

2020

Ending the Forever War: Resolving the Boeing-Airbus Trade Dispute with a New Bilateral Agreement

Brooke Vaydik

Southern Methodist University, Dedman School of Law, BVaydik@smu.edu

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Brooke Vaydik, *Ending the Forever War: Resolving the Boeing-Airbus Trade Dispute with a New Bilateral Agreement*, 85 J. AIR L. & COM. 355 (2020)
<https://scholar.smu.edu/jalc/vol85/iss2/6>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**ENDING THE FOREVER WAR: RESOLVING THE
BOEING-AIRBUS TRADE DISPUTE WITH A
NEW BILATERAL AGREEMENT**

BROOKE VAYDIK*

ABSTRACT

In today's ever-connected and increasingly global economy, there is a strong need for cooperation in bilateral and multilateral trade exchanges, but international trade disputes have arisen in the context of many industries, goods, and services. Over the last two decades, the European Union (EU) and the United States have been embroiled in a complicated dispute over subsidies given to their largest commercial airline manufacturers, a practice that both governments have engaged in heavily.

Increased global reliance on air travel, coupled with the dominance of few companies worldwide, has raised the stakes for maintaining innovation and profitability. Both the EU and the United States have each sought to protect their largest aircraft manufacturers with favorable government grants while at the same time condemning the other's use of the same tactics. These subsidies on both sides of the Atlantic have been the subject of dueling complaints at the World Trade Organization (WTO) that have recently come to a head. The WTO has found that both the EU and the United States are in violation of a 1992 agreement that prohibits the use of subsidies in the aircraft manufacturing industry, findings that have paved the way for both the EU and the United States to retaliate against each other using tariffs.

* Winner, 2020 International Aviation Womens Association Scholarship. J.D. Candidate, SMU Dedman School of Law, May 2021; B.A. Political Science, Boston University. Thanks to my husband, Michael Rossi, for his constant support and encouragement. Thank you also to the incredible staff of the SMU Law Review Association for their hard work and dedication.

This Comment seeks to explore a solution to this dispute by suggesting a new bilateral trade agreement between the two governments. The devastating effects of prolonging the dispute even more, compounded by the already heightened tensions between the two governments on the world stage, underscore the urgency of coming to a new bilateral agreement specific to civilian aircraft. Because it is unlikely that the EU and the United States will actually abandon the practice of subsidizing their respective aircraft manufacturers—especially in a time of uncertainty and turmoil in the large civilian aircraft industry—it is important that the two governments clearly define what will be acceptable moving forward and agree to adhere to such terms.

TABLE OF CONTENTS

I. INTRODUCTION.....	356
II. SUBSIDIES AT THE HEART OF THE BOEING-AIRBUS DISPUTE	360
A. BOEING'S HISTORY OF RELIANCE ON STATE TAX BREAKS	360
B. AIRBUS'S SUCCESS USING GOVERNMENTAL LOANS	363
III. THE INTERNATIONAL TRADE FRAMEWORK...	364
A. POST-GATT BILATERAL AIRCRAFT AGREEMENT ..	365
B. THE CURRENT INTERNATIONAL DISPUTE RESOLUTION MECHANISM	367
C. RETALIATION AT THE WORLD TRADE ORGANIZATION.....	370
IV. THE PATH TO THE CURRENT STALEMATE....	371
A. DUELING COMPLAINTS	372
B. THE CURRENT STATE OF THE DISPUTE	375
C. OBSTACLES COMPLICATING CURRENT NEGOTIATIONS.....	376
V. A NEW PROPOSAL.....	378
A. BOEING'S EFFORTS TO AVOID SANCTIONS ARE NOT ENOUGH	379
B. A NEW AGREEMENT IS THE BEST WAY FORWARD .	380
C. WHY IT MATTERS	382
VI. CONCLUSION.....	383

I. INTRODUCTION

IN TODAY'S EVER-CONNECTED and increasingly global economy, there is a strong need for cooperation in bilateral and multilateral trade exchanges. On the most basic level, the

success of many countries' domestic industries often depends on access to, and success in, the global market. Further, trade agreements between nations can benefit consumers as well—imports often give consumers more choices and reduce the cost of goods.¹ So it is understandable that obtaining favorable terms in international trade deals has long been the object of many countries' participation at the global bargaining table.

International trade disputes have arisen in the context of many industries, goods and services. At one point or another over the last half century, automobiles,² lumber,³ tires,⁴ and even bananas⁵ have been the subject of a serious trade dispute between the United States and other nations. These disputes can drag on for decades, embroiling multiple political administrations and sometimes having an impact on industries outside of those that are the subject of the dispute. This is certainly the case for the almost twenty-year trade war between the United States and the EU centered around large civilian aircraft. Although the WTO, the global trade governing body that is responsible for enforcing bilateral and multilateral trade agreements, has played a part in mediating the dispute and attempting to hold both the EU and the United States to commitments they have made to each other in the past, these enforcement mechanisms have proven to be less than successful as the trade war reaches its culmination.

The business of commercial aircraft has frequently been a controversial and fraught endeavor. Increased global reliance

¹ Jeffrey J. Schott, *Trade Agreements Benefit Consumers and Producers*, N.Y. TIMES (Mar. 17, 2016), <https://www.nytimes.com/roomfordebate/2016/03/17/are-trade-agreements-good-for-americans> [https://perma.cc/63BR-Q2NC].

² See David E. Sanger, *A Deal on Auto Trade: The Agreement; U.S. Settles Trade Dispute, Averting Billions in Tariffs on Japanese Luxury Autos*, N.Y. TIMES (June 29, 1995), <https://www.nytimes.com/1995/06/29/us/deal-auto-trade-agreement-us-settles-trade-dispute-averting-billions-tariffs.html> [https://perma.cc/82LH-X9GY].

³ See Bryce Baschuk, *WTO Delivers Mixed Ruling in U.S.-Canada Lumber Dispute*, BLOOMBERG (Apr. 9, 2019), <https://www.bloomberg.com/news/articles/2019-04-09/wto-delivers-mixed-ruling-in-u-s-canada-lumber-dispute> [https://perma.cc/6LLL-QAHH].

⁴ See Keith Bradsher, *China Moves to Retaliate Against U.S. Tire Tariff*, N.Y. TIMES (Sept. 13, 2009), <https://www.nytimes.com/2009/09/14/business/global/14-trade.html> [https://perma.cc/834Y-27LN].

