The WTO's Toughest Case: An Examination of the Effectiveness of the WTO Dispute Resolution Procedure in the Airbus-Boeing Dispute over Aircraft Subsidies

Nils Meier-Kaienburg

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THE WTO'S "TOUGHEST" CASE: AN EXAMINATION OF THE EFFECTIVENESS OF THE WTO DISPUTE RESOLUTION PROCEDURE IN THE AIRBUS—BOEING DISPUTE OVER AIRCRAFT SUBSIDIES

Nils Meier-Kaienburg*

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I. INTRODUCTION

IN AN IDEAL WORLD there would be no disputes. In the real world, disputes are inevitable. Sometimes disputes are necessary, can be productive, and can even help improve certain situations. At other times they can be counterproductive, can ruin business relationships, or even be destructive. The fight for subsidies in the commercial jetliner industry between Airbus and Boeing could be one of those destructive disputes. Except for subsidies concerning the agricultural sector, "[i]n no other industry has the subsidies question been more contentious than in
aircraft manufacturing."\(^1\) The dispute over subsidies between Airbus Industries and Boeing, which has continued for more than two decades, is the biggest commercial dispute between the United States and the European Community and its member States ("EC"),\(^2\) and one of the most intractable.\(^3\)

The threat to involve the World Trade Organization ("WTO") in this long lasting subsidy dispute has arisen many times before, but this time, on October 6, 2004, the United States actually initiated the first stage of dispute settlement proceedings before the WTO by requesting consultations with the EC.\(^4\) Following the United States’ complaint to the WTO, the EC and its member states responded by requesting consultations on alleged United States subsidies to Boeing.\(^5\)

This subsidy battle between Airbus and Boeing could be the most expensive case ever to come before the WTO. As Peter Mandelson, the European trade commissioner, stated, “America’s decision will, I fear, spark probably the biggest, most difficult and costly legal dispute in the WTO’s history.”\(^6\) By involving the WTO and requesting the establishment of a dispute settlement panel, this showdown has not only huge stakes for the companies at hand, but also could create acrimony and sour relations between the EC and the United States and even damage the WTO.\(^7\) Moreover, bringing the dispute to the WTO could affect global trade by creating specific problems concerning the Doha Round of trade negotiations, which, in the worst case scenario, could result in a trade war between the United States and the EC.

This paper examines the effectiveness of the WTO dispute settlement procedure in Measures Affecting Trade in Large Civil Aircraft between Airbus and Boeing and assesses the possible

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2. EC in the following text refers to the European Community and its member States and also relates to the European Union.
outcomes and effects of the WTO's forthcoming decision. This article will argue that the WTO is not the appropriate forum to settle this dispute as the WTO is not equipped to handle such a large and highly "political" case between its leading powers. This article will also show that by ruling on this case, the legitimacy and credibility of the WTO will likely be threatened, especially due to potential compliance issues.

Part II of this article briefly explains the different trade paradigms of the United States and Europe. Part III reviews the origins of the trade dispute between Airbus and Boeing, including an assessment of the agreements that cover subsidies in the aircraft manufacturing sector. Part IV delves into the claims that the parties have filed with the WTO. Part V then examines the effectiveness of the WTO dispute settlement procedure, examining the different stages of the dispute settlement system and highlighting the areas that are most likely to cause problems. This section includes an evaluation of whether the WTO dispute settlement mechanism will be able to cope with the large-scale and highly complex dispute between Airbus and Boeing, and also whether the WTO is the appropriate forum. Part V also discusses what a decision made by the WTO might look like, which party would profit the most from a ruling, and whether the parties are likely to comply with a decision issued by the WTO. Finally, this paper explores potential points for improvement in the WTO dispute settlement system and searches for alternative solutions that might resolve this dispute for good.

II. TWO DIFFERENT TRADE PARADIGMS

The EC and the United States represent the two largest economic trading blocs in the world. Civil aviation is the largest export industry in the United States, and Boeing, which controls nearly one hundred percent of the United States civil aviation manufacturing industry, is the largest exporting manufacturer in the United States and the world. Moreover, Boeing is one of the world's most recognizable and valuable brands. Boeing is a dominant force in the United States industrial market since aircraft production affects nearly eighty percent of the United States economy. Airbus occupies a similar economic and geo-

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9 Id.
political place in the European economy. However, the United States and the EC have very different market philosophies, which is illustrated by their attitudes towards subsidization.

European political systems have traditionally mingled public and private sectors. This tradition dates back to Europe’s emergence from the Second World War when massive government support was needed to rebuild Europe’s torn economy. This attitude towards subsidization and government involvement in industry is still seen in the EC. Most subsidization takes the form of direct relief, largely in the form of direct grants and tax concessions.

In the United States, government encroachment is seen as suspicious and is only acceptable under rare circumstances, such as in times of emergency. The perception in the United States is that subsidization is an intrusion on free market principles. Conversely, the EC perceives limits on domestic subsidies as interference with the responsibility and rights of national governments. Thus, behind the Boeing – Airbus dispute are the competing ideologies of liberal, free-enterprise America, and state-supported Europe.

In this context, the United States’ policy has been guided by a political philosophy that presumes subsidies distort resource allocations, influence international trade flows, and flout the law of comparative advantage by enabling the survival of otherwise uncompetitive industries. Due to this political climate and the concept of free-market economics, direct aid to industry in the United States is a very sensitive issue. Throughout the history of Airbus Industries, financial support provided by European governments for the creation and, more importantly, operation of the company has been a major point of dispute between the


11 Levick, supra note 8, at 448.
12 Spradlin, supra note 1, at 1197.
13 Levick, supra note 8, at 438.
15 Spradlin, supra note 1, at 1197.
16 Levick, supra note 8, at 439.
United States and Europe. Accordingly, this long-running case over government support reflects a "clash of philosophies about the limits of state intervention." As will be seen in the following section, the negotiations between the United States and the EC over aircraft subsidies reflect the parties' differing trade paradigms and make reconciliation more difficult.

III. AGREEMENTS GOVERNING AIRCRAFT SUBSIDIES

From the beginning, the United States made clear its view that Europe's subsidies to Airbus were improper. The first round of hostilities started in 1978 when Boeing accused Airbus of predatory pricing in order to secure a deal with Eastern Airlines. The United States referred the matter to the General Agreement on Tariffs and Trade ("GATT"), complaining that Airbus had arranged for European governments to extend $250 million of export credits to the cash-strapped airline. From this point on, the dispute was no longer a spat between two aircraft manufacturers, but had become a government-to-government matter.

In order to entirely understand this dispute, which was revived in 2004, this article reviews several agreements that govern aircraft subsidies.

A. THE GATT TOKYO ROUND

The Tokyo Round of the General Agreement on Tariffs and Trade lasted from 1973 until 1979. It was signed at the end of the Agreement on Trade in Civil Aircraft, which was the subject of much controversy. The agreement was ambiguous in many parts, did not include clear rules covering aircraft subsi-

19 Spradlin, supra note 1, at 1199.
20 O'Cunningham, supra note 17, at 5.
21 ARIS, supra note 14, at 154.
23 ARIS, supra note 14, at 154.
24 Id.
dies, and in the end, served more as a general declaration of principles than a specific enforceable document.\textsuperscript{26} The question the GATT Tokyo Round sought to resolve was how much government support should be allowed under GATT rules to ensure that the guiding principles of free trade and free competition were not unduly compromised.\textsuperscript{27} "[T]he language restricting European practices [though] was left extremely vague and almost unenforceable."\textsuperscript{28} One of the main problems was that the agreement did not define the term "subsidy," and merely provided a list of permissible subsidies based on actions and objectives. While the agreement brought aircraft subsidies into the overall GATT framework, they were not banned as such.\textsuperscript{29} This was due to the fact that the subject matter of subsidies was fairly new to the parties involved and subsidies were widely seen as having largely positive effects. Accordingly, in the main GATT Agreement, domestic subsidies were permitted and it was even noted that such subsidies were "widely used as important instruments for the promotion of social and economic policy objectives."\textsuperscript{30} The subsidy practices that had given Airbus an advantage were not addressed substantively in the GATT Tokyo Round.\textsuperscript{31}

B. The 1992 Civil Aircraft Agreement

Despite the 1979 multilateral agreement reached during the Tokyo Round, trade tensions over civil aircraft continued between the United States and Europe.\textsuperscript{32} Airbus's penetration of the United States market and key foreign markets in the late 1970s to 1990s raised the political and domestic pressure on the United States government to limit subsidies.\textsuperscript{33}

\begin{flushleft}
\footnotesize

\textsuperscript{27} Matthew Lynn, Birds of Prey 155 (1997).

\textsuperscript{28} Levick, supra note 8, at 449.

\textsuperscript{29} Aris, supra note 14, at 155.

\textsuperscript{30} Agreement in Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade art. 11(1), Nov. 6, 1979.

\textsuperscript{31} Fisher, supra note 10, at 873; Robert Carbaugh & John Olienyk, Boeing-Airbus Subsidy Dispute: An Economic and Trade Perspective, 2 Global Econ. Q. 261, 265 (2001).

\textsuperscript{32} Long-Term Viability, supra note 26, at 2.

\textsuperscript{33} Fisher, supra note 10, at 874.
\end{flushleft}
In July 1992, the EC and the United States signed the Agreement on Trade in Large Civil Aircraft. The agreement recognizes that the GATT Civil Aircraft Code of 1979 "should be strengthened with a view toward progressively reducing the role of government support." The bilateral Agreement on Trade in Large Civil Aircraft clarifies and expands the application of the "plurilateral" agreement of 1979. It includes several structural changes to world trade law that limit or cap the use of subsidies. The key point of the agreement is the amount of an aircraft’s development costs that may be financed by government.

First, the agreement provides for a ban on all future production subsidies and a limit on development subsidies at thirty-three percent of total cost. Second, it limits indirect subsidies to three percent of the turnover of civil aircraft manufacturers or four percent of their value in civilian sales. Third, trade officials are explicitly barred from pressuring the governments of trading partners to purchase aircraft. Finally, it increases reporting requirements by setting up a bilateral panel that monitors compliance and increases the transparency of the commercial aircraft industry. The bilateral agreement is not self-enforcing and the remedy of one party for the other’s violation is termination of the agreement. The agreement reached by the parties also does not preclude either party from taking subsidiary or other issues to WTO dispute resolution.

In order to classify the agreement, it is important to understand the dynamics of the negotiations that led up to the agreement between the parties. Due to Airbus’s growing success,

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34 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), available at http://www.ita.doc.gov/td/aerospace/inform/usaeuclca.pdf [hereinafter The 1992 Civil Aircraft Agreement].
35 Id. pmbl. para. 3.
39 Id.
40 Id.
41 Id.
42 O’Cunningham, supra note 17, at 6.
pressure on the United States government increased in the 1980s and 1990s. Accordingly, the United States turned to GATT to limit Airbus subsidies.\(^4\) The EC was afraid that the Airbus dispute was adversely impacting the overall EC-United States relationship and thus requested the negotiation of a bilateral agreement, rather than proceeding with GATT dispute resolution.\(^4\) The negotiations did not intend to achieve “balance” between the indirect United States supports and European supports, but rather sought to determine whether limits on future European subsidization could be devised that would be sufficient for the United States to stop pursuing a GATT remedy.\(^4\)

The 1992 subsidy agreement, therefore, can be seen as a political compromise that had little economic foundation.\(^4\)

The American benefits included that the EC had to agree to force Airbus to repay cash advances at the market rate of interest which was higher than the common practice, and that future production subsidies were banned. The Europeans also gained because, for the first time, the Americans accepted that indirect subsidies from the United States Department of Defense and NASA came under “international discipline,” which became an explicit part of the agreement.\(^4\)

However, in many parts of the agreement, the parties could not agree on important points and refrained from defining substantial and decisive terms. More importantly, the agreement, like the 1979 Agreement on Trade in Civil Aircraft, failed to define a “subsidy” or what actions constitute “government support.”\(^4\) Furthermore, “the agreement does not contain a formal dispute settlement mechanism, but rather calls for consultations between the two parties when there is a disagreement.”\(^4\) “Thus, the effectiveness of the agreement depends on the two parties acting in good faith to implement their commitments.”\(^4\)

The agreement provides that both parties “shall make their utmost efforts to ensure that these or similar disciplines

\(^4\) Id. at 4.
\(^4\) Id. at 5.
\(^4\) Id. at 15.

