada’s Bombardier and Brazil’s Embraer, are increasingly competing at the small end of the LCA market.²⁸¹ Bombardier expects to introduce a new series of aircraft in 2013 with a seating capacity somewhat below that of the 737 and A320.²⁸² Brazil is currently the world’s third largest

²⁷⁸ *Details of the US Subsidies to Boeing Challenged by the EU*, EUR. COMMISSION (Sept. 13, 2010), http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146484.pdf.

²⁷⁹ The subsidies dispute became a significant point of contention, at least among politicians and in the media, in the awarding of a contract by the United States Air Force to build its new generation of refueling tankers, valued at up to \$35 billion. See Aubrey Cohen, *Politicians Pivot WTO Ruling to Air Force Tanker Fight*, SEATTLEPI (June 30, 2010, 9:51 AM), <http://blog.seattlepi.com/aerospace/2010/06/30/politicians-pivot-wto-ruling-to-air-force-tanker-fight/>; Roxana Tiron, *WTO Ruling Gives EADS Ammunition in Tanker Fight Against Boeing*, THE HILL (Sept. 15, 2010, 5:28 PM), <http://thehill.com/news-by-subject/defense-homeland-security/119053-wto-ruling-gives-eads-ammunition-in-tanker-fight-against-boeing>; *WTO Penalties on the Tanker? Let’s Talk About This*, LEEHAM NEWS & COMMENT (Feb. 1, 2011), <http://leehamnews.wordpress.com/2011/02/01/wto-penalties-on-the-tanker-lets-talk-about-this/>. Both Boeing and Airbus submitted bids, each basing the proposed tanker on one of its civil aircraft, and the contract was ultimately awarded to Boeing. Christopher Drew, *EADS Won’t Protest Loss of Tanker Contract to Boeing*, N.Y. TIMES (Mar. 4, 2011), <http://www.nytimes.com/2011/03/05/business/global/05tanker.html?src=busln>.

²⁸⁰ Michelle Dunlop, *Small Jetmakers Hungry for More: Regional Rivals Are Eager to Steal Some of Boeing’s Business*, HERALDNET (Nov. 18, 2010) [hereinafter *Hungry for More*], <http://www.heraldnet.com/article/20101118/BIZ/711189963/1005>; Michelle Dunlop, *A Host of Challengers to 737’s Throne*, HERALDNET (Nov. 21, 2010) [hereinafter *Host of Challengers*], <http://www.heraldnet.com/article/20101121/BIZ/311219999/1010/BIZ01>; *Brazil Eyes Boeing, Airbus Aviation Market*, UPI (Nov. 29, 2010, 5:11 PM) [hereinafter *Brazil Eyes Boeing*], http://www.upi.com/Business_News/Security-Industry/2010/11/29/Brazil-eyes-Boeing-Airbus-aviation-market/UPI-86421291068679/ (“The aviation duopoly of Airbus and Boeing is about to change forever.”); P.C., *The Dubai Airshow: The Russians are Coming—and the Chinese and the Canadians*, *Gulliver*, ECONOMIST (Nov. 14, 2011, 11:10 AM), <http://www.economist.com/blogs/gulliver/2011/11/dubai-air-show>.

²⁸¹ Marc. L. Busch, *Testimony of Marc L. Busch to the House Aviation Subcommittee* (May 25, 2005), <http://www.aei.org/speech/100121>; *Hungry for More*, *supra* note 280.

²⁸² *Host of Challengers*, *supra* note 280; PEDER ANDERSEN, *NEW CIVIL AIRCRAFT COMPETITORS ON THE HORIZON?* (Apr. 2009), http://www.usitc.gov/publications/332/Executive_Briefings/NewCivilAircraftExecutiveBriefing.pdf.

producer of commercial aircraft,²⁸³ and Embraer also competes at the small end of the 737/A320 market and may be looking to expand.²⁸⁴ More importantly in the long term, Comac, the state-owned Commercial Aircraft Corporation of China, has a new aircraft under development.²⁸⁵ The C919, seating 166 and set to enter service in 2016, will compete directly against the 737 and A320.²⁸⁶ This is particularly significant because demand for aircraft in China is projected to exceed 4,000 aircraft over the next twenty years.²⁸⁷ These entrants to the narrow-body market, which currently accounts for around sixty percent of the LCA market and is dominated by the 737 and A320,²⁸⁸ pose serious threats to the continued dominance of Airbus and Boeing over the LCA market.

With this competition looming, neither the United States nor the EC will be eager to agree to limits on its own activities that will not apply to or be enforced vis-à-vis its emerging competitors.²⁸⁹ While the long term will likely require a pluri- or multilateral agreement among the LCA players, adding additional parties to the already highly complex negotiations between the United States and the EC could be counterproductive.²⁹⁰ Because of this, the parties may be content at this time to let the current WTO rulings serve as a precedent on LCA subsidies.²⁹¹

B. Potential Resolutions

Despite these complications, the parties will likely need to return to the negotiating table to reach an agreement limiting subsidies and resolving the WTO dispute. Full and immediate compliance with the WTO rulings by

²⁸³ *Brazil Eyes Boeing*, *supra* note 280.