⁵ See Anthony Depalma, *U.S. and Europeans Agree on Deal to End Banana Trade War*, N.Y. TIMES (Apr. 12, 2001), <https://www.nytimes.com/2001/04/12/business/us-and-europeans-agree-on-deal-to-end-banana-trade-war.html> [https://perma.cc/3WCJ-F6J8].

on air travel, coupled with the dominance of few companies worldwide, has raised the stakes for maintaining innovation and profitability. Both the EU and the United States have each sought to protect their largest aircraft manufacturers with favorable government grants while at the same time condemning the other's use of the same tactics.⁶ In the United States, The Boeing Company (Boeing) has benefitted from numerous state tax breaks designed to keep manufacturing in the United States and make their products competitive in the global market.⁷ The U.S. federal government has also given more direct handouts to Boeing in the form of research grants and other contracts for services.⁸ In the EU, Airbus SE (Airbus) has received favorable loan terms from multiple EU governments in order to finance the development and manufacture of new aircraft models, often at lower-than-normal interest rates with very lenient payback terms.⁹

These subsidies on both sides of the Atlantic have been the subject of dueling complaints at the WTO that have recently come to a head.¹⁰ The WTO has found that both governments are in violation of a 1992 agreement that prohibits the use of subsidies in the aircraft manufacturing industry, findings that have paved the way for both the EU and the United States to retaliate against each other using tariffs.¹¹ In October 2019, the

⁶ See, e.g., *EU Threatens Escalation in Tariff Fight Over Boeing and Airbus Subsidies*, BBC NEWS (July 6, 2020), <https://www.bbc.com/news/business-53309937> [<https://perma.cc/54Z2-EEGV>].

⁷ See, e.g., *Subsidy Tracker: Boeing*, GOOD JOBS FIRST, <https://subsidy-tracker.goodjobsfirst.org/parent/boeing> [<https://perma.cc/CM5T-Y48G>]; Dominic Gates, *Huge Tax Breaks for Aerospace Didn't Deliver Many New Jobs*, SEATTLE TIMES (Dec. 17, 2007), <https://www.seattletimes.com/business/boeing-aerospace/huge-tax-breaks-for-aerospace-didnt-deliver-many-new-jobs/> [<https://perma.cc/HR3D-FL7J>].

⁸ *Subsidy Tracker: Boeing*, *supra* note 7.

⁹ Carol Matlack, *European Taxpayers May Pay the Price for Airbus A380's Demise*, BLOOMBERG (Mar. 8, 2019), <https://www.bloomberg.com/news/articles/2019-03-08/european-taxpayers-face-hard-landing-from-airbus-a380-s-demise> [<https://perma.cc/SV88-QH5P>].

¹⁰ See, e.g., *EU Threatens Escalation in Tariff Fight Over Boeing and Airbus Subsidies*, *supra* note 6; David J. Lynch, *U.S. Can Impose Tariffs on \$7.5 Billion in Goods Because E.U. Gave Illegal Subsidies to Airbus*, WTO RULES, WASH. POST (Oct. 2, 2019), https://www.washingtonpost.com/business/economy/the-united-states-can-impose-tariffs-on-75-billion-in-goods-because-european-union-gave-illegal-subsidies-to-airbus-wto-rules/2019/10/02/021edc06-e51d-11e9-b403-f738899982d2_story.html [<https://perma.cc/G2F3-XLMG>].

¹¹ Jonas Ekblom, *Timeline: Highlights of the 15-year Airbus, Boeing Trade War*, REUTERS (Oct. 2, 2019), <https://www.reuters.com/article/us-wto-aircraft-time>

WTO granted the United States permission to retaliate with \$7.5 billion worth of tariffs on everything from wine and cheese to aircraft themselves.¹² A decision allowing the EU to retaliate in a similar fashion was expected from the WTO in May 2020,¹³ further escalating the decades-long dispute and potentially harming worldwide industries and consumers in the process. Due to the worldwide outbreak of the virus COVID-19, this decision has been delayed.¹⁴

This Comment seeks to explore a solution to this dispute by suggesting a new bilateral trade agreement between the two governments. A new agreement specific to aircraft manufacturing subsidies is necessary and is superior to the current alternatives for two reasons. First, the United States and the EU have both signaled that they are unwilling to completely abandon the practice of subsidizing their aircraft manufacturers. Therefore, both sides must agree not necessarily to completely end the practice, but rather on what level of subsidization is acceptable given the economic realities that each government is facing. Second, moving forward and continuing to impose tariffs on broad categories of goods and services will only serve to hurt the manufacturers, the airlines that purchase goods from them, and the customers they serve. The United States needs to agree to rescind the tariffs that have already been implemented, and the EU must avoid moving forward with any retaliatory tariffs they are given permission to impose in order to bring predictability and stability back to the large civilian aircraft market.

In order to expand on these issues, Part II gives a summary of the subsidies to both Boeing and Airbus that gave rise to the decades long dispute. Next, Part III details the international trade framework, discussing the major agreements that make up the framework as well as the enforcement mechanisms at its disposal. Part IV then discusses the current state of the dispute between the United States and the EU against the backdrop of this framework while also detailing the obstacles that complicate cur-

line/timeline-highlights-of-the-15-year-airbus-boeing-trade-war-idUSKBN1WH198 [perma.cc/35JA-GNHY].

¹² Lynch, *supra* note 10.

¹³ Eric M. Johnson, *Washington State Acts to Drop Boeing Tax Break to Head off EU Tariffs*, REUTERS (Feb. 19, 2020), <https://ar.reuters.com/article/idUSKBN20D2LC> [https://perma.cc/QA2K-FM4L].

¹⁴ Philip Blenkinsop, *EU is 'Very Concerned' by Delayed WTO Decision on Tariffs vs U.S.*, REUTERS (June 25, 2020), <https://www.reuters.com/article/us-usa-trade-eu/eu-is-very-concerned-by-delayed-wto-decision-on-tariffs-vs-u-s-idUSKBN23W2L7> [https://perma.cc/M3DR-ECGB].

rent negotiations. Part V criticizes the recent efforts at resolving the dispute and presents suggestions for a bilateral agreement between the two governments. Finally, Part VI concludes the article.