\(^4\) De Melo, supra note 38, at 22.
\(^4\) McGuire, supra note 10, at 157; David Weldon Thornton, Airbus Industrie—The Politics of an International Industrial Collaboration 146 (1995); O’Cunningham, supra note 17, at 5.


\(^4\) Long-Term Viability, supra note 26, at 15.
are incorporated into the GATT Aircraft Code.\textsuperscript{51} However, an agreement to replace the 1979 Agreement on Trade in Civil Aircraft was not reached until recently.

Due to the problems mentioned above and many other unresolved issues concerning the 1992 Civil Aircraft Agreement, the agreement has not eliminated the dispute over aircraft subsidies. In October 2004, the United States terminated the 1992 Civil Aircraft Agreement, alleging that the Europeans had violated the agreement by providing illegal subsidies to Airbus.\textsuperscript{52}

C. The Uruguay Round

The GATT civil aircraft committee agreed to renegotiate the GATT Aircraft Code as part of the Uruguay Round.\textsuperscript{53} The Uruguay Round agreement was entered into on December 15, 1994; however, it “did not include a new agreement on civil aircraft.”\textsuperscript{54} Still, the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”)\textsuperscript{55} was established under the Uruguay Round.

1. The Agreement on Subsidies and Countervailing Measures

Due to the fact that the airline industry has had an unusual history of government sponsorship, the founders of the WTO envisioned special rules to govern aircraft subsidies. That is why a footnote in the global trade body’s formative agreement on subsidies was included, indicating that the WTO should recognize the outcome of industry talks on the rules. Other footnotes note some of the major concerns of the industry that are reflected in the 1992 Agreement, which remains in force until parties agree to a successor to the 1979 Agreement.\textsuperscript{56} Although the footnotes did not affect the ratification of the SCM Agreement, talks between the United States and the EC concerning a new agreement dealing with subsidies in the aircraft manufacturing

\textsuperscript{51} The 1992 Civil Aircraft Agreement, \textit{supra} note 34, art. 12, ¶ 2.
\textsuperscript{53} Levick, \textit{supra} note 8, at 461.
\textsuperscript{54} \textit{LONG-TERM VIABILITY}, \textit{supra} note 26, at 42.
sector were not successful, leaving only the footnote with the intent to agree on a special aircraft subsidies code.57 Accordingly, the SCM Agreement does not specifically deal with the issue of large commercial aircraft.58 As a result, there are only "broad subsidy rules that were never [really] intended for aircraft manufacturers."59

Nevertheless, the SCM Agreement established a new discipline on domestic subsidies. Unlike the old GATT Code, the new WTO Code defines what constitutes a subsidy, and the SCM Agreement is an integral part of the WTO Agreement.60 According to the new agreement, a subsidy exists where "there is a financial contribution by a government" and "a benefit is thereby conferred."61 A financial contribution may occur by means of a direct transfer of funds, such as grants or loans, a potential transfer of funds, or a government making payments to a funding mechanism.62 A benefit includes some notion of an advantage to the recipient.63

Under this definition, money or anything else of value provided to a manufacturer or exporter at a lower cost than would have been charged in a commercial transaction is considered to be a subsidy. Furthermore, exchange rate guarantees, debt forgiveness, or export credits are seen as subsidies when provided on terms more favorable than those obtainable from commercial sources.64 The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to restriction. Consequently, not just direct payments, but also indirect support such as benefits from research and defense pro-

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58 ROYAL AERONAUTICAL SOCIETY, supra note 18, at 6.
61 ASCM, supra note 55, art. 1.1(a)(1).
64 O'Cunningham, supra note 17, at 6.
grams can constitute a subsidy under certain conditions, as will be explained below.

In general, this new agreement concerning subsidies addresses two separate but closely related topics. On one hand, it addresses multilateral disciplines regulating the provision of subsidies, and on the other hand, it addresses the use of countervailing measures to offset injury caused by subsidized imports.\textsuperscript{65} Countervailing duties are a unilateral instrument, which may be applied by a member after an investigation by that member and a determination that the criteria set forth in the SCM Agreement are satisfied and can be challenged before the Dispute Settlement Body ("DSB").

a. "Traffic Light Approach"

The obligations of Members regarding subsidies are laid down by the SCM Agreement in what is known as the "traffic light approach" - red, green, and yellow.\textsuperscript{66} While "red-light" subsidies are prohibited in almost all circumstances, "green-light" subsidies are permissible; subsidies falling into the category of "yellow-light" subsidies are generally permissible, but actionable in certain situations depending on their effects on trade.\textsuperscript{67} The SCM Agreement does not ban subsidies as such, but creates two basic categories of subsidies, those that are prohibited and those that are actionable.\textsuperscript{68} Prohibited subsidies include those that are tied directly to exports and would necessarily have an effect on foreign economies. Annex I of the SCM Agreement provides further guidance in determining whether a subsidy is a prohibited export subsidy.

Under the SCM Agreement, subsidies are "actionable" when they cause "adverse effects" on free trade. Parties can only seek remediation on actionable subsidies.\textsuperscript{69} In cases where subsidies are found to be prohibited, the remedy is repayment or removal of the scheme.\textsuperscript{70} In the Airbus-Boeing dispute, most of the allegedly illegal subsidies fall in the category of "actionable" subsidies

\textsuperscript{65} Pritchard & MacPherson, \textit{supra} note 36, at 6.

\textsuperscript{66} Hoda & Ahuja, \textit{supra} note 62, at 4.

\textsuperscript{67} CONGRESSIONAL BUDGET OFFICE, \textit{Policies that Distort World Agricultural Trade: Prevalence and Magnitude} 1, 3 (2005).

\textsuperscript{68} J. Michael Showalter, \textit{A Cruel Trilemma: The Flawed Political Economy of Remedies to WTO Subsidies Disputes}, 37 \textit{VAND. J. TRANSNAT'L L.} 587, 600 (2004); \textit{ROYAL AERONAUTICAL SOCIETY}, \textit{supra} note 18, at 7.

\textsuperscript{69} Showalter, \textit{supra} note 68, at 601.

\textsuperscript{70} Pritchard & MacPherson, \textit{supra} note 36, at 7.
under the SCM Agreement. The task of the WTO in cases involving complaints filed by the member nations is to evaluate what constitutes a subsidy and to identify which subsidies are illegal under the WTO rules.

b. Adverse Effects and Specificity

Questions of benefit and specificity are the key points with regard to the SCM Agreement. The legality of subsidies is largely assessed by looking at whether subsidies impose illegal conditions or distort trade by causing adverse effects on free trade.\(^7\) Also, the question of what constitutes a “financial contribution” is very important because it is possible to take the United States countervailing duty law (“CVD”) into account in order to assess what constitutes a subsidy under Article 1.1 of the SCM Agreement.\(^7\) If the conditions as set out in the SCM Agreement are met, the WTO can find not only direct subsidies, but also indirect subsidies illegal under the SCM Agreement. However, the WTO requires proof of damage and a measurable injury to competitors before finding that government financial assistance is a subsidy that causes adverse effects.\(^7\) Hence, the WTO must take into account many issues before declaring measures inconsistent with the SCM Agreement.

2. New Dispute Settlement Procedure

As important as the newly introduced WTO subsidy disciplines are, an even more striking factor is the new WTO dispute settlement procedure.\(^7\) Before the Uruguay Round, all decisions on panel reports were required to be made by consensus of the GATT members. Consequently, a losing party could block the adoption of a panel report and condemn its subsidies or other practices inconsistent with GATT.\(^7\) Under the new Dispute Settlement Understanding (“DSU”), panel reports are effective unless there is a consensus against the panel report.\(^7\) The WTO framework, including the Dispute Settlement Body

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\(^7\) Panel Report, United States — Measures Treating Exports Restraints as Subsidies, WT/DS/194/R (June 29, 2001).

\(^7\) ROYAL AERONAUTICAL SOCIETY, supra note 18, at 8.

\(^7\) O'Cunningham, supra note 17, at 7.

\(^7\) WTO SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 13 (2004).

\(^7\) Id. at 15.
WTO'S "TOUGHEST" CASE

IV. FIGHTING FOR AIRCRAFT SUBSIDIES IN THE NEW MILLENNIUM

Trade representatives from the EU and the United States engaged in negotiations in the fall of 2004 in an attempt to modify the 1992 Civil Aircraft Agreement. Those negotiations failed, and the United States withdrew from the agreement and sought the involvement of the WTO by filing a request for consultations.

A. The Complaint to the WTO Filed by the United States

On October 6, 2004, the United States requested consultations with the European Communities pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the GATT 1994, and Articles 4, 7, and 30 of the Agreement on Subsidies and Countervailing Measures with regard to Measures Affecting Trade in Large Civil Aircraft. Articles 4 and 7 of the SCM Agreement deal with remedies and Article 30 relates to the dispute settlement procedure. The United States asserts that the EC provides subsidies to Airbus inconsistent with their obligations under the SCM Agreement and the GATT 1994.

For the United States, launch aid to Airbus is at the center of this dispute. According to the United States, this financing method provides benefits to the recipient companies that would otherwise not be commercially feasible. The non-commercial terms of the financing include, according to American allegations, no interest or interest at below-market rates and a conditional repayment obligation that is tied to the success of the aircraft model being financed, and if a model is not successful, some or all of the financing is forgiven. Boeing claims this so-called launch aid that Airbus receives is risk-free money that is not equally available to Boeing and that Airbus has used this advantage to develop a larger family of aircraft than would have been possible if Airbus was required to finance its programs on

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77 Request for Consultations by the United States, supra note 4.
78 Id.
ordinary commercial terms. From the United States' perspective, this violates the principles of a free and competitive market in which companies must accept the risk of failure in the market place. Specifically, the United States is concerned that this launch aid to Airbus appears to be an export subsidy in breach of Articles 3.1(a) and 3.2 of the SCM Agreement.

The subsidies that are the subject of the complaint filed by the United States include those provided to fund the launch of the entire family of Airbus products (A300 through A380). In its WTO complaint, the United States specifically cites the subsidization of the Airbus 380. In a press release, the United States trade representative even spoke of the Airbus 380 as being the most subsidized aircraft in history.

The United States is concerned that the measures appear to be causing adverse effects to their interest as provided in Article 5(a) of the SCM Agreement. It asserts that the measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement; furthermore, an evaluation of all relevant economic factors has shown that their effects are causing or threatening to cause injury to the United States' civil aircraft industry. The main issue is whether the financial assistance provided to Airbus constitutes a "red-light" subsidy that is not allowed because it causes adverse effects on trade. Finally, the United States is concerned that the measures appear to be inconsistent with Article XVI:1 of GATT 1994. This provision refers to signatories of GATT and their obligations.

On May 31, 2005, the United States initiated the next step by filing a request with the WTO for the establishment of a panel. With this, the United States requested the DSB to establish a panel pursuant to Article 6 of the DSU, Article XXIII:2, GATT 1994.
B. THE EUROPEAN COUNTERCLAIM TO THE WTO

The EC filed a counterclaim on October 6, 2004, by requesting consultations with the United States. In this WTO counterclaim, the EC alleged that Boeing has been receiving illegal government subsidies. At the heart of the European complaint are tax benefits granted by the State of Washington and other tax breaks and incentives to Boeing provided by Kansas, Oklahoma, and various other states. The EC contends that these tax incentives are inconsistent with the obligations of the United States under Articles 3.1(a) and (b), Articles 5(a) and (c), and Articles 6.3(a), (b) and (c) of the SCM Agreement, and Article III:4 of GATT 1994.

Moreover, the EC challenges “indirect” subsidies from the United States military and NASA contracts, as well as research development expenditures. Following the United States’ request for the establishment of a panel on May 31, 2005, the EC submitted a similar request the same day. The EC alleged that the subsidies granted to Boeing violate Articles 3, 5, and 6 of the SCM Agreement and Article III:4 of GATT.