²⁸⁴ *Id.*; *Host of Challengers*, *supra* note 280; GLENNON J. HARRISON, CONGRESSIONAL RESEARCH SERVICE, CHALLENGE TO THE BOEING–AIRBUS DUOPOLY IN CIVIL AIRCRAFT: ISSUES FOR COMPETITIVENESS 29–30 (2011), <http://www.fas.org/sgp/crs/misc/R41925.pdf>.

²⁸⁵ *Host of Challengers*, *supra* note 280; Liza Lin, *China's First Passenger Plane Stokes Pride, Wins Initial Sales*, BLOOMBERG NEWS (Nov. 17, 2010), <http://www.bloomberg.com/news/2010-11-17/china-s-first-passenger-plane-stokes-pride-wins-initial-sales.html>.

²⁸⁶ *Host of Challengers*, *supra* note 280; Lin, *supra* note 285.

²⁸⁷ 4,330 aircraft as projected by Boeing. *Host of Challengers*, *supra* note 280. 4,265 aircraft according to the Aviation Industry Corporation of China. Lin, *supra* note 285.

²⁸⁸ HARRISON, *supra* note 284, at 1.

²⁸⁹ See Press Release, Airbus, Statement by Airbus President and CEO Tom Enders in Response to the WTO Announcement of a Further Delay of the Report in the Boeing Subsidies Case (DS 353) (July 8, 2010) <http://www.airbus.com/presscentre/pressreleases/press-release-detail/detail/statement-by-airbus-president-and-ceo-tom-enders-in-response-to-the-wto-announcement-of-a-further-de/>.

²⁹⁰ See LONG-TERM VIABILITY, *supra* note 80, at 42–45.

²⁹¹ See Meier-Kaienburg, *supra* note 1 at 236–37; *WTO to Release 'Milestone' EU-US Aircraft Battle Ruling*, CHINA POST (JAN. 31, 2011, 11:41 PM) <http://www.chinapost.com.tw/business/global-markets/2011/01/31/289743/p2/WTO-to.htm>; John W. Miller & Daniel Michaels, *WTO Condemns Airbus Subsidies*, WALL ST. J. (July 1, 2010), <http://online.wsj.com/article/SB10001424052748703426004575338773153793294.html>.

either party is highly doubtful because, as in other high-profile WTO disputes, the high stakes in the LCA industry give little incentive for prompt compliance, and determining how to become compliant would be very difficult even for a party inclined to do so, due to the complexity of the case.²⁹² Absent a negotiated agreement, then, each party would be left to whatever remedies the DSU entitles it to coerce compliance from the opposing party. This would likely take the form of a suspension of concessions, since compensation—a trade concessions benefit to the prevailing party by the party subject to the complaint—must be offered by the noncompliant party, and is therefore quite unlikely.²⁹³

The fact that the United States has been much less insistent on returning to the bargaining table than the EC throughout the WTO process²⁹⁴ may indicate that the United States is content with the SCM Agreement as it stands, and with the remedies that the SCM Agreement and DSU will entitle it. However, the large amount of subsidies found on both sides means that absent full compliance or a negotiated solution, each party would be able to impose massive trade sanctions against a wide range of industries of the opposing party.²⁹⁵ While this may resolve the instant dispute in the WTO, it could also inflict significant harm on the imposing party's domestic consumers, as well as industries of the opposing party unrelated to the LCA industry.²⁹⁶ It would also be limited to the current dispute, leaving the parties back at square one the next time subsidies come up—for the A350, for example. Additionally, if such an arrangement is unacceptable to the EC, the dispute would likely just spill over into the already fragile and stalemated Doha Round of WTO negotiations.²⁹⁷

If a negotiated agreement is reached, one distinct possibility is that it will be along the same lines as the 1992 Bilateral Agreement: rather than establishing a comprehensive framework eliminating aircraft subsidies,

²⁹² Meier-Kaienburg, *supra* note 1, at 228–30.

²⁹³ See *supra*, Part III.C.2.

²⁹⁴ See, e.g., Charles Alcock, *Boeing and Airbus Still at Loggerheads over WTO Rulings*, AINONLINE (Sept. 24, 2010), <http://www.ainonline.com/?q=aviation-news/ain-air-transport-perspective/2010-09-24/boeing-and-airbus-still-loggerheads-over-wto-rulings>; Gow, *supra* note 3; Press Release, European Comm'n, EU Resumes WTO Case Against Boeing (May 31, 2005), http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134266.pdf.