II. SUBSIDIES AT THE HEART OF THE BOEING-AIRBUS DISPUTE

The dispute between Boeing and Airbus for many years has gone deeper than a surface level disagreement about trade policy. Boeing and Airbus together represent the two largest commercial aircraft manufacturers in the world—accounting for around 90% of the market share globally¹⁵—with Airbus recently overtaking Boeing for the top spot for the first time since its founding in 1970.¹⁶ At its core, the fight is over which aircraft manufacturer will continue to dominate the global market in the coming decades.

A. BOEING'S HISTORY OF RELIANCE ON STATE TAX BREAKS

Boeing, founded and headquartered in the United States, was for most of the twentieth century the world's only commercial aircraft manufacturer.¹⁷ Since its founding, Boeing has been a significant contributor to the U.S. economy, employing 161,133 people in the United States and over 70,000 in Washington state alone.¹⁸ As a result, the U.S. government and the governments of many states consider the financial health of Boeing to be crucial to the health of the greater U.S. economy. This has led the United States and its state governments to implement significant economic incentives in order to keep Boeing's business in the United States and its financial health in order.¹⁹

¹⁵ Trefis Team, *How Airbus Has Grown Over the Years to Dethrone Boeing as the Largest Commercial Aircraft Maker*, FORBES (Jan. 6, 2020), <https://www.forbes.com/sites/greatspeculations/2020/01/06/how-airbus-has-grown-over-the-years-to-dethrone-boeing-as-the-largest-commercial-aircraft-maker/#7b999e203a59> [perma.cc/P6TF-ADRB].

¹⁶ *Id.*

¹⁷ See *Boeing History Chronology*, BOEING.COM, http://www.boeing.com/resources/boeingdotcom/history/pdf/Boeing_Chronology.pdf [https://perma.cc/R9VN-RMWC].

¹⁸ *General Information: Employment Data*, BOEING.COM, <https://www.boeing.com/company/general-info/#/employment-data> [perma.cc/3RRK-4ZUW].

¹⁹ See Michael Hiltzik, *Boeing Got a Record Tax Break from Washington State and Cut Jobs Anyway. Now the State Wants to Strike Back*, L.A. TIMES (May 3, 2017), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-boeing-washington-2017>

Because of the large number of manufacturing and corporate jobs that a Boeing plant or office can bring to a state, many U.S. states have created incentives for Boeing to either keep their operations in a particular location or to develop new operations elsewhere. Three states in particular have been the primary contributors to Boeing's business in the form of tax breaks and state subsidies: Washington State, South Carolina, and Missouri.²⁰ Washington State has by far been the biggest state boost to Boeing's operations, offering more than \$12.5 billion in subsidies in the form of tax breaks and other monetary awards.²¹ For example, in 2003, Washington granted a \$3.2 billion subsidy package—the largest in the state's history—to Boeing for the construction of Boeing's new 777X jet in the state.²² The tax incentives faced swift scrutiny and condemnation from some politicians and others who claimed that the large incentives were unnecessary, arguing that it was unlikely that Boeing would move production even without the tax breaks.²³ Similarly, South Carolina's state legislature passed over \$800 million in tax incentives to entice Boeing to build a second manufacturing site for its 787 Dreamliner in the state.²⁴ Unlike the Washington State tax break, the South Carolina incentives were tied directly to Boeing's ability and will to maintain jobs within the state.²⁵ Figure 1 below details the long history of state tax breaks to Boeing, reflecting the total amount of awards from 1994 to the present day.²⁶

0503-story.html [https://perma.cc/ARB6-UUBM]; Curtis Tate, *Boeing is Top Winner of State, Local Tax Breaks*, McCLATCHY WASH. BUREAU (Mar. 17, 2015), https://www.mcclatchydc.com/news/nation-world/national/economy/article-24781525.html [https://perma.cc/8KEX-5LQR].

²⁰ *Subsidy Tracker: Boeing*, *supra* note 7.

²¹ *Id.*

²² See Hiltzik, *supra* note 19; Andrew Garber, *Legislature Approves Tax Breaks to Secure Boeing 777X*, SEATTLE TIMES (Nov. 9, 2013), https://www.seattletimes.com/seattle-news/legislature-approves-tax-breaks-to-secure-boeing-777x/ [perma.cc/W534-K56X].

²³ *Id.*

²⁴ *Boeing's Charleston Tax Breaks Top \$800M; 60 Years and Counting for Airplane Tax Break*, SEATTLE TIMES (Jan. 23, 2010), https://www.seattletimes.com/business/boeings-charleston-tax-breaks-top-800m-60-years-and-counting-for-airplane-tax-break/ [perma.cc/A85H-GPZ4].

²⁵ Hiltzik, *supra* note 19.

²⁶ *Subsidy Tracker: Boeing*, *supra* note 7.

Figure 1

State	Total Amount of Subsidies	Number of Awards
Washington State	\$12,526,999,303	40
South Carolina	\$1,020,000,000	3
Missouri	\$255,797,275	5
Texas	\$155,000,000	2
Alabama	\$150,000,000	1
Other	\$227,769,756	121

In addition to support from state and local governments, Boeing has enjoyed subsidies from the federal government and its agencies as well. Since 2000, the federal government has awarded over \$570 million in subsidies to Boeing.²⁷ The contracts that Boeing receives from the federal government are often contracts for advanced research. For example, over the past twenty years, Boeing has continually received research grants from the National Aeronautics and Space Administration (NASA) for the Space Program, the Department of Defense for its Air Force Defense and Research Sciences Program, and the Department of Energy for its Fossil Energy Research and Development Program.²⁸ While the amount of these grants pales in comparison to the value of the tax breaks given by state governments to lure in manufacturing jobs, the grants still contribute to the overall financial stability of Boeing and its ability to continue to build large civilian aircraft. Boeing also receives additional grants from the federal government for military procurement purposes, but these grants are not considered to benefit the company's large civilian aircraft division.²⁹ Figure 2

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., Aaron Gregg, *Air Force Turns to Boeing for \$9.2 Billion Training Jet Program*, WASH. POST (Sept. 27, 2018), <https://www.washingtonpost.com/business/2018/09/27/air-force-turns-boeing-billion-training-aircraft-contract/> [perma.cc/3MYF-8DZ9]; Trefis Team, *How Much of Boeing's Revenues Comes From the U.S. Government?*, FORBES (Jan. 2, 2020), <https://www.forbes.com/sites/greatspeculations/2020/01/02/how-much-of-boeing-revenues-comes-from-the-us-government/#2722d33d5144> [perma.cc/4CJ9-9DDJ]; Amanda Macias, *Boeing Cleaned Up on Pentagon Contracts This Summer. Here are Some of the Big-Ticket Buys*, CNBC (Oct. 9, 2018), <https://www.cnbc.com/2018/10/09/boeing-bagged-billions-in-pentagon-contracts-this-summer.html> [perma.cc/SMX8-EC5M].