C. CLAIM AND COUNTERCLAIM

The core of the disagreement is that neither side is willing to classify all the aid their respective companies receive as “subsidies.” In Boeing’s view, Airbus benefited greatly from direct assistance provided by European governments. Boeing argues that several of Airbus’s projects, especially the A380, could not have been financed in commercial markets because of their risk. Airbus rejected Boeing’s argument and countered that Boeing benefited from huge indirect governmental subsidies in the form of military and space contracts, as well as potential support from states and foreign governments. For example, the

87 Request for Consultations by European Communities, United States — Measures Affecting Trade in Large Civil Aircraft, WT/DS317/1 (Oct. 12, 2004).
88 Id.
89 Id.
90 Request for the Establishment of a Panel by the European Communities, United States — Measures Affecting Trade in Large Civil Aircraft, WT/DS317/2 (June 3, 2005).
93 Id.
Japanese government provided financial support for the development of the Boeing 787. Although Japan is not a party to the 1992 bilateral agreement, the EC considers the financial assistance provided by the Japanese government to Boeing to be a circumvention of the 1992 Civil Aircraft Agreement between the United States and Europe. According to Boeing, the EC would need to file a separate WTO complaint if they were concerned with aid provided to Boeing by Japan.

There are several other reasons for the current crisis. They lie largely in Boeing’s steady loss of market share to Airbus and the launch aid for the A350, which supposedly competes directly with Boeing’s 787. In sum, the current dispute centers on the United States’ charge that Europe provides direct launch aid and other financial support to Airbus, and Europe’s countercharge that the United States provides indirect subsidies to Boeing. Because the WTO will have to evaluate the parties’ claims, the next part of this article examines the effectiveness of the WTO’s dispute settlement procedure.

V. THE EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT PROCEDURE

“No other area of the [WTO] has received more attention than its dispute settlement procedures.” An aerospace fight between Boeing and Airbus over subsidies would severely test the WTO dispute resolution process. This part of the article includes a brief overview of the general WTO framework, followed by an analysis of the likely effectiveness of the WTO dispute settlement procedure regarding Measures Affecting Trade in Large Civil Aircraft between Airbus and Boeing.

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A. THE GENERAL WTO FRAMEWORK

Today, more than ninety percent of the world’s trade takes place between the 148 member states of the WTO. Because of this, the new WTO dispute settlement system quickly became one of the most frequently utilized mechanisms for international dispute resolution.99

1. Transition from the GATT to the WTO Procedure

In order to evaluate the effectiveness of the WTO dispute settlement system, it is important to recognize the changes that resulted from the Uruguay Round, because the WTO dispute settlement procedure substantially differs from that in GATT.100 There were numerous problems with GATT, but the most significant problem was the requirement of a consensus ruling for approval of panel decisions.101 As mentioned above, the former GATT consensus requirement for the establishment of a panel and adoption of reports is reversed, meaning that consensus in the WTO is required to reject, rather than to adopt the report.102 In sum, the new WTO dispute settlement procedure has a much more formalized and legalistic approach than the former GATT procedure and makes the dispute settlement resolution within the WTO much more effective.103

2. The DSB and the DSU

The WTO Agreements are enforced through a WTO-specific dispute settlement system.104 The Dispute Settlement Understanding (“DSU”), which constitutes Annex 2 of the WTO Agreement, sets out the procedures and rules that define the

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100 Torsten Lorcher, WTO Dispute Settlement and Arbitration, 6 Int’l A.L.R. 203, 204 (2003).
104 Showalter, supra note 68, at 590.
WTO dispute settlement system. The Dispute Settlement Body ("DSB") is the plenary organ constituted of representatives of all members of the WTO. Only the member governments of the WTO may participate in the dispute settlement procedure. The DSB is authorized to administer the rules and procedures under the DSU, which gives the DSB oversight of the entire dispute settlement process. Hence, it has authority to establish panels, adopt panel and Appellate Body reports, and to supervise the implementation of rulings.

B. THE WTO DISPUTE SETTLEMENT PROCEDURE—AN EFFECTIVE MECHANISM?

The most important question in the subsidy dispute between Airbus and Boeing is whether the WTO is equipped to handle this case. To answer this question, this section will highlight areas of the dispute settlement procedure that, due to the scale and complexity of the Airbus-Boeing dispute, might break down. This section also includes a prediction of how the WTO might rule.

There are three main stages in the WTO dispute settlement process: the consultation stage; the panel procedure, including a possible appeal; and finally, the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling. "The main dispute settlement mechanism within the WTO is the so-called panel procedure." The panel procedure is embedded in a framework before the DSB. Within the panel procedure, the panels are in charge of adjudicating disputes between Members in the first instance. As will be shown, numerous problems throughout all stages of the panel procedure will make it difficult for the WTO to manage the dispute between Airbus and Boeing.

107 WTO SECRETARIAT, supra note 75, at 9.
108 Id. at 17; Kleiner, supra note 101, at 130.
109 WTO SECRETARIAT, supra note 75, at 17.
110 Id. at 43.
111 Lorcher, supra note 100, at 204.
112 WTO SECRETARIAT, supra note 75, at 21.
WO'S "TOUGHEST" CASE

1. The Consultation Stage

A request for consultations formally initiates a dispute in the WTO and triggers the application of the DSU. A request for consultations must be submitted in writing and must give reasons for the request. Specifically, Article 4.4 of the DSU requires that a request for consultation identify the measures at issue and indicate the legal basis for the complaint. It is a fundamental principle for any legal procedure that the scope of the procedure be clearly defined at the outset by the party initiating the dispute in order to ensure that due process and the rights of defence are preserved. The problem that arises in the consultation stage is the degree of clarity required in requesting consultations. The current DSU fails to state how clear complaints must be during the consultation stage. This is a substantial shortcoming of the entire DSU process, because "once claims go to a panel, parties cannot revise them at a later time."

As mentioned above, DSU Article 4.4 spells out the legal requirements for making a request for consultations, and DSU Article 6.2 does the same for the panel process. "Within the framework of Articles 4 and 6, DSU jurisprudence has listed some important constraints as to how, when, and with what effect disputed issues are to be identified." Like the request for consultations, the request for a panel must indicate whether "consultations were held," identifying "the specific measures at issue," and providing a "brief summary of the legal basis of the complaint" that is "sufficient to present the problem clearly."

The Appellate Body wishes to impose a hard procedural con-

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113 Id. at 45.
114 DSU, supra note 105, art. 4.4.
115 Id.
118 Id.
119 Id. at 104-05.
121 DSU, supra note 105, art. 6.2.
straint and for that reason interprets the requirements of DSU Article 6.2 narrowly.122

The question is whether the same constraint and narrow interpretation of DSU Article 6.2 applies to the consultation stage as well. There is no requirement that all legal claims cited in a panel request must have been raised during the consultations; however, the parties must be very precise in the consultation stage.123 According to the Appellate Body, “[a]ll parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims.”124 The problem is that the consultation stage is compared to the heavily formalized panel and appellate process, despite its informal nature which aims to allow parties to gather information.125 “In this connection, the DSU provisions can create an atmosphere in which discussions can evolve and parties can speak and explore ideas freely.”126

Due to the Appellate Body’s narrow interpretation of Article 6.2 of the DSU, the risk is that parties in the consultation stage are guarded, and that the consultation stage is used as a mere procedural phase in the panel process.127 Totally ignoring what the parties say in the consultation stage could significantly undermine the stage’s role, but a rule that holds parties accountable for all they have said or not said in consultations will have a negative effect on the consultation process as well.128 Recent decisions of the Appellate Body suggest that the focus has moved from what was discussed in the consultations to what was said in the panel request.129

124 India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, supra note 122, at & 94.
126 Horlick & Butterton, supra note 120, at 581.
The parties to the Airbus-Boeing dispute illustrate this weakness in the dispute settlement procedure by quarrelling over the clarity of the other's request for consultations. One can already conclude that the consultation stage, which should be used to discuss the claims asserted and possibly settle the dispute before it reaches the panel stage, creates a major area of contention in the Airbus-Boeing dispute.

2. The Panel Procedure

As previously discussed, the initiation of panel proceedings requires the complaining party to first request consultations. If consultations take place but negotiations fail within sixty days, the complaining party is entitled to request the establishment of a panel.130 On October 6, 2004, the United States requested consultations with the EC; the EC likewise filed a counterclaim on the same day. Consultations were held on November 5, 2004, and were not successful. On May 31, 2005, both parties requested the establishment of a panel.

a. Establishment of a Panel

The request for the establishment of a panel initiates the adjudication phase.131 As already indicated, the content of the request for establishment of the panel is crucial. Under Article 7.1 of the DSU, the request determines the standard terms of reference for the panel's examination of the matter. In other words, the request for the establishment defines and limits the scope of the dispute and thereby the extent of the panel's jurisdiction.132 Only the measures identified in the request become the object of the panel's review. All legal claims must be specified in the request for the establishment of a panel. If the initial request does not specify a certain claim, the request cannot subsequently be “cured.”133

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130 DSU, supra note 105, art. 4.7.
131 WTO SECRETARIAT, supra note 75, 48.
132 Id.
133 Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, & 143, WT/DS27/AB/R (Sept. 9, 1997); WTO SECRETARIAT, supra note 75, at 49.
Establishing panels is one of the DSB’s functions. When the request is considered, any member may block the creation of a panel. If a blocked request is placed on the DSB’s agenda a second time, the panel must be established unless the DSB decides by consensus to the contrary. If a panel is not blocked, it will be established within approximately ninety days of the initial request for consultations. On June 13, 2005, the United States and the EC both blocked each other’s requests to create panels to investigate illegal subsidies allegedly paid to Airbus and Boeing.

Concerning the request for consultations initiated by the United States, the EC stated that WTO Agreements would not allow Members to bring cases against perceived threats of subsidisation. “Moreover, the EC stated that consultations had not and could have not been held on a non-existent measure raising questions about the real motives of the United States.” They also “added that consultations had not been held on a number of the challenged measures and that the United States’ request was framed broadly making it difficult to understand what the claims of the Americans were.” The EC concluded that, “in light of the foregoing, it could not accept the establishment of a panel at the current meeting of the DSB.”

The United States alleged that the EC’s panel request was defective and did not meet the requirements spelled out in the DSU. Mainly, it stated that of the twenty-eight subsidy programs listed in the panel request, thirteen had not been the subject of consultations between the parties. Consequently, the request by the EC to establish a panel was deferred by the DSB.

The uncertainty about the clarity required in the request for consultations and about what issues were raised during the consultations proved to be a major issue of disagreement between the parties, deferred the establishment of a panel, and is likely to lead to even more contention once a panel is established.

134 DSU, supra note 105, art. 6.1. 135 WTO SECRETARIAT, supra note 75, at 49. 136 WTO News Item, EC and US Block Each Other’s First Requests for Panels in the Airbus Boeing Disputes (June 13, 2005), available at http://www.wto.org/english/news_e/news05_e/dsb_13june05_e.htm. 137 Id. 138 Id. 139 Id. 140 Id. 141 Id.
On July 20, 2005, after the United States and the EC went forward with their second requests, the DSB set up two panels\textsuperscript{142} to examine the claims made by the parties.\textsuperscript{143} Thus, in the end, there will be two separate rulings in this case, with two possible losers or winners.\textsuperscript{144}

b. Problems Concerning the Composition of a Panel

"Composition of the panel is one of the most important aspects of any WTO dispute."\textsuperscript{145} The establishment and especially the selection of a mutually acceptable panel is likely to become heavily disputed in this case and may become a major obstacle if suitable persons cannot be found to sit on the panels.

Panels are usually composed of three panelists, unless the parties agree to five.\textsuperscript{146} There is no permanent panel at the WTO; rather, a different panel is composed for each dispute on an ad hoc basis.\textsuperscript{147} Under WTO procedures, the WTO staff offers parties prospective candidates to hear the dispute.\textsuperscript{148} The WTO Secretariat maintains an indicative list of names, from which panelists may be drawn.\textsuperscript{149} The panelists have to be "well-qualified" and are not allowed to be from a nation that is a party to the dispute.\textsuperscript{150}

Parties have increasingly used the DSU rules to reject panelists.\textsuperscript{151} If parties do not agree on panelists within twenty days of the establishment of the panel, either party may request the Di-


\textsuperscript{146} Id.