²⁹⁵ The United States has already moved forward with this option by requesting authority to suspend concessions under both GATT and GATS for the EC's alleged failure to comply with the Panel and AB rulings. Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by the United States, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/18 (Dec. 9, 2011).

²⁹⁶ See *supra*, Part III.C.2.

²⁹⁷ See C.R.L. Narasimhan, *Doha Talks Going in Rounds*, HINDU (Jan. 1, 2012), http://www.thehindu.com/opinion/columns/C_R_L_Narasimhan/article2766271.ece; *Global Economy Faces Protectionism: UN*, HINDUSTAN TIMES (Jan. 17, 2012, 9:16 PM), <http://www.hindustantimes.com/business-news/WorldEconomy/Global-economy-faces-protectionism-UN/Article1-798593.aspx>.

each party may agree to just enough concessions to address its immediate concerns and to keep the other from imposing any trade sanctions to which the WTO decisions may entitle them. These concessions would likely take the form of limiting or eliminating subsidies to the A350 and the 787, which have been the most pressing concerns for the parties, and setting slightly more restrictive limits on direct and indirect aid. Such a limited agreement would be short-sighted and a missed opportunity, though. As the 1992 agreement demonstrated, such an agreement would be no more than a stop-gap measure and would likely bring the parties back to the same situation not too many years down the road.

Instead of settling for this option, the parties should return to the negotiating table with the goal of ending all subsidies to the LCA industry.²⁹⁸ The United States has insisted on the goal of eliminating subsidies as to launch aid,²⁹⁹ but has yet to do the same with its own indirect subsidies. The EC has preferred a more measured approach, but has indicated that it is willing to remove its subsidies should the United States do the same.³⁰⁰

The agreement should ban all production and development subsidies, which would include any launch aid measures provided at terms that would not be available on the market. The EC has decreasing incentive to maintain such programs anyway, as their benefit to Airbus over private alternatives has decreased with Airbus' success,³⁰¹ and the rationales that previously supported the EC's subsidies to Airbus to allow it to overcome barriers to entry are no longer applicable.³⁰² The agreement should also ban all indirect subsidies received through preferential contracts or access to government facilities or intellectual property at no or reduced cost. In doing so, it should also carefully define how such subsidies are determined and calculated, so as to avoid the conflict over the definition of indirect

²⁹⁸ Determining how to address the lingering effects of past or present subsidies is a potential impediment to reaching such an agreement. However, the WTO process provides the parties with remedies to address precisely these effects should they be unable to reach an agreement as to this issue. See *supra* text accompanying notes 145–148.

²⁹⁹ United States Takes Next Step in Airbus WTO Litigation, *supra* note 175; EU Resumes WTO Case Against Boeing, *supra* note 294; Press Release, Office of the U.S. Trade Representative, The United States Challenges EU Non-Compliance in WTO Airbus Ruling (Dec. 9, 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/december/united-states-challenges-eu-non-compliance-wto-ai> (stating that “the United States cannot accept anything less than an end to this subsidized funding”).

³⁰⁰ EU Resumes WTO Case Against Boeing, *supra* note 294. In fact, the EC claims to have already eliminated the subsidies or removed their adverse effects in order to comply with the WTO ruling. Communication from the European Union, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/17 (Dec. 1, 2011).

³⁰¹ See *supra* notes 276–277 and accompanying text.

³⁰² Claude Barfield, *Avoiding an Air War*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES. (Oct. 20, 2004), <http://www.aei.org/article/21412>.

subsidies that plagued the bilateral agreement.³⁰³ Finally, as with the bilateral agreement, the agreement should call for a regular exchange of information in order to dispel suspicion and incentivize compliance.

Such an agreement would have much more staying power than an agreement that stopped short of eliminating subsidies within the LCA industry. An agreement that limited but did not eliminate subsidies would create perpetual haggling over the comparative effects of the direct and indirect subsidies, and cause a party to cry foul any time that party's industry became disadvantaged relative to the other. In addition, this agreement would give both parties additional credibility in potentially seeking enforcement against any subsidies their emerging competitors may utilize, or in future talks to multilateralize the treaty, which should be the ultimate goal.

VI. CONCLUSION

Since the creation of Airbus over four decades ago, the United States and the EC have disputed over subsidies in the civil aircraft industry. This dispute was the subject of negotiations between the parties over much of that time without achieving any agreement that suitably addressed the concerns of the parties before reaching a head and finally devolving to the current all-out litigation in the WTO. After eight years, the WTO process is finally nearing an end and the parties will be able to return to the negotiating table to again attempt to produce an agreement. The history of the dispute suggests that the current struggle will result in a patchwork agreement to address the parties' more immediate interests in their new aircraft. However, the parties should resist the temptation to reach such a limited agreement and should instead take advantage of the information and leverage that the exhausting WTO process has provided them to make an agreement addressing the civil aircraft industry as a whole and eliminating subsidies to the maximum extent possible.

³⁰³ See *supra* note 91.