shows the total amount of subsidies given to Boeing by the federal government since 2000.³⁰

Figure 2

Entity	Total Amount of Subsidies
Department of Defense	\$380,751,554
NASA	\$103,359,118
Department of Energy	\$71,067,225
Other	\$19,500

B. AIRBUS'S SUCCESS USING GOVERNMENTAL LOANS

Airbus has similar support from its home region. Originally a consortium of several different airplane manufacturers, Airbus was founded in Europe in 1969 in response to the American domination of the commercial aircraft manufacturing industry.³¹ Since its founding, Airbus's market share in the global industry has steadily increased, going from just 15% in 1987 to around 45% today.³² Most of Airbus's employees are based in Europe, with over 103,500 employed in the EU alone.³³ As a result, Airbus's regional presence in the EU and its contribution to the economies of its member states have created a strong incentive for the European nations to contribute to the success of the company in whatever way they can.

The biggest financial incentive that Airbus receives from EU nations comes in the form of low interest loans with extremely favorable terms.³⁴ Specifically, Airbus secured over \$3.7 billion in loans from EU nations in 2002 as an investment in its new A380, a civilian aircraft that was specifically designed to rival

³⁰ *Subsidy Tracker: Boeing*, *supra* note 7.

³¹ See David Slotnick, *Airbus Is One of the Most Powerful Companies in Aviation. Here's a Closer Look at Its Rise from Upstart to Industry Titan*, *BUS. INSIDER* (Mar. 27, 2020), <https://www.businessinsider.com/airbus-history-airliner-photos-details-2019-5> [perma.cc/88AR-P62X].

³² Jeffrey D. Kienstra, Comment, *Cleared for Landing: Airbus, Boeing, and the WTO Dispute Over Subsidies to Large Civil Aircraft*, 32 *Nw. J. INT'L L. & BUS.* 569, 577 (2012); Trefis Team, *How Will Boeing Gain Market Share?*, *FORBES* (Feb. 21, 2019), <https://www.forbes.com/sites/greatspeculations/2019/02/21/how-will-boeing-gain-market-share/#714d373d1e9b> [perma.cc/RW8L-T2RQ].

³³ See *Worldwide Presence*, AIRBUS.COM, <https://www.airbus.com/company/worldwide-presence.html> [perma.cc/99AN-LPTJ].

³⁴ Matlack, *supra* note 9.

Boeing's long-haul passenger offerings like the 747.³⁵ Germany loaned 942 million euros, France and Spain loaned 1.21 billion and 376 million euros, respectively, and the United Kingdom loaned 530 million pounds.³⁶ These loans allegedly were offered at below-market rates, with an obligation to repay the loans only if the aircraft was commercially successful.³⁷ Additionally, Airbus has received support from EU governments in the form of infrastructure and commercial property grants from all four main European governments that have contributed to its financial success and ability to develop more civilian aircraft projects.³⁸ Specifically, these grants include "certain infrastructure measures . . . namely, the lease of land . . . in Hamburg, the right to exclusive use of an extended runway at Bremen Airport, regional grants by the German authorities in Nordenham, and Spanish government grants and regional grants"³⁹

Making the dispute more complicated and potentially more consequential are broader disagreements about politics and the role of governments in supporting their national economies.⁴⁰ Traditionally, the United States has been theoretically opposed to public involvement in private business, while European nations have embraced the role of the government in supporting industry.⁴¹ Despite a supposed idealistic opposition to government subsidies and involvement in private businesses, the United States has kept pace with the EU in protecting and investing in its aviation crown jewel.

III. THE INTERNATIONAL TRADE FRAMEWORK

The importance of the Boeing-Airbus dispute cannot be understood without a brief description of the structure of the

³⁵ See *id.*; Angela Charlton & Jonathan Gambrell, *Airbus Announces It Will Stop Making Struggling A380 Superjumbo in 2021*, USA TODAY (Feb. 14, 2019), <https://www.usatoday.com/story/money/business/2019/02/14/airbus-to-stop-making-superjumbo/2867953002/> [<https://perma.cc/M88Y-SRZ8>].

³⁶ Matlack, *supra* note 9.

³⁷ See Sylvia Pfeifer, *Airbus Chief Signals Tough Stance on A380 Loans*, FIN. TIMES (Mar. 7, 2019), <https://www.ft.com/content/c74422ee-4102-11e9-9bee-fab61506f44> [perma.cc/H629-9BW7].

³⁸ Gregory Polek, *WTO Rules European Subsidies to Airbus Illegal*, AVIATION INT'L NEWS (Sept. 22, 2016), <https://www.ainonline.com/aviation-news/aerospace/2016-09-22/wto-rules-european-subsidies-airbus-illegal> [perma.cc/5KF2-725C].

³⁹ *Id.*

⁴⁰ See Nils Meier-Kaienburg, *The WTO's "Toughest" Case: An Examination of the Effectiveness of the WTO Dispute Resolution Procedure in the Airbus-Boeing Dispute Over Aircraft Subsidies*, 71 J. AIR L. & COM. 191, 196 (2006).

⁴¹ *Id.*

WTO itself and its dispute resolution process. Before the WTO was founded in 1995, the primary governing law concerning international trade was the General Agreement on Tariffs and Trade (GATT), which had been in place since 1948.⁴² The primary objective of GATT was to liberalize international trade by reducing tariffs and allowing countries previously unable to trade multilaterally to participate in the international market.⁴³ GATT largely succeeded, but there were unforeseen consequences. By the mid-1990s, countries were becoming concerned about the increased foreign competition that GATT had enabled, and as a result, many turned to protectionist policies to keep out these foreign competitors.⁴⁴ It was clear that modifications to GATT, or an entirely new agreement, needed to be made.