\textsuperscript{147} WTO SECRETARIAT, supra note 75, at 21.

\textsuperscript{148} DSU, supra not 105, art. 8.6.

\textsuperscript{149} WTO SECRETARIAT, supra note 75, at 51.

\textsuperscript{150} DSU, supra note 105, art. 8.1.

rector-General to name the panelists. Over time, it has become more common for the Director-General to appoint the panel. Approximately eighty percent of the time, the selection of the panelists falls to the Director-General. Finding qualified panelists that the parties agree on has been a difficult job in the past and will become even more difficult in the future. Nearly a third of the 303 panel positions in the WTO’s history have gone to citizens of just four countries: Switzerland, Australia, New Zealand, and Canada. According to WTO Secretary-General Supachai Panitchpakdi, the lists of people who are supposed experts in certain areas are nearly exhausted.

The panelists work on a sessional and rotational basis and are not full-time judicial officers; however, by no means is their experience confined to law. Due to the complexity of the issues, which would challenge even aviation experts, it will be very difficult for the United States and the EC to agree on panelists. Agreeing who should sit on each panel could take months. Although panelists should be selected to ensure the independence of the panel, lobbying and exertion of influence on the panelists during the panel procedure and the composition phase will undeniably exist in this highly political case. There is a danger that winning the “race” to the panelists, rather than whose arguments are most persuasive, will determine the outcome of the case.

Three rounds of names have been presented to the parties, but as of September 6, 2005, the EC and the United States could not reach a consensus; therefore, the panelists that will sit on the two panels are expected to be appointed by the WTO Director-General.

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152 DSU, supra note 105, art. 8.7.
154 Miller, supra note 59, at A1; Roberts, supra note 152, at 543.
155 Id.
156 Miller, supra note 59, at A1.
157 Arup, supra note 102, at 912.
c. The Panel Process Itself

Not only is the establishment and the composition of the panel problematic, but there are various problems in the panel process itself that will be difficult to overcome in the Airbus-Boeing dispute. After giving a brief overview of the panel process itself, the next part of this article draws attention to the areas in the panel stage that are likely to become particularly problematic in this dispute.

Once established and composed, a panel exists as a collegial body and starts its work.\(^{161}\) The procedure is primarily set out in DSU Article 12 and Appendix 3. Following the panel formation, each party to the dispute offers written submissions to the Secretariat, who transmits them to the panel and the other disputing members.\(^{162}\) After the first written submissions are exchanged, there is a first oral hearing. Following oral statements, the parties respond to questions from the panel in order to clarify the legal and factual issues.\(^{163}\) After the hearings conclude, the panel begins internal deliberations, reviews the matter, and makes an objective assessment of the relevant factual questions and legal issues.\(^{164}\) The objectives of a panel are to strike a balance between member interests in protecting their sovereignty and the general interest in achieving uniformity and correctness of WTO law, and assess whether the respondent has acted inconsistently with its WTO obligations.\(^{165}\)

The panel issues an interim report before the final report is submitted. The interim report is the first substantial indication the parties receive as to the likely outcome of the final panel report and is designed for a reconsideration of precise aspects of the panel report. The final panel report should be submitted to the parties within two weeks of the interim review. Once issued, panel reports are considered for adoption by the DSB. “Unless the DSB decides by consensus not to adopt the panel report or one of the parties appeals the report, it is automatically adopted within 60 days of its issuance.”\(^{166}\)

\(^{161}\) WTO Secretariat, supra note 75, at 53.
\(^{162}\) DSU, supra note 105, art. 12.6.
\(^{163}\) DSU, supra note 105, app. 3 & 8.
\(^{164}\) DSU, supra note 105, art. 11.
\(^{165}\) WTO Secretariat, supra note 75, at 56.
i. Adherence to the Timeframe

In order to ensure that panel proceedings within the WTO are conducted quickly and efficiently, the applicable provisions provide for a detailed timeframe.\textsuperscript{167} The period between the actual formation of the panel and the adoption of the report, not including the time for a possible appeal, should not exceed one year.\textsuperscript{168} An initial ruling in the case between Airbus and Boeing will take at least nine months.\textsuperscript{169} The parties' written submissions are complex documents, sometimes of considerable length, and often include elaborate annexes.\textsuperscript{170} With the panelists unlikely to be aviation experts, and even for those who are experts in the field, it will be a challenge to read through the enormous amount of documents that will be produced; therefore, it might take quite some time for a decision to be reached by the panelists. As previously discussed, agreeing on the panelists could take months; consequently, it is uncertain if the suggested timeframe of one year can be adhered to in the Airbus-Boeing case.\textsuperscript{171}

Even if the panels are given additional time to issue their rulings, which, for example, happened in the Biotech case\textsuperscript{172} due to the unusually large number of issues, the fact that there is no agreement dealing with this issue suggests that it will be a long time before the panelists reach a conclusion. As long as there is no decision by the WTO or a new agreement between the parties, the parties will continue to subsidize, as illustrated by the fact that the EC is considering granting launch aid for the A350.\textsuperscript{173} Furthermore, the longer the case continues, the longer the two aircraft makers will operate under uncertainty regarding the outcome. The longer the dispute lasts, the more the trust of the parties involved in this dispute and other Member nations

\textsuperscript{167} DSU, supra note 105, arts. 12-18, app. 3.
\textsuperscript{168} Lorcher, supra note 100, at 206.
\textsuperscript{170} WTO Secretariat, supra note 75, at 54.
\textsuperscript{172} Communication from the Chairman of the Panel, European Communities—Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/29, WT/DS292/23, WT/DS293/23 (Aug. 15, 2005).
\textsuperscript{173} Warwick, supra note 161; Oh for the Wings of an A350 Airbus, FIN. TIMES, Sept. 6, 2005, at 18.
will decline in the WTO as a fast and efficient mechanism for resolution of trade dispute.

ii. Dissonance Between Diplomatic and Legal Cultures

Concerning the panel procedure itself, there seems to be a "dissonance" between the diplomatic and legal cultures within the WTO dispute settlement system. Under GATT, trade disputes were understood as technical matters best handled by trade diplomats in confidential proceedings. As shown above, the Uruguay Round agreements, particularly the DSU, heralded a shift to a more legalistic approach. The individuals at the WTO, the delegates, staff and most importantly the panelists seem to have failed to internalize the attitudinal change that should accompany this shift from a political to a more legalistic approach to dispute resolution. Although the system is now supposed to be highly legalistic, echoes of the diplomatic attitude remain. "For example, panelists are selected in an ad hoc manner; they are not called 'judges,' the Appellate Body is not called a 'court,' and there is a desire to keep dispute settlement proceedings private." The provisions of the DSU do little to encourage transparency in the panel process. Panel deliberations are confidential, and the final panel opinions are expressed without any indication of the individual contribution of the panel members. In terms of the profiles of panelists, the rosters have changed only slightly to reflect the new more legalistic approach. The new panel procedure might have enhanced the internal legitimacy of the system, but the external legitimacy of the dispute settlement has not improved.

As has just been shown, there are shortcomings in nearly every stage of the panel procedure that are likely to create considerable difficulties in the Airbus-Boeing case. In particular, the search for suitable panelists and the lack of transparency within the WTO dispute settlement system will almost inevitably lead to problems in the Airbus-Boeing dispute. Considering the

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174 Dunoff, supra note 99, at 198; Weiler, supra note 97, at 189.
175 Dunoff, supra note 99, at 198.
176 Id.
177 Id.
178 Id.
180 Weiler, supra note 97, at 189.
181 Dunoff, supra note 99, at 199.
importance of the outcome of the rulings for the parties in this case, the above-discussed dissonance between the diplomatic and legal cultures which still exists within the WTO seem to make it particularly difficult in this high-profile case to reach a decision that will be accepted and followed on both sides of the Atlantic. Together with the fact that the public cannot witness any of the proceedings, the remaining diplomatic ethos within the WTO dispute settlement system seems to weaken the external legitimacy, resulting in possible compliance problems, as will be illustrated later in this paper.

The next question that arises with regard to the panel process is what outcome is most likely to occur when the panel makes its rulings in the dispute between Airbus and Boeing regarding Measures Affecting Trade in Large Civil Aircraft.

3. Ruling Made by the WTO: Who, if Anyone, Will Win?

If the WTO is required to make a ruling, the question becomes who, if anyone, will win? Each side charges the other with violating the WTO Agreement on Subsidies and Countervailing Measures and contends that it would prevail in a ruling made by the WTO. However, dispute settlement at the WTO is a very complex process, and the outcome of a case like this is highly uncertain. A tentative prediction of the outcome of a ruling made by the WTO will follow, assessing which party to the dispute, if any, is more likely to prevail.

a. Defining “Subsidies”

From the very start of the dispute between Airbus and Boeing, the exact definition of “subsidies” has been controversial. If the WTO panels make their decisions, the main issues will revolve around the question of what constitutes a subsidy and whether United States and EC actions are in accordance with WTO law. In other words, the issue will be what defines a harmful or “bad” subsidy. The panels will have to deal with questions like whether a government loan is a subsidy if it is below market-rate and is not repayable if the aircraft program does not generate

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profits, whether government-backed research and defense programs are subsidies, and whether government loans and grants given to key suppliers are subsidies.\textsuperscript{184}

b. Likelihood of a Ruling Against Airbus

One possible outcome of the present dispute is that Boeing will prevail, and the launch aid and other measures provided to Airbus will be declared violations of the SCM Agreement. Trade expert Daniel Ikenson feels that Boeing has a strong case because the subsidies that the EC provides to Airbus are a "blatant violation of free trade rules."\textsuperscript{185} The United States seems to have an advantage in this case because the direct loans provided to Airbus appear much more vulnerable to being ruled violations of the SCM Agreement than the indirect aid Boeing receives.\textsuperscript{186} Many experts think that the loans given to Airbus will not pass the WTO test.\textsuperscript{187} Moreover, analysts believe that the Europeans’ complaint about the Washington state tax credits is weaker because trade officials in Washington were trying to attract jobs to their state, and those types of subsidies are presumably not banned by the WTO.\textsuperscript{188}

The United States claims that EC support for the A380 contravenes both the 1992 Agreement and the SCM Agreement.\textsuperscript{189} Of course, the EC asserts that its support for the A380 conforms to both; and Airbus insists that launch aid is legal.\textsuperscript{190} For the

\textsuperscript{184} Philip Butterworth-Hayes, Time to Talk About Subsidies, AEROSPACE AM., Nov. 2004, at 4, 5.
\textsuperscript{185} David Nicklaus, Boeing and Airbus Turn up the Heat in Fight over Funding, ST. LOUIS TODAY, June 6, 2005, at C1.
\textsuperscript{188} Thomas J. Downey, Airbus "Loans" Are Stealth Subsidies, WALL ST. J., Apr. 6, 2005, at A1; No More Subsidies for Either Boeing or Airbus, AVIATION Wk. & SPACE TECH., Oct. 11, 2004, at 91.
\textsuperscript{189} ROYAL AERONAUTICAL SOCIETY, supra note 18, at 8.
\textsuperscript{190} Boeing Seeks to Reopen Talks on State Aid, GUARDIAN, June 14, 2005, available at http://business.guardian.co.uk/story/01505647,00.html; ROYAL AERONAUTICAL SOCIETY, supra note 18, at 8.
United States to succeed with this claim, it will need to demon-
strate that the Europeans are extending a subsidy, American in-
terests were hurt, and there is a demonstrable connection
between the subsidy and the harm done.191

The United States argues that the connection between EC
loans and harm to Boeing is clearly reflected in Boeing’s steady
loss of market share. For the United States to prevail on its
claims, the panel merely has to recognize a link between the
loans and Boeing’s shift in market share. The Europeans deny
the connection and argue that the United States will have to
demonstrate the link precisely.192 The fact that Boeing has lost
twenty percent of the market share in the past four years seems
to make that point quite obvious, but nothing is really apparent
in this matter. There may be factors that speak for a ruling
favorable to Boeing, but the fact that the parties are arguing
about what degree of connection is required shows that an out-
come completely in favor of Boeing is not certain.

c. Likeliness of a Ruling Against Boeing

According to David Pritchard, Airbus’ strongest point may be
the $3.2 billion incentive package that the state of Washington
approved for the production of the Boeing Model 787, formally
known as the 7E7.193 Pritchard and McPherson assert that close
to fifty percent of public investments in the case of the Boeing
787 are actionable or prohibited under WTO rules.194 Moreo-
ver, reductions in the state’s business and occupancy taxes con-
stitute a clear violation of the WTO rules on providing
production subsidies because this money will not be paid
back.195 According to Teal Group aerospace analyst Richard
Aboulafia, Boeing’s financial transparency is also a weakness in

1992 Aircraft Subsidy Agreement Dies as the Trade War Countdown Starts, AVIATION Wk.

192 Id.

193 John Della Contrada, Subsidy War Could Harm Boeing More Than Airbus, UB
reporter/vol35/vol35n40/articles/Boeing.html; David Pritchard & Alan Mac-
Pherson, Industrial Subsidies and the Politics of World Trade: The Case of Boeing 7E7, 1
THE INDUS. GEOGRAPHER 57, 63 (2004).