A. POST-GATT BILATERAL AIRCRAFT AGREEMENT

In an attempt to solve the protectionist tendencies of countries under GATT, the EU and the United States signed on to a separate agreement that governed the civilian aircraft industry. The 1992 Agreement on Trade in Large Civil Aircraft (1992 Agreement),⁴⁵ signed by the EU and the United States, was designed to fill gaps left by previous agreements that had led to protectionist and overreaching subsidies in the civilian aircraft manufacturing industry.⁴⁶ The new agreement was designed to clarify how much support, financial or otherwise, a country could contribute to a new aircraft's development.⁴⁷

⁴² *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm [perma.cc/HWN6-EBLH].

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ 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, EC-U.S., July 17, 1992, 1992 O.J. (L 301) 32 [hereinafter 1992 Agreement]. The United States terminated the 1992 Agreement with the EU on October 6, 2004. Int'l Trade Admin., *Enforcement and Compliance: European Union Agreement on Trade in Large Civil Aircraft*, U.S. DEP'T OF COM. TRADE AGREEMENTS COMPLIANCE PROGRAM, https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002816.asp [https://perma.cc/N6L4-7AQL].

⁴⁶ Daniel I. Fisher, Note, "Super Jumbo" Problem: Boeing, Airbus, and the Battle for the Geopolitical Future, 35 VAND. J. TRANSNAT'L L. 865, 874-75 (2002); Meier-Kaienberg, *supra* note 40, at 211.

⁴⁷ Meier-Kaienberg, *supra* note 40, at 202.

The primary reason for the new agreement was a heightened desire from the United States to protect the domestic civilian aircraft market in light of increased pressure from European-backed Airbus.⁴⁸ Because they recognized that waiting for the United States to move forward with a dispute resolution under GATT would likely be harmful to the overall EU–U.S. relationship, the EU sought a bilateral agreement that would fill in the gaps left by GATT and previous agreements on the amount of subsidies that would be acceptable in the large civilian aircraft market.⁴⁹ While the agreement was intended to ease the pressure on the bilateral relationship, the primary object was not to equalize the two parties in the civilian aircraft market; rather, the objective was to clearly define what would constitute an illegal subsidy.⁵⁰

Despite the lofty goals of the negotiations, the 1992 Agreement did not solve the growing problem created by both parties' continued aircraft subsidies. While the agreement capped a country's ability to contribute to the financing of new aircraft at 33% of the total cost,⁵¹ the agreement, like GATT, failed to give a clear cut definition of a subsidy and what "constitute[d] 'government support.'"⁵² Both parties had small victories, however. The EU promised that Airbus would have to pay back any loans received from EU governments at the market rate or above, and the United States acknowledged that "indirect subsidies" from federal agencies were subject to "international discipline," bringing them under the authority of a trade agreement for the first time.⁵³ Although the agreement represented a small step forward in the negotiating process, the United States quickly became unsatisfied with its impact on the subsidy issue and immediately began seeking an alternative that would not leave the success of their largest source of exports to the mercy of another country's "good faith."⁵⁴

⁴⁸ Fisher, *supra* note 46, at 874.

⁴⁹ Meier-Kaienberg, *supra* note 40, at 200.

⁵⁰ *Id.*

⁵¹ See generally 1992 Agreement, *supra* note 45, art. 4.

⁵² Meier-Kaienberg, *supra* note 40, at 200.

⁵³ *Id.*

⁵⁴ U.S. GEN. ACCT. OFF., GAO/GGD-95-45, LONG-TERM VIABILITY OF U.S.–EUROPEAN UNION AIRCRAFT AGREEMENT UNCERTAIN 3 (Dec. 1994).

B. THE CURRENT INTERNATIONAL DISPUTE RESOLUTION
MECHANISM

The WTO was created on January 1, 1995, replacing GATT as the primary governing authority for international trade.⁵⁵ Like GATT, the WTO covers trade in goods, but it extends this coverage to services and intellectual property and creates a new dispute resolution process for its participating nations.⁵⁶ This dispute resolution process is a cornerstone of the WTO. It was designed to enable member nations to effectively enforce trade agreements using neutral arbiters and evaluations and is a vast improvement over the previous process built into GATT, which required the consensus of member nations in order to hand down a ruling.⁵⁷ Its central objective is “to provide security and predictability to the multilateral trading system” through quick and efficient independent rulings that are binding on its member states.⁵⁸ While the WTO adjudicatory rulings apply to the member states, they are not binding in the sense that a member state must reverse the trade policies that led to the violation. States “can maintain their policies that breach the trade rules and simply accept retaliatory actions from injured states.”⁵⁹ The new system also bans unilateral action by any member state, requiring authorization from the adjudicatory panel for any retaliation to international trade violations.⁶⁰

The WTO dispute resolution and settlement process (Dispute Settlement Understanding) has three main components: the consultation phase, the panel phase, and the implementation phase.⁶¹ A party seeking to adjudicate its trade dispute through the WTO must first request a consultation by precisely identifying the issues and the legal bases for the complaint.⁶² During this consultation phase, the complaining party and the party accused of the violation must engage in discussions and attempt to settle the dispute for sixty days; if the agreement deals with per-

⁵⁵ *History of the Multilateral Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/history_e.htm [perma.cc/QA6K-A9CL].

⁵⁶ *Id.*

⁵⁷ Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When the United States Complies with WTO Rulings*, 39 YALE J. INT'L L. 201, 205 (2014).

⁵⁸ WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 5 (2d ed. 2017).

⁵⁹ Brewster & Chilton, *supra* note 57, at 206.

⁶⁰ *Id.* at 207.

⁶¹ *Id.* at 207–9.

⁶² Meier-Kaienburg, *supra* note 40, at 211.

ishable goods, the process is shortened to twenty days.⁶³ If the dispute is not resolved through this consultation process, the parties then move to perhaps the longest and most substantive part of the dispute resolution process—the panel phase.⁶⁴

The panel phase begins the core adjudicatory process of the WTO dispute resolution. During the panel phase, parties choose individual panel members to arbitrate the dispute and ultimately issue a final ruling.⁶⁵ The ruling is appealable, but if the decision is not appealed, the body will adopt the decision under a “reverse consensus” rule.⁶⁶ This is the primary difference between the dispute resolution process under GATT and the current process under the WTO. Previously, there had to be a consensus in order to *adopt* the ruling; now, a consensus is only required to reject a ruling.⁶⁷ The process of adopting a ruling is now seen as an almost automatic process; scholars have noted that the reverse consensus rule has never led to the rejection of a panel ruling.⁶⁸

Once a panel ruling has been adopted, the parties involved may appeal the ruling to a standing appellate body (Appellate Body) made up of “persons of recognized authority, with demonstrated expertise in . . . the subject matter of the covered agreements generally.”⁶⁹ The Appellate Body has ninety days to consider whether to adopt the ruling;⁷⁰ however, in cases where there are alleged illegal subsidies in dispute, the WTO provides a “fast track” procedure that reduces the time-table for appealing prohibited subsidy cases to thirty days.⁷¹ The Appellate Body can either accept or reverse the panel’s ruling but has no remand authority back to the panel.⁷² If there is no appeal at all,

⁶³ See Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 4.7, 4.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

⁶⁴ *Id.* art. 6.