194 ROYAL AERONAUTICAL SOCIETY, supra note 18, at 9.

195 Pritchard & MacPherson, supra note 194, at 63; Risk Exposure: As Airbus’ Suc-
cess Grows, Boeing Insists It’s Time to Re-Examine Subsidies, AVIATION WEEK & SPACE
Aboulafia is specifically referring to Japan’s government funding of the Boeing 7E7 program, about which the European side has been complaining. Furthermore, the EC states that it has collected evidence that clearly demonstrates that the massive subsidies to Boeing committed since 1992 violate the SCM Agreement. While these points seem to indicate a ruling in favor of Airbus, it is not assured that the panel will find for the European side.

d. Ruling Against Both Parties

It is also possible that neither party will prevail, and, instead, the panel could rule that both parties are in violation of the Agreement on Subsidies and Countervailing Measures. In fact, according to many commentators and experts, this is the likeliest outcome of the dispute. Boeing already has received an adverse decision by the WTO involving the Foreign Sales Corporations program. The same danger exists in this case. In an editorial of the Chicago Tribune, it was said that “neither company’s hands are clean” and that “[t]hey may both lose, since the WTO is traditionally hostile to government giveaways involving prominent exporters.”

Or, as was stated in the Financial Times:

The WTO panel could well rule that both the United States and the European Union are in violation of its rules, leaving Brussels
and Washington in the unhappy and mutually destructive position of levying truly gigantic trade penalties against each other, perhaps totaling tens of billions of dollars or euros.\(^{204}\)

During negotiations in January 2005, European trade commissioner Peter Mandelson said that “[b]oth sides’ subsidies would have been struck down under a WTO verdict.”\(^{205}\) He further stated that a “WTO verdict would probably take years and could be unclear, with no clear-cut victory for either side.”\(^{206}\) According to political analyst Eugene Gholz, it is highly unlikely that there will be an outcome with only one party being penalized because such an outcome would be very difficult politically for the WTO.\(^{207}\) A final solution of the controversy before the WTO seems unlikely. Observers foresee panel reports that declare parts of the financial assistance given to Airbus as well as to Boeing illegal.\(^{208}\) In the end, it is quite likely that either party could win, and there is a significant danger that the WTO would rule that both complaints are valid.\(^{209}\) Due to the arguments mentioned above and the fact that both sides grant their respective aircraft manufacturers significant financial assistance, the most likely outcome in the Airbus-Boeing dispute is that both parties’ complaints will be ruled valid.

e. Who Will Suffer More?

“Airplanes are among the most valuable and highest-volume elements of international trade, with forecasters estimating a $2 trillion export market of up to 25,000 planes over the next 20 years.”\(^{210}\) Consequently, the stakes in this confrontation are extremely high for both sides and both could suffer severely from
a transatlantic battle over subsidies.\textsuperscript{211} With the odds being that both sides are likely to "win" their cases, the issue becomes who will lose more, or for whom are the stakes higher?\textsuperscript{212}

On the one hand, a WTO confrontation may be more problematic for Boeing because its 7E7 support has not yet been paid.\textsuperscript{213} However, according to Richard Aboulafia, Boeing has "the unique track record of building planes and showing returns to investors," which makes Boeing more equipped for autonomy than Airbus.\textsuperscript{214} Nevertheless, Boeing probably would not escape an adverse ruling from the WTO unscathed.\textsuperscript{215} In the end it will be very difficult to assess who will stand "to gain or lose the most in what at best would be a very messy outcome."\textsuperscript{216} Consequently, there will probably be a similar impact on both sides.\textsuperscript{217}

4. Surveillance of the Implementation of Recommendations and Rulings

The major criticism of the WTO dispute settlement system concerns the provisions dealing with implementation and compensation.\textsuperscript{218} This section assesses the efficiency of the implementation stage, including compliance, remedies, and enforcement. This phase seems to be even more challenging and may yield even more problems than the areas of concern in the panel procedure.

a. Implementation of a Ruling

Following the issuance of a panel or Appellate Body decision, the DSU demands "prompt compliance" with the recommendations and rulings from member nations implicated in the dispute.\textsuperscript{219} The panel and Appellate Body have the power, but not the obligation, to suggest ways that the DSB should implement the recommendations.\textsuperscript{220} Within thirty days after adoption, the

\textsuperscript{211} Royal Aeronautical Society, supra note 18, at 3; Schuman, supra note 98.
\textsuperscript{212} See Royal Aeronautical Society, supra note 18, at 10.
\textsuperscript{214} Wingfield, supra note 171.
\textsuperscript{215} Royal Aeronautical Society, supra note 18, at 10.
\textsuperscript{216} Id.
\textsuperscript{217} Wingfield, supra note 171.
\textsuperscript{219} DSU, supra note 105, art. 21(1).
\textsuperscript{220} DSU, supra note 105, art. 19.
losing party must inform the DSB how and when it intends to implement the recommendations and rulings.\textsuperscript{221} If immediate compliance is impracticable, the losing party may be given a reasonable period of time, which should not exceed fifteen months from the adoption of the report.

Article 4, paragraph 7 of the SCM Agreement contains a *lex specialis* rule stipulating that the panel shall specify in its recommendations the time period within which a prohibited subsidy must be withdrawn.\textsuperscript{222} In case of actionable subsidies, the maximum period for implementing measures either to remove the adverse affects of the subsidy or to withdraw the subsidy is six months from the date of the adoption of the report by the DSB.\textsuperscript{223}

b. Compliance Problems

This section of the article discusses the likelihood of compliance with rulings issued by the WTO. It argues that the parties are not likely to comply with a decision made by the WTO and then addresses the problems that might arise in the event of non-compliance.

According to Article 21(1) of the DSU, “prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”\textsuperscript{224} As indicated above, there is a high chance that the WTO will declare both American and European subsidies illegal. A similar dispute in the WTO between Canada and Brazil over aircraft subsidies ended in a double ruling against both.\textsuperscript{225}

i. Double Ruling Against Canada and Brazil

The aircraft manufacturers Embraer and Bombardier have been embroiled in a dispute since 1996 with a significant number of panel reports issued but no satisfactory end in sight.\textsuperscript{226} In

\textsuperscript{221} Porges, *supra* note 106, at 1104.
\textsuperscript{223} Id.
\textsuperscript{224} DSU, *supra* note 105, art. 21(1).
\textsuperscript{226} Joseph D’Cruz & Charles M. Castle, *Canada-Brazil Trade Relations: An expedited Arbitral Mechanism May Be Required to Resolve the WTO Aircraft from Brazil/Ca-
1999, the DSB adopted the Appellate Body Report finding that Brazil was in violation of the SCM Agreement.\textsuperscript{227} One year later, the WTO panel determined that Brazil still was not in compliance with the SCM Agreement.\textsuperscript{228} Canada was therefore granted authority to impose "economic countermeasures" against Brazil.\textsuperscript{229} Instead of imposing punitive tariffs, Canada matched what it perceived to be non-compliant subsidies.\textsuperscript{230} This "matching" strategy represented a so-called "self-help" remedy, which clearly ignored the comments of the Appellate Body Report in 1999.\textsuperscript{231} These self-help remedies are said to threaten the viability of the WTO dispute settlement mechanism because it is designed to prevent such unilateral action.\textsuperscript{232}

Like in the case where Brazil refused to comply with Appellate Body findings,\textsuperscript{233} rulings made in the Airbus-Boeing dispute may be ignored or bypassed by the parties due to the critical importance of the companies to the United States and EC.\textsuperscript{234} With so many jobs at stake, it could be hard for either government to back down.\textsuperscript{235} Prestige, wealth, and power make it unlikely that the national governments will readily comply with a ruling made by the WTO that is not in their favor.\textsuperscript{236}

The panel or Appellate Body recommendations were ignored in other cases where long-standing disputes between major countries involved crucial interests for each side.\textsuperscript{237} Two cases where suspension of concession or other obligations were requested and ignored were EC-BANANAS and EC-HORNADA Dispute, Estey Centre for L. & Econ. in Int'l Trade, Feb. 2002, at 1, 23, available at http://www.esteycentre.ca/CanadaBrazilTradeRelations.pdf; Helena D. Sullivan, Regional Jet Trade Wars: Politics and Compliance in WTO Dispute Resolution, 12 MINN. J. GLOBAL TRADE 71, 73 (2003).


\textsuperscript{228} D'Cruz & Gastle, \textit{supra} note 226, at 24.

\textsuperscript{229} Id.

\textsuperscript{230} Id. at 26.

\textsuperscript{231} Id. at 9; see also Appellate Body Report, Brazil—Export Financing Programme for Aircraft, WT/DS46/13 (Nov. 26, 1999).

\textsuperscript{232} D'Cruz & Gastle, \textit{supra} note 226, at 9.


\textsuperscript{235} Evans, \textit{supra} note 144.

\textsuperscript{236} Marshall, \textit{supra} note 234.

\textsuperscript{237} Zhu Lanye, \textit{The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?}, 17 TEMP. INT'L & COMP. L.J. 221, 225 (2003).
As will be shown, the EC has a worse track record than the United States with regard to compliance with WTO rulings.

ii. Compliance Issues Illustrated by the EC-Bananas and EC-Hormones Cases

The EC-BANANAS dispute demonstrates the difficulty encountered by the WTO in ascertaining what constitutes compliance and reveals the unsettled issue of the time frame within which Member nations must comply. The dispute also exemplifies that Article 21 of the DSU basically gives a Member nation the chance to use the time given to comply as a mechanism to evade WTO obligations.

The EC-BANANAS case was exceedingly complex. It resulted in a lengthy series of decisions stretching over eight years and presented an extremely controversial and difficult implementation problem that almost destroyed the WTO system in its relative infancy. The significance of the case was that the EC repeatedly showed reluctance to correct the violations identified in the report. Similarly, in the EC-HORMONES case, the European side showed, from the beginning of the case, a clear reluctance to comply with the ruling made by the WTO. These WTO rulings were seen by many as the first test of whether the EC was prepared to begin honoring agricultural dispute settlement rulings under the WTO. In these particular cases against the EC, "Europe has done nothing thus far to engender confidence that it will begin to implement properly future adverse

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240 Id.


242 Frances Williams, Ecuador Seeks to Retaliate in Banana Dispute, FIN. TIMES, Nov. 20, 1999, at 7.

If compliance problems arose in those relatively modest commercial disputes, "many doubt whether the system will succeed in resolving the more challenging trade disputes" that are currently pending at the WTO.\textsuperscript{245}

The United States record of compliance with decisions made by the WTO can be described as mixed. Of the thirteen WTO cases against the United States that had reached the implementation stage by October 2002, the United States appears to have complied with nine.\textsuperscript{246} Interestingly enough, the main incidents of non-compliance have been disputes with the EC.\textsuperscript{247} Although the United States, by contrast, has more consistently come into compliance with adverse WTO rulings, there are quite a few cases pending at the WTO that have the potential of raising difficult compliance issues in the near future.\textsuperscript{248}

The United States, for instance, is having considerable implementation problems in the Foreign Sales Corporations case, which has been going on for years and still is not satisfactorily resolved.\textsuperscript{249} "This case involves a high degree of risk for the world trading system," and "[t]he scale of retaliation threatened . . . , and its long running nature makes this an important test" for the WTO.\textsuperscript{250}

In particular, the Foreign Sales Corporations case, the EC-BANANAS dispute, and the EC-HORMONES dispute show that the parties are aware of the difficulties that can arise when "high profile" cases are decided by a WTO ruling.\textsuperscript{251} One could infer that the parties to this dispute believe and hope that the other side will eventually comply with the WTO ruling, as finally happened in the EC-BANANAS case. One could also conclude that the United States and the EC know how difficult it is to imple-

\textsuperscript{244} Id. at 728.
\textsuperscript{245} Id.
\textsuperscript{248} Gleason & Walther, \textit{supra} note 244, at 729; Swagel, \textit{supra} note 184.
\textsuperscript{251} Id. at 10-14.
ment the recommendations made by the WTO ruling when the industry concerned is of high importance to the parties involved. The EC-HORMONES case is such a case and is still not fully resolved.252

Many trade experts believe that a WTO decision in the Boeing-Airbus dispute, possibly banning some types of subsidies but allowing others, could be so confusing that it would be difficult for either the United States or Europe to implement.253 With the stakes in the Boeing-Airbus case exceptionally high and the airplane manufacturing industry a crucial factor in the respective countries' economies, it seems rather doubtful that the parties will comply with a decision promptly.254 Conversely, the high stakes nature of this dispute almost guarantees that one or both economic powers will not comply with the WTO rulings.255

iii. The "Buying-Out" Option

The EC-BANANAS dispute also highlights the fact that Member nations may choose the imposition of sanctions over the enforcement of WTO recommendations or rulings.256 The EC voluntarily failed to fully comply with WTO recommendations and rulings, resulting in the WTO authorizing retaliation against the EC banana import regime.257 The European side chose the imposition of $191.4 million in sanctions in 1999 over full compliance with the WTO ruling.258 Whereas the EC immediately refused to comply in the dispute over the import of bananas, in the Foreign Sales Corporations case the United States has at least taken steps to pass legislation to comply with the ruling issued by the WTO.259

Choosing to pay rather than fully comply, especially with regard to the European side, is likely to happen in the Airbus-Boeing dispute due to the vital importance of aircraft manufac-

253 Miller, supra note 59, at A1.
255 Id.
256 Palmer, supra note 239, at 473.
257 Id. at 482.
258 Id.
turing to the United States and EC. Goldstein and McGuire suggest that both governments may conclude that the costs of compliance are too high if it means reversing several decades of industrial and technological policy favoring an export-oriented aerospace sector. Much will depend upon shifting assessments of the costs of compliance versus the costs of non-compliance.

The acceptance of sanctions rather than compliance with WTO recommendations and rulings seriously undermines the effectiveness of the DSU and the whole WTO system. The reality that a member nation may elect the imposition of trade sanctions rather than compliance reflects a substantial weakness in the DSU. If powerful nations continue to choose sanctions over compliance, non-compliance may become an acceptable option and the WTO would serve little purpose in the area of dispute resolution. It is not possible to build a credible system of global governance if compliance can simply be replaced with compensation. Or, as former United States Trade Representative Charlene Barshefsky noted, “[w]e cannot have a global, rules-based system if major partners in it do not comply.”

c. No Suitable Remedies

Even if the losing party is willing to comply with a ruling, suitable remedies must be found. Many WTO Members consider the issue of remedies a major problem in WTO law. This issue is pertinent in the Airbus-Boeing dispute because no clear and suitable remedy seems available for the parties involved.

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261 ROYAL AERONAUTICAL SOCIETY, supra note 18, at 9.


263 Id. at 163.

264 Id.


Trade retaliation and compensation are the classic remedies of the WTO.268 Retaliation and compensation “aim to exercise pressure on the non-complying country to bring its measures into conformity with WTO law.”269 These measures are “only possible when the non-complying country offers it and the parties to the dispute agree on its scope and implementation.”270

“Although the DSU expresses an affirmative preference for compliance with DSU rulings and recommendations, it also delineates procedures for compensation or the suspension of concession or other obligations.”271 If a WTO Member fails to implement recommendations and rulings adopted by the DSB within the required period of time, the complaining party is entitled to request authorization from the DSB to suspend concessions and other obligations such as applying trade sanctions.272 Within that context, trade sanctions should be linked as closely as possible to the subject matter of the panel proceedings to which they relate. Only if the complaining party believes that it is not practicable to seek suspension of concessions within the same sector in which a violation had been found, may that party seek to apply trade sanctions in other sectors under the same agreement.273

“Compensation” in the WTO system has a very different meaning than in international law generally. While “compensation” is ordinarily thought of as a retrospective remedy designed to compensate for past harm, in the WTO, the term refers to a purely forward-looking remedy: the granting of a trade benefit to the prevailing party in order to compensate prospectively for the nullification or impairment caused by a non-conforming measure.274 Consequently, the term “compensation” in the WTO context traditionally does not refer to payment for trade lost because of an inconsistent measure, but rather to a rebalancing of trade concessions.275 Only on very rare occasions

269 Id.
270 Id.
272 DSU, supra note 105, art. 22.
273 Lorcher, supra note 100, at 209 (this process is know as a “cross-sector-retaliation”).
274 Vazquez & Jackson, supra note 271, at 560.
275 Id.
will retaliation be considered appropriate for past harms, such as in the case of the United States regarding the Anti Dumping Act of 1916.276

Simply leveling the field, as in compensation under the WTO, runs the risk that the violator is better off having broken the rules than complying with them since no damages for the past can be claimed under current DSU rules. No further incentive is provided in the WTO rules to remove this inconsistency apart from compensation; this prospective remedy effectively gives a premium to non-complying countries that drag their feet in implementing a WTO ruling, as they do not have to worry about the past.277

This shortcoming also affects the Airbus-Boeing dispute because even after the United States had requested consultations at the WTO and terminated the 1992 Civil Aircraft Agreement, the British government received an aid request in April 2005 from Airbus for launch aid of the A350, which is also supported by the EC.278 European Trade Commissioner Mandelson even stated that throughout proceedings and a very likely appeal by the losing party, “nothing would prevent either side from continuing to offer further financial support.”279 If Airbus gets the launch aid for the A350 while the litigation is under way, assistant professor Eugene Gholz believes that “there won’t be an easy remedy even if the United States does win this trade case.”280

If the WTO finds that the European or United States government is improperly subsidizing the manufacturers, the governments will each be told to stop breaking the rules. If they fail to desist, retaliatory sanctions will be allowed in line with a scale set by the WTO.281 The level of authorized suspended concessions “shall be equivalent to the level of nullification or impair-

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276 Decision by the Arbitrators, United States—Anti Dumping Act of 1916, WT/DS/136 ARB (Feb. 24, 2004); see Bronckers & Van den Broek, supra note 268, at 102.
277 Bronckers & Van den Broek, supra note 268, at 103.
281 Evans, supra note 144.
ment."  The major problem in that context is the calculation of the level of nullification and impairment. A senior United States trade official stated that the United States, "if it prevails, would ask the WTO to require that Airbus repay the launch aid on commercial terms."  The United States could put tariffs on European goods if the WTO rules against Airbus, and vice versa. These tariffs could cause major turbulence throughout the aviation industry and even beyond.

The problem is that "retaliation puts a disproportionate burden on innocent bystanders. Industries who are not at all involved in the particular trade dispute will suffer from trade retaliation."  Assistant Professor Gholz said that if the United States were awarded sanctions, the Americans might protect even some other threatened industry rather than target the airline market. For instance, in both EC-Bananas and EC-Hormones, the level of sanctions bore no accurate relationship to the breach of WTO commitments. Or, as one author has stated, "the punishment does not fit the crime."  Only in rare cares will it be possible to get the level of sanctions right. Other penalties, like paying back subsidized loans early, seem equally ineffective. With regard to the Airbus-Boeing dispute, Gholz said that "the remedies people are talking about are not actually desirable remedies."

d. Difficulties of Enforcing a Ruling

Strongly connected to the question of compliance and remedies is the question of enforcement and what can be done if the parties are not willing to comply with a ruling rendered by the WTO. The major problem is that the WTO does not have a real

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282 DSU, supra note 105, art. 22.4.
285 Bronckers & Van den Broek, supra note 268, at 103.
286 THE BROOKINGS INSTITUTION, supra note 186, at 44; Christie, supra note 280.
enforcement arm.\textsuperscript{289} The "legalization" of the dispute settlement process has not been paired with a stronger enforcement mechanism.\textsuperscript{290} This creates a major impediment to the WTO's enforcement of its rulings.

The WTO does not seek to enforce directly compliance itself. It employs softer methods, such as monitoring and reporting on implementation and discussions in councils and ministerial meetings, to encourage Members to conform.\textsuperscript{291} The purpose of remedies in current WTO law is not to punish the WTO Member that is the subject of the complaint, but to achieve a prompt settlement when all prior procedures have been exhausted.\textsuperscript{292} "Experience with the implementation of retaliation suggests that it adds little, if anything, to the pressure applied to bring the [violation] in question into compliance."\textsuperscript{293} Even if the WTO were to make a clear ruling against one or both sides, "it would be impossible to enforce in view of the huge commercial and political interests at stake on both sides of the Atlantic."\textsuperscript{294}

C. Is the WTO the Proper Forum for the Dispute?

Closely linked to the question of whether the WTO is equipped to handle this case is another very controversial issue: whether the WTO is even the appropriate forum to settle this dispute. The next section of this paper will contrast the two opposing views to this highly controversial question.\textsuperscript{295} While some experts\textsuperscript{296} argue that the WTO has been set up to handle disputes just like this, even when they are large and highly com-

\begin{thebibliography}{99}
\bibitem{} Aurup, \textit{supra} note 102, at 902.
\bibitem{} O'Connor, \textit{supra} note 287, at 264.
\bibitem{} D'Cruz & Gastle, \textit{supra} note 226, at 70.
\bibitem{} Edward Alden & Raphael Minder, \textit{War of Aircraft Titans Gives WTO Biggest Case}, \textit{FIN. TIMES}, June 1, 2005, at 8.
\bibitem{} Townsend, \textit{supra} note 7.
\end{thebibliography}
plex, the majority of experts have the opinion that the WTO is not the appropriate forum for this dispute.297

1. Arguments for the WTO Being the Proper Forum to Settle this Dispute

There are basically four arguments as to why the WTO is the proper forum to settle this dispute.

a. Effective Mechanism

Since it is only possible to block rulings at the WTO by consensus after the Uruguay Round, "there is a sense that litigation may be more efficacious this time around."298 According to United States trade representatives and other government officials, the WTO is equipped and exactly the place to litigate this dispute.299 They believe that "the WTO was created to channel disputes into a neutral forum" where global rules are applied.300 According to these notions, the WTO dispute settlement system is an effective mechanism, and the WTO is the right place to settle this dispute even though it might be very complex and not easy to resolve.301

b. Clear Up the Situation

Moreover, the WTO could "bring needed transparency to what constitutes an unacceptable subsidy."302 The Airbus-Boeing litigation could help clarify "which subsidy programs are illegal under international trade rules, and which are not."303

c. Creating a Precedent

By deciding this case, the WTO could also create a precedent. The experience of Canada and Brazil at the WTO is instructive,