⁶⁵ *Id.* art. 8.

⁶⁶ *Id.* art. 16; Brewster & Chilton, *supra* note 57, at 208.

⁶⁷ Brewster & Chilton, *supra* note 57, at 207 n.16.

⁶⁸ *Id.* at 208.

⁶⁹ DSU, *supra* note 63, art. 17.3.

⁷⁰ *Id.* art. 17.5.

⁷¹ Agreement on Subsidies and Countervailing Measures art. 4.9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter Subsidies Agreement]; DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 212 (2d ed. 2004).

⁷² DSU, *supra* note 63, art. 17.13.

then the panel's ruling is considered adopted.⁷³ If the ruling found that a party's trade measure was "inconsistent with [the requirements of] a covered agreement," the panel will recommend that the concerned party bring its policy into conformity.⁷⁴ In the case of alleged prohibited subsidies, the subsidy must be withdrawn "without delay," reflecting the generally accelerated timetable that governs disputes on subsidies.⁷⁵

The issue, however, with panel and appellate rulings at the WTO is that they are not "binding" in the traditional sense. As one scholar has said, "[t]he WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas."⁷⁶ Thus, the WTO and its panels must rely on the parties to voluntarily bring their trade measures into compliance with the rulings. Remedies prescribed by the rulings are prospective and look to address future harms that would occur as a result of the trade measure.⁷⁷ Typically, the preferred remedy is for a complete withdrawal of the offending measure either immediately or "within a reasonable period of time."⁷⁸ If the offending member state refuses or fails to comply with the order to withdrawal, two other remedies are available: compensation and retaliatory countermeasures.⁷⁹

The WTO envisions compensation not as monetary restitution for past harms, but rather as compensation in the form of "trade advantages to be granted in future."⁸⁰ Parties are required to enter into negotiation to attempt to find appropriate compensation, but if they are unable to agree, the harmed party is entitled to take countermeasures.⁸¹ These countermeasures must be authorized by the WTO's Dispute Settlement Body (DSB), although authorization has historically been granted automatically.⁸² Typically, the move from a ruling to counter-

⁷³ *Id.* art. 19.1.

⁷⁴ PALMETER & MAVROIDIS, *supra* note 71, at 154.

⁷⁵ Subsidies Agreement, *supra* note 71, art. 4.7.

⁷⁶ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 109 (2007) (quoting Judith Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416 (1996)).

⁷⁷ *Id.*

⁷⁸ DSU, *supra* note 63, arts. 3.7, 22.

⁷⁹ *Id.* art. 3; BHUIYAN, *supra* note 76, at 110.

⁸⁰ BHUIYAN, *supra* note 76, at 110.

⁸¹ *Id.*

⁸² *Id.* at 111 ("The DSB . . . is to act under the negative consensus rule [in authorizing countermeasures] and accordingly, if requested, authorization is granted automatically.").

measures is almost immediate, as “the complainant often relinquishes its right to negotiate compensation and directly requests the authorisation to retaliate.”⁸³

C. RETALIATION AT THE WORLD TRADE ORGANIZATION

Like the other remedies prescribed by the DSB, retaliation is envisioned to be a prospective remedy; additionally, any retaliation undertaken by a member party should be temporary in nature and may only remain in place as long as there is noncompliance with the DSB’s ruling.⁸⁴ The DSU stipulates that any retaliation by member parties should not be punitive and instead should merely be “equivalent to the level of the . . . impairment.”⁸⁵ Additionally, the party seeking permission to retaliate should seek retaliation in the “same sector” as the one in which the DSB found a violation; however, if the party finds that to be either impracticable or ineffective, the party may retaliate in sectors that are covered under the same agreement.⁸⁶ The complaining party must identify why retaliation in the same sector would not be effective in inducing compliance.⁸⁷ The Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) has “special and additional rules” for retaliation in cases that involve bilateral and multilateral disputes over subsidies.⁸⁸

Retaliation by any nation is intended to be a “last resort” and is not supposed to be punitive in nature.⁸⁹ But while the amounts approved by the arbitration panel cannot cross into this punitive territory, they are intended to be strong and severe enough to induce compliance.⁹⁰ The Subsidies Agreement does not add much clarity to exactly how retaliatory a countermeasure can be before it is considered punitive; arbitrators who have issued decisions under the Subsidies Agreement have mostly determined that a countermeasure should be large enough to “counter the measure at issue . . . or counteract its

⁸³ MICHELLE LIMENTA, WTO RETALIATION: EFFECTIVENESS AND PURPOSES 26 (2017).

⁸⁴ *See id.*; DSU, *supra* note 63, art. 22.2.

⁸⁵ DSU, *supra* note 63, art. 22.4.

⁸⁶ *Id.* art. 22.3.

⁸⁷ LIMENTA, *supra* note 83, at 34.

⁸⁸ *Id.* at 26 (citing Decision by the Arbitrators, *Brazil—Export Financing Programme for Aircraft*, ¶ 3.5, WTO Doc. WT/0S46/ARB (Aug. 28, 2020)).

⁸⁹ *See id.* at 27.

⁹⁰ *Id.* at 34.

effect on the affected party, or both.”⁹¹ Thus, the countermeasure should correspond to the amount of the violative subsidy and not necessarily the harm that was inflicted by the subsidy.⁹² The countermeasure may be more than the subsidy’s “equivalent,” but cannot be “disproportionate.”⁹³ The language of the Subsidies Agreement clearly leaves much room for interpretation. As a result, the Agreement does not provide an adequate or workable guideline for difficult and politically fraught disputes between governments like the current dispute over civilian aircraft manufacturing.

IV. THE PATH TO THE CURRENT STALEMATE

While the rivalry between Boeing and Airbus had been strong since Airbus was founded in 1970, it escalated greatly when the United States filed the first complaint about the EU’s practice of subsidizing Airbus in 2004.⁹⁴ Specifically, the U.S. Trade Representative (Trade Representative) alleged that France, Germany, Spain, and the United Kingdom were providing financing to Airbus “for projects that would otherwise not be commercially feasible.”⁹⁵ This financing, the United States alleged, was secured in violation of the Subsidies Agreement, to which both the United States and the EU are parties.⁹⁶

The Subsidies Agreement defines a subsidy as: “(i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit.”⁹⁷ In order to violate the agreement, the subsidy must be given “at the direction of a government or any public body within the territory of a Member” and must be specific to an enterprise, region, or industry; alternatively, a subsidy violates the agreement when it is “prohibited,” or targets export goods generally.⁹⁸ The subsidies covered by the agreement fall into two categories: prohibited subsidies, which are violative per se, and actionable subsidies,

⁹¹ *Id.* at 38 (referencing Subsidies Agreement, *supra* note 71, art. 4.10).

⁹² *Id.* at 39.

⁹³ *Id.* at 40–41.

⁹⁴ See Ekblom, *supra* note 11.

⁹⁵ Request for Consultations by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, 1, WTO Doc. WT/DS316/1 (Oct. 12, 2004) [hereinafter *Original U.S. Complaint*].

⁹⁶ *Id.*; see generally Subsidies Agreement, *supra* note 71.

⁹⁷ *Subsidies and Countervailing Measures: Overview*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/scm_e/subs_e.htm [perma.cc/DP3Z-MJ3A]; see also Subsidies Agreement, *supra* note 71, art. 1.

⁹⁸ *Subsidies and Countervailing Measures: Overview*, *supra* note 97.

which are subject to challenge through dispute resolution channels or “countervailing action.”⁹⁹ Actionable subsidies are only subject to dispute resolution if they have “adverse effects to the interests of other Members,” which includes injury to another Member’s domestic industry.¹⁰⁰

A. DUELING COMPLAINTS

In its request for consultation, the United States claimed that EU governments had given Airbus grants and government-provided services “to develop, expand, and upgrade Airbus manufacturing sites for the development and production of the Airbus A380,”¹⁰¹ a large, long-haul aircraft specifically designed to cut into the market of the Boeing 747.¹⁰² In addition to subsidies granted for the A380, the United States alleged that EU governments had given loans with preferential terms to Airbus in order to finance the A380 and at least four other aircraft models.¹⁰³ The United States further alleged that these subsidies were “export subsidies in breach of . . . the [Subsidies] Agreement,” and that they threatened to cause adverse effects in the form of “serious prejudice to the interests of the United States through displacement . . . of US imports of large civil aircraft into the [EU].”¹⁰⁴

Shortly after, the EU filed its own complaint accusing the United States of providing illegal subsidies to Boeing.¹⁰⁵ Specifically, the EU alleged that the state and local tax breaks provided by Kansas, Washington, and Illinois before 2004 amounted to actionable subsidies under the Subsidies Agreement.¹⁰⁶ In addition to the tax breaks, the EU cited the subsidies and generous contracts provided by NASA, the Department of Defense, and

⁹⁹ *Id.*

¹⁰⁰ Subsidies Agreement, *supra* note 71, art. 5.

¹⁰¹ *Original U.S. Complaint*, *supra* note 95, at 2.

¹⁰² Robert Wall, *Airbus to Retire the A380, the Superjumbo That Never Quite Took Off; After Billions of Dollars of Investment, Airbus Is Retiring a Plane It Had Hoped Would Supplant Boeing’s 747*, WALL ST. J. (Feb. 14, 2019), <https://www.wsj.com/articles/airbus-will-stop-building-its-a380-superjumbo-jet-11550121699> [perma.cc/594D-MDTS].

¹⁰³ *Original U.S. Complaint*, *supra* note 95, at 2. In addition to financing the A380, the United States alleged that these preferential loan terms were secured to finance the A320, A321, and A330/340. *Id.*

¹⁰⁴ *Id.* at 2–3.

¹⁰⁵ Request for Consultations by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS/317/1/Add.1 (July 1, 2005).

¹⁰⁶ *Id.* at 1–2.

the Department of Commerce.¹⁰⁷ The EU complaint essentially alleged the same adverse effects as the U.S. complaint; namely, that the U.S. subsidies were impeding the export of European civilian aircraft products and were causing lost sales in markets that would ordinarily purchase Airbus products.¹⁰⁸ As a result of the two individual complaints, the parties requesting consultations (EU and United States) entered into mandated bilateral consultations; however, these consultations failed, and the WTO began two separate investigations into public funding of Airbus and Boeing in 2005.¹⁰⁹

Despite the fact that the Dispute Settlement Understanding prescribes specific timelines for dispute settlement and panel investigations, a panel report on the U.S. complaint was not circulated until June 2010, four years after the establishment of the panel itself.¹¹⁰ In its report on the U.S. complaint, the panel found that the measures taken by EU governments to give grants and services in order to facilitate the manufacture of new Airbus models constituted a prohibited subsidy under the Subsidies Agreement.¹¹¹ Although the panel found that some of the financing terms guaranteed by government banks qualified as actionable specific subsidies under the Subsidies Agreement, the panel nonetheless found that these subsidies did not have significant enough adverse effects on the U.S. domestic civilian aircraft market to qualify as a breach of the agreement.¹¹²

As expected, the EU appealed the panel's report to the WTO Appellate Body, who affirmed the panel's report in May 2011.¹¹³ The DSB ordered that the EU bring its trade measures into compliance within the timeframe set out in the Subsidies Agreement; the EU agreed, and began implementation in December 2011.¹¹⁴ Despite this, the United States requested the establish-

¹⁰⁷ *Id.* at 2–5.

¹⁰⁸ *See id.* at 5.

¹⁰⁹ *See* Ekblom, *supra* note 11.

¹¹⁰ *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WORLD TRADE ORG. [hereinafter *WTO Dispute Summary*], https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm [perma.cc/9H7B-J9EX].

¹¹¹ Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, 1046–49, WTO Doc. WT/DS316/R (adopted June 1, 2011) [hereinafter *First Panel Report*]; *see also* Kienstra, *supra* note 32, at 594.

¹¹² *First Panel Report*, *supra* note 111, at 1049.