297 Airing Differences: The Airbus-Boeing Dispute Should Be Kept Out of the WTO, GUARDIAN (London), Oct. 9, 2004, at 27; Miller, supra note 59, at A2; Swagel, supra note 183; Marshall, supra note 235.
298 Busch, supra note 296.
301 Gresser, supra note 210; Senator Patty Murray Statement, supra note 296.
302 Airbus-Boeing Culture War, supra note 284.
and the WTO ruling made in that case has curtailed the use of certain subsidy programs. The Airbus-Boeing litigation at the WTO could impact not only the United States and Europe, but also other countries such as Brazil and Canada as well, "in the sense that WTO rulings influence how subsequent cases are decided." 304

d. Force the Parties to an Agreement

The WTO rulings in the Canada and Brazil case have "pressured both sides to return to the bargaining table" to renegotiate and try to "seek a long-term solution" to their problem. 305 According to some commentators, the "result of the litigation" at the WTO "will likely encourage the United States and Europe to return to the negotiating table." 306 The benefit of the WTO is that it can depoliticize highly political and controversial cases—"and perhaps force the two sides to an agreement to avoid high WTO-sanctioned tariffs." 307 Or, as WTO lawyer Brendan McGivern said, "WTO obligations could focus the bilateral negotiations in a way that may not be possible at the moment." 308

2. Arguments for the WTO Being an Inadequate Forum for this Dispute

According to many analysts, the WTO is not the appropriate forum for this dispute because the WTO seems poorly suited and ill-equipped to resolve this case. 309

a. Highly Political

Some commentators claim that the United States filed the lawsuit more for political than economic reasons and further allege that given the political nature of the decisions involved, "the WTO seems poorly suited to resolve this case." 310 The WTO lacks the popular backing to resolve political disputes. 311 Problematic in that sense is that the request for consultations by

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304 Busch, supra note 296.
305 Id.
306 Id.
307 Airbus-Boeing Culture War, supra note 284.
310 Swagel, supra note 183.
311 Id.
the United States was filed just one month before the presidential election, and the employees of Boeing and manufacturers in general are a key constituency in many states.\textsuperscript{312} Hence, EC representatives have questioned whether the United States action was largely driven by political reasons.\textsuperscript{313}

\textbf{b. Too Complex}

Commentators argue that this dispute should not have been brought to the WTO because it is too complex.\textsuperscript{314} Some trade experts state that the "WTO is utterly unsuited to deal with a dispute on this scale, both because of the complexity of some of the issues and the huge commercial stakes on either side."\textsuperscript{315} They argue that the "Trade Organization is not equipped to handle such a large dispute between its leading powers."\textsuperscript{316}

\textbf{c. Poor Record in Resolving High Stakes Disputes}

For many observers, the true measure of a dispute settlement mechanism is how it handles the "toughest cases." "Tough" or "high-stakes" cases are those with the highest monetary and political stakes.\textsuperscript{317} There have been several disputes over non-compliance that have tested the WTO system of remedies,\textsuperscript{318} including the EC-Bananas case, the EC-Hormones case, and the Brazil and Canada case over aircraft subsidies.

The DSU has, according to some observers, a poor track record in resolving high stakes cases between the United States and the EC.\textsuperscript{319} In particular, issues that have an "all-or-nothing-quality" are more likely to escalate to the panel phase.\textsuperscript{320} In the "new" WTO era, defendants fully concede to complainant's demands in a small minority of cases; furthermore, these conces-

\begin{thebibliography}{99}
\bibitem{312} Gresser, \textit{supra} note 210.
\bibitem{313} \textit{Royal Aeronautical Society, supra} note 18, at 6.
\bibitem{314} Uchenna Izundu, \textit{The Battle over Aircraft Subsidies, Fin. Times}, Jan. 11, 2005, \textit{available} at WLN 9796690.
\bibitem{317} Marc Busch & Eric R. Reinhardt, \textit{Transatlantic Trade Disputes: The EU, the US and the WTO, in Transatlantic Trade Conflicts & GATT/WTO Dispute Settlement 475} (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003).
\bibitem{318} O'Connor, \textit{supra} note 287, at 245.
\bibitem{319} Busch & Reinhardt, \textit{supra} note 317, at 483.
\bibitem{320} Guzman & Simmons, \textit{supra} note 166, at 217.
\end{thebibliography}
sions are largely driven by factors outside the dispute settlement system. This trend suggests that in “tough” cases, it is highly unlikely that the parties will make concessions or that a dispute will be settled at an early stage. European Trade Commissioner Peter Mandelson stated that it could take “years to resolve the standoff but it would likely result in a legal stalemate.”

d. Key Document Is Missing

There is no agreement or document that precisely deals with the subsidies and relevant issues concerned. “The 1979 Agreement included the 1979 Understanding as its basis for dispute settlement,” and “Appendix 1 of the 1992 Agreement states that it is covered by the DSU.” However, the DSU “is not listed in the Appendix of the DSU as an agreement that uses its own dispute settlement terms in place of the DSU.”

Furthermore, “there is corresponding uncertainty over the legal mechanisms and even [the] legal status of dispute resolution under the Agreement on Trade in Civil Aircraft.” Efforts to reform the agreements have failed. The 1979 Agreement was not updated during the Uruguay Round of negotiations and was never renegotiated; consequently, it does not reference the 1994 SCM Agreement. As a result, there are only “broad subsidy rules that were never really intended for aircraft manufacturers.” This means that panels will be applying subsidy rules to aircraft makers that were not meant for the industry. Thus, the “key” document in this case on which the WTO could rely to make its rulings is missing.

e. Negative Effect on Other Trade Relations

An aerospace fight not only severely tests the WTO dispute-resolution process, but also risks poisoning other trade areas,
including the Doha Round. A decision made by the WTO in this case would likely cool transatlantic relations and create new animosities regarding trade between the EC and the United States. The decision could affect billions of dollars in future subsidies, thousands of jobs in both countries, and could also have effects on suppliers for both firms and subcontractors worldwide. Such a decision would not only be costly and bad for the business of Airbus and Boeing, but it could also upset airline customers and possibly "disrupt the entire aviation industry."

Moreover, production subsidies of Boeing and Airbus products are not limited to the United States and Europe. As indicated above, the Japanese government is currently supporting the development of Boeing planes; therefore, Japan could also be affected by this dispute. An escalation of the dispute could set the tone for the resolution of similar disputes and "competition in other industries as well." European Trade Commissioner Peter Mandelson warned that the dispute "may also harm important global talks aimed at reducing barriers to trade." In the end, "the threat of countervailing import duties being applied to new Airbus and Boeing planes would cast a pall over the aviation industry."

f. Risk of a Trade War

If matters escalate further, there is even the threat of a trade war between the United States and the EC. The above mentioned WTO case of Canada and Brazil is a striking example of what can happen when the WTO issues rulings against both parties who refuse to comply and "each threaten billions of dollars

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330 Schuman, supra note 98.
332 See generally Miller, supra note 59, at A1.
335 Carbaugh & Olienyk, supra note 52, at 7.
338 Id.
in trade sanctions as a consequence.” In that case, neither side was willing to back down, and the clash between the countries escalated so far that the Brazilian President Fernando Henrique Cardoso stated, “[i]f they [Canada] want war, war is war.” Neither Boeing nor Airbus has the standing of Embraer or Bombardier, so a fierce trade war as was seen between Canada and Brazil is not likely. However, there is a risk that the Airbus-Boeing dispute could further strain the transatlantic relationship at a crucial point in time, degenerating into a surrogate for wider differences between the world’s two biggest trading partners and, at the worst, igniting a trade war between the United States and Europe.

g. Likelihood of Damage to the Credibility of the WTO

“The frequent use by the United States and the EC of the WTO dispute settlement against each other has raised ‘serious concerns about whether’ those disputes are ‘detrimental to the WTO as a whole.’ ” Given the predicted outcome of the dispute – that is, the United States and the EU going their own ways - the WTO’s credibility will suffer and affect its stature as an impartial body.” Or, to put it in other words, the WTO could overstrain itself with this complex case. Additionally, the WTO’s energies could be more profitably expended elsewhere.

The problem is that the WTO presently lacks the guaranteed credibility and power it needs to function as an authoritative final arbiter on grand international trade schemes. This credibility was “slowly being built up, and set to be fully tested by a contentious series of cases against agricultural subsidies.” A deal is still to be negotiated in this area, but the Airbus-Boeing case now threatens to poison the transatlantic relationship even more and makes a solution to the problem of subsidies in the agricultural sector even more difficult.
If the issue of subsidies in the agricultural sector had been resolved before the WTO became involved in the Airbus-Boeing dispute, the gained confidence in the WTO system could have helped the transatlantic partners resolve their long standing battle over subsidies in the aircraft manufacturing sector.\textsuperscript{347} Now, however, the high visibility and sensitivity of this high profile case will propel it to the spot of central importance, making it the “toughest” case for the WTO so far.

The greatest risk of this dispute will be the WTO’s legitimacy as a final arbiter in trade relations. The WTO currently lacks sufficient legitimacy.\textsuperscript{348} By deciding this case, the WTO “risks losing credibility as a forum for resolving large-scale trade disagreements involving powerful vested interests.”\textsuperscript{349} As a result of non-compliance and other problems arising out of a WTO decision made in this complex dispute, other nations may lose faith in the WTO.\textsuperscript{350} As a consequence, ongoing or upcoming trade disputes may not be adequately resolved through the WTO mechanism and could drag on for years. This dispute could also set-back international commerce by delaying the facilitation of global commerce and world stability.\textsuperscript{351}

\textbf{h. Not Solving the Problem and No Final Solution}

Even if the WTO makes a decision and the parties comply, this would not ultimately solve the Airbus-Boeing dispute.\textsuperscript{352} The WTO looks backward and assesses what happened in the past to determine whether a party should have to pay penalties.\textsuperscript{353} The 1979 Agreement has not proven to be very successful and does “not appear to deal effectively with massive government subsidies;” accordingly, the Agreement needs to be renegotiated.\textsuperscript{354} The 1992 Agreement has also outlived its usefulness and needs to be replaced. The questions that must be addressed, regardless of a WTO decision, is how subsidies can be disciplined in the future and how governments can agree to where the limits are. This can only happen through negotiations. The importance of a WTO decision would be to clarify

\textsuperscript{347} See Fisher, supra note 10, at 81.
\textsuperscript{348} Id.
\textsuperscript{349} Marshall, supra note 234.
\textsuperscript{350} See The Brookings Institution, supra note 186, at 39.
\textsuperscript{351} Marshall, supra note 234.
\textsuperscript{352} Christie, supra note 280; The Brookings Institution, supra note 186, at 37.
\textsuperscript{353} The Brookings Institution, supra note 186, at 11.
\textsuperscript{354} Falken, supra note 327.
and decide which subsidies are allowed and which are not. If only one party is in violation of the WTO rules, the prevailing side could, with the help of the WTO, pressure the other side into complying with the ruling.

However, if both parties are found in violation of the SCM Agreement, both sides would have to make numerous changes to their business cultures that are largely based on present subsidies. If both are found guilty of using illegal subsidies and one party does not fulfill its obligation under the WTO ruling, it might be easier for the other party to take unilateral action without turning to the WTO and continue using subsidies on their own side, as illustrated by the Canada-Brazil case. According to Hugo Paemen, former EC ambassador to Washington, a WTO decision will not solve the problem of future disagreements.\textsuperscript{555} To have a solution that works over a long period of time, the parties need to negotiate more workable rules for the future. Only “bilateral talks permit the kind of give-and-take bargaining that a WTO panel cannot provide.”\textsuperscript{556}

3. \textit{Summary}

As has been shown, throughout nearly every stage of the panel procedure, there exist many potential problems that will be difficult to overcome in the Airbus-Boeing dispute. Finding the proper panelists is the first major obstacle, followed by numerous difficulties concerning the panel process itself, in particular the compliance dilemma and enforceability of the panel reports. Taking this and the above mentioned arguments into account, especially the potential damage to WTO credentiality, it becomes evident that the WTO is, at least at the moment, not the appropriate forum to settle this dispute. Deciding this case would weaken the WTO’s credibility by suggesting that it is not equipped to solve this tough and complex case. If the parties do not settle this dispute and the WTO has to make a decision, the result must be a firm decision. The rulings must be based on the law and facts and not on perceived risks of sour relations or the threat of a trade war.