¹¹³ *WTO Dispute Summary*, *supra* note 110.

¹¹⁴ *Id.*

ment of a compliance panel.¹¹⁵ In April 2012, a compliance panel was formed to determine whether the EU was duly attempting to comply with the DSB's order to bring their trade measures into compliance.¹¹⁶ Because of the complexities of the alleged subsidies and the markets involved in the dispute, it took over four years for the compliance panel to issue its report, which found that the EU was not in compliance with its earlier rulings on Airbus subsidies.¹¹⁷ Despite assurances from the EU that attempts to comply were ongoing, the WTO issued rulings in 2016 and again in 2018 stating that the EU continued to defy orders to bring their programs supporting Airbus into compliance.¹¹⁸

At the same time as they were adjudicating the U.S. complaint against the EU, the WTO was also considering the counter-case filed by the EU in 2004.¹¹⁹ In 2011, while the WTO Appellate Body was considering the EU's appeal of the initial ruling in the U.S. case, the panel handling the EU's initial complaint ruled that "at least \$5.3 billion . . . in research grants and tax breaks given to Boeing constitute[d] illegal subsidies."¹²⁰ Despite the fact that the ruling was a victory for the EU on its face, the EU immediately appealed and asked for the WTO to find that all of the subsidies laid out in the original complaint—around \$16 billion—were violative measures under the Subsidies Agreement.¹²¹ Ultimately, the original decision of the panel was upheld, and the United States was ordered to bring their measures into compliance.¹²²

The EU opened up another case against the United States in 2014, separate from their main complaint, alleging that the record-breaking tax incentives given to Boeing by Washington State were outright "prohibited" subsidies under the Subsidies Agreement.¹²³ The WTO panel established to hear this complaint agreed, but the case against the 777X tax breaks was stopped when the Appellate Body reversed the panel finding in

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Ekblom, *supra* note 11.

¹¹⁹ *Id.*

¹²⁰ Toby Vogel, *EU Claims Subsidies Victory in Boeing Case*, POLITICO (Mar. 31, 2011), <https://www.politico.eu/article/eu-claims-subsidies-victory-in-boeing-case/> [perma.cc/JRY2-7LKW].

¹²¹ *Id.*

¹²² Ekblom, *supra* note 11.

¹²³ *Id.*; see also Part III, *supra*.

2017.¹²⁴ Nevertheless, the initial counter-case that was filed in 2004 continued, with the WTO ruling in 2019 that the United States had failed to attain compliance with their earlier ruling against the 2003 Washington State tax breaks.¹²⁵

B. THE CURRENT STATE OF THE DISPUTE

Despite the fact that disputes at the WTO usually only take around three years to resolve, the dispute between the United States and the EU over civilian aircraft subsidies has lasted over fifteen.¹²⁶ After the WTO's final ruling on the EU subsidies in 2018, the United States entered arbitration to determine the scope of the retaliatory tariffs that could be imposed on EU goods entering the country.¹²⁷

On October 2, 2019, the WTO arbitrator issued a ruling stating that the United States would be allowed to impose up to \$7.5 billion worth of tariffs on EU goods imported into the country.¹²⁸ This record-breaking authorization confirmed what both parties had been anticipating; indeed, the United States had earlier that year published a long list of EU goods that would be affected by an authorization to impose tariffs.¹²⁹ These goods included items like French cheeses and wines, Irish and Scotch whiskies, Italian cashmeres, and German knives—all subject to up to 25% tariffs.¹³⁰

With permission from the arbitrator to impose the high dollar tariffs, the United States implemented the tariffs almost immediately in October 2019.¹³¹ Perhaps wanting to send a stronger message to the EU to get them to comply with prior WTO rulings, the Trade Representative is presently deciding whether to

¹²⁴ Ekblom, *supra* note 11.

¹²⁵ *WTO Dispute Summary*, *supra* note 110.

¹²⁶ Sabri Ben-Achour, *EU Gave Illegal Subsidies to Airbus, WTO Rules*, MARKETPLACE (Oct. 2, 2019), <https://www.marketplace.org/2019/10/02/wto-rules-eu-gave-illegal-subsidies-airbus/> [perma.cc/59K2-C3S6].

¹²⁷ Ekblom, *supra* note 11.

¹²⁸ Stephanie Nebehay, *WTO Clears U.S. to Target EU Goods with Tariffs Over Airbus*, REUTERS (Oct. 14, 2019), <https://www.reuters.com/article/us-wto-aircraft/wto-clears-u-s-to-target-eu-goods-with-tariffs-over-airbus-idUSKBN1WT0T2> [https://perma.cc/9GSV-FDX4].

¹²⁹ Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 32,248, 32,249–51 (July 5, 2019).

¹³⁰ *Id.*; Thomas Franck, *US Weighing 100% Tariffs on more EU Products Including Whiskies and Cognac, According to Documents*, CNBC (Dec. 13, 2019), <https://www.cnbc.com/2019/12/13/ustr-weighing-100percent-tariffs-on-new-eu-products-including-whiskies.html> [perma.cc/2D8T-L5CP].

¹³¹ Franck, *supra* note 130.

raise the current tariffs to a staggering 100%, as well as impose tariffs on new goods that were not previously affected.¹³² In the meantime, both parties are awaiting a final ruling in the EU counter-case.¹³³

C. OBSTACLES COMPLICATING CURRENT NEGOTIATIONS

There are several issues that make the path forward toward a solution complicated. First, and perhaps most importantly, the U.S. government has become increasingly wary of cooperative trade agreements under the Trump Administration, moving toward a protectionist strategy across all areas of trade over the last three years.¹³⁴ After many decades marked by free trade deals, American policymakers on both sides of the political spectrum have become wary given the seemingly overwhelming growth of other countries' economies and the perceived stagnancy of the U.S. export machine.¹³⁵ Given the fact that the United States has been seemingly vindicated by multiple WTO verdicts in their favor, it does seem unlikely that they will be incentivized to back off the pressure on the EU's Airbus subsidies.

Additionally, there is a lot at stake for a very large U.S. company—Boeing has seen losses over the last few years due not only to increased competition from Airbus, but also its own internal failures. In October 2018, a new Boeing 737 MAX aircraft crashed in Indonesia shortly after takeoff, with the cause of the crash determined to be the plane's automatic safety system.¹³⁶ Only five months later, another 737 MAX crashed in