VI. HOW TO RESOLVE THE DISPUTE

After assessing whether the WTO is equipped to handle this dispute and showing that it is not the proper forum for it to be

\textsuperscript{555} Christie, \textit{supra} note 279.
\textsuperscript{556} Drezner, \textit{supra} note 254.
resolved, this article addresses other ways this dispute might be resolved. This is done by suggesting improvements to the dispute settlement system that will enable it to handle “high-stakes” cases more adequately in the future.

A. IMPROVING THE WTO DISPUTE SETTLEMENT SYSTEM

Much has been said regarding the improvement of the WTO system. This section focuses on how the dispute settlement mechanism can be improved and made more ready to deal successfully with “high-profile” cases.

1. Proposed Changes to the WTO Rules

There have been many proposals to reform the WTO dispute settlement procedure during the last few years, especially concerning the implementation stage and the enforcement mechanism.\textsuperscript{357} Also, a wide range of proposals for improving and strengthening remedies have been brought forward.\textsuperscript{358} Examples of such solutions include collective retaliation, retroactive damages,\textsuperscript{359} and monetary damages.\textsuperscript{360}

2. Specific Changes Needed for “High-Profile” Cases

This paper suggests four specific changes that could help improve the WTO’s dispute settlement system and facilitate the “dealing” and decision-making in future “high-profile” cases.

a. Permanent Panel

As has been discussed, the selection process of panelists is often extremely contentious and one of the major causes of delay in the dispute settlement system because it has become increasingly difficult for partners to agree on panelists.\textsuperscript{361} One way to improve the effectiveness of the dispute settlement system would be to introduce a permanent panel system.\textsuperscript{362} This

\textsuperscript{357} Van den Broek, supra note 246, at 127.
\textsuperscript{358} Bronckers & Van den Broek, supra note 268, at 106.
\textsuperscript{359} Pauwelyn, supra note 290, at 335-347.
\textsuperscript{360} Bronckers, supra note 265, at 63.
\textsuperscript{361} E. Kessie, WTO Jurisprudence and Dispute Settlement Practice, in The WTO Dispute Settlement System 1995-2003 140 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).
potential solution has often been suggested and was first proposed by the EC in 1998. The disadvantage of a permanent panel is that parties to a dispute are not able to choose experts specialized in the concerned matter. However, if the number of rejected panelists continues to increase, a fixed panel system might become unavoidable. Additionally, the list from which panelists can be drawn could be extended to contain more experts that are proficient in various aspects of WTO law and other technical matters. Although this proposed change might be very difficult and delicate to put into practice, it needs to be addressed by all WTO Members if the overall consistency and quality of panel reports is to be improved. At this point, anything that can be done to improve the “professionalism” of the panel system would be a major step forward.

b. Improved Compliance and Enforcement Mechanism

A significant number of WTO members seem to agree that the implementation phase of the dispute settlement system is relatively weak as compared to other stages. The ability of

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WTO members to prolong the implementation period and the problem that compensation is purely for past violations creates quite a few problems, as has been illustrated above. “Improved incentives are needed under the DSU to help achieve the WTO’s implementation objective of ‘prompt compliance.’”\(^{368}\) Allowing compensation at an earlier stage and, most importantly, for damages that have occurred in the past, would provide a motivation for parties in violation of WTO rules to implement a ruling more rapidly.\(^{369}\)

Before introducing new remedies such as financial compensation into the WTO system, the issue that must be addressed is whether the WTO is ready to move away from a rebalancing approach to one of “punishment” and, if so, what sort of new remedies would be appropriate.\(^{370}\) New remedies would have to be introduced carefully and a simple approach of “punishment” in the form of punitive damages does not fit in the system of the WTO.\(^{371}\) Nevertheless, one option worth considering is the possibility of introducing financial compensation as a remedy, an option that will be addressed further in the next section.

c. Financial Compensation for Past Harms

The idea of financial compensation is not novel. Reparation by governments for violations of laws “is part of the tradition of public international law” and “has also been proposed more recently in the WTO.”\(^{372}\) Major advantages of financial compensation are that it is not trade restrictive and does not lead to a disproportionate burden on innocent bystanders. While suspension of concessions implies an increase in trade barriers, compensation would lower trade barriers, which is the very objective of the WTO.\(^{373}\) Moreover, financial compensation helps to redress the injury and, if introduced retroactively, is an incentive to comply with WTO decisions faster.\(^{374}\) This has the further advantage of relieving pressure on the system caused by long-term non-compliance. As has been shown, this is particularly a problem in the Airbus-Boeing dispute because even after consultations were requested, the EC applied for more aid. By

\(^{368}\) Gleason & Walther, supra note 243, at 712.

\(^{369}\) Clough, supra note 218, at 273.

\(^{370}\) O’Connor, supra note 287, at 266.

\(^{371}\) Hudec, supra note 267, at 392; see generally Sullivan, supra note 226, at 74.

\(^{372}\) Bronckers & Van den Broek, supra note 268, at 109-10.

\(^{373}\) Kessie, supra note 361, at 148; Rosas, supra note 22, at 137.

\(^{374}\) Bronckers & Van den Broek, supra note 268, at 110.
introducing retroactive financial compensation parties would be forced to comply with WTO agreements from the beginning of proceedings. One possible solution is to calculate compensation from the date of the establishment of a panel.\footnote{Kessie, \textit{supra} note 361, at 145.}

A critical question is whether compensation should be made mandatory.\footnote{\textit{Id.} at 148.} Problematic in that sense is that “financial compensation is a ‘self-help-remedy’” and a “WTO Member depends on the cooperation of the non-complying country to collect the compensation.”\footnote{Bronckers & Van den Broek, \textit{supra} note 268, at 114.} Self-help remedies against treaty violations are exceptional in international law,\footnote{\textit{Id.} at 115.} and one has to keep in mind that the WTO remains an intergovernmental system and, as such, lacks the power to enforce and implement its rules.\footnote{Van den Broek, \textit{supra} note 246, at 138.} In addition, compensation does not lead to the same level of political pressure on governments that suspension of concession does because it does not impact specific industries.\footnote{\textit{Id.} at 148.}

More than other disputes, the EC-Bananas and the Foreign Sales Corporations cases have exposed the limits of the WTO’s system of remedies and show that something needs to be done in this area. The remedy of financial compensation is not completely unusual in the area of international law and can, for example, be found in the free trade agreement recently negotiated by the United States and Morocco.\footnote{Final Text of the Monaco Free Trade Agreement, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html (last visited Mar. 20, 2006).} One option would be to let the winning WTO member decide whether the classic remedies or financial compensation will achieve the best results in terms of compliance.\footnote{Bronckers & Van den Broek, \textit{supra} note 268, at 118.} Most of the Members, however, would like to retain the flexibility in deciding whether to offer compensation.\footnote{Kessie, \textit{supra} note 361, at 148.}

Another option would be to introduce such clauses in a new bilateral agreement negotiated between the United States and the EC, as the 1992 Agreement did not provide any kind of remedy and, therefore, proved not to be effective in solving the dispute. Improving the implementation and compliance circumstances would also take pressure off the WTO system and
give other member nations more confidence in referring disputes to the WTO, knowing they can be solved more effectively. However, the recognition of retroactive financial compensation will be a politically sensitive issue that needs to be introduced carefully.

d. Greater Transparency in the Proceedings

In recent years, demands for greater transparency in the dispute settlement system have become louder.\textsuperscript{384} The WTO needs to create greater transparency in order to enhance public awareness of non-compliance and the legitimacy of the dispute settlement process in general.\textsuperscript{385} Regarding the problems revolving around Article 4.4 and 6.2 of the DSU and what must be stated in the requests, "panels and the Appellate Body will need to establish a body of precedents to guide the parties on the level of specificity that will suffice in their requests."\textsuperscript{386} Alternatively, the DSB could issue a document to the members that specifies the level of detail required to raise a claim under each of the covered agreements; so that from the beginning there will be certainty about what parties are required to bring forward.\textsuperscript{387} Generally, there should be an emphasis on improving the transparency of the dispute settlement system as a whole.

B. Negotiating and Drafting a New Agreement

Regardless of a possible decision made by the WTO, the parties to the Airbus-Boeing dispute need to enter into a new agreement governing subsidies because a decision by the WTO will not completely solve the issue of aircraft subsidies. Even in the case of WTO rulings, there is a need for more predictable rules in the area of aircraft manufacturing so that future disputes can be avoided.

The EC can no longer argue that launch aid is necessary to protect its infant civil aviation industry, and Airbus has recognized that it does not need launch aid for the development of the A350.\textsuperscript{388} Therefore, the European side should be willing to discuss abolishing the use of launch aid all together. The


\textsuperscript{385} Van den Broek, \textit{supra} note 246, at 151.

\textsuperscript{386} Cameron & Orava, \textit{supra} note 362, at 220.

\textsuperscript{387} \textit{Id.}

\textsuperscript{388} \textit{Boeing Seeks to Reopen Talks on State Aid}, \textit{THE GUARDIAN}, June 14, 2005, at 17.
United States should then agree to discuss all forms of financial aid provided to Boeing, especially indirect financial assistance.  

Even after the WTO makes its rulings, it is not likely that subsidies in the aircraft manufacturing sector will be totally abandoned. Therefore, the goal of both parties should be to create a level playing field. What is needed is a system to define, limit, and monitor the government aid that both companies receive. Making subsidies more transparent should be the starting point for an agreement, and the basis for the new agreement could be the definitions and framework of the WTO subsidies rules.

Most importantly, "all potential forms of subsidies should be placed on the table." More than in any other area, there is a need for precision. "The new deal should contain provisions for calculating the size and impact of subsidies . . . using international accounting standards." "A reduced ceiling on supports should be negotiated" and the new agreement should also include "clearly defined penalties for a violation," which should be supervised by an "independent overseer." Finally, the new agreement should also become a global one. Taking the multilateral route by including, at a minimum, Brazil, Canada, Japan, China, and Russia would ensure that no one would feel left out in this central economic industry.

C. Alternative Solutions

After showing that the WTO is not the proper place to settle this case, the question arises whether there are any alternatives to the WTO rendering rulings in this dispute. As United States Trade Representative Robert Zoellick said in a speech to the European Parliament, "[w]e must be more creative in settling bilateral disputes. . . Litigation is not always the solution for solving

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389 Barfield, supra note 309.
393 No More Subsidies for Either Boeing or Airbus, Aviation Wk. & Space Tech., Oct. 11, 2004, at 91; Royal Aeronautical Society, supra note 18, at 11.
394 Barfield, supra note 309.
395 Garten, supra note 200, at 9.
396 Royal Aeronautical Society, supra note 18, at 11.
every problem.” The creation of an “expedited arbitral process that can evaluate subsidy” programs could be considered for settling this dispute. The parties also might agree to arbitration before a third-party from Asia or Latin America. Arbitration allow the United States and Europe to handle their toughest problems in a more cooperative way without having to worry about the qualifications and independence of panelists at the WTO; and they could start over by having talks in a completely new atmosphere. As a general framework, the rules of the SCM Agreement could be applied to an arbitration proceeding.

VII. CONCLUSION

There are numerous reasons why the WTO is not the appropriate forum to resolve the dispute between Airbus and Boeing. In this long lasting controversy over aircraft subsidies, the chances are very high that there will be rulings against both parties. Hence, the best possible outcome would be that the parties comply with the decision made by the WTO immediately, or that they settle the controversy before the WTO issues a ruling. In any case, the WTO’s credibility must be maintained at all cost, and all efforts need to be undertaken to prevent a damaging trade war, in which everybody, including the WTO, would lose.

One remaining question is whether the WTO will ever be ready to decide such a “high-stakes” case. If the WTO decides other pending “key” cases, such as the dispute over agricultural subsidies, and if the suggested changes to the WTO dispute settlement system are introduced, the WTO could approach “high-stakes” cases in the future more readily and successfully. At the present time, however, the likelihood of damage to the WTO system by deciding its “toughest” case so far is too high, and this case is more likely to do harm to the existing system than strengthen the reputation of the WTO. As one commentator has stated, “[t]his is a case the WTO [does] not want to hear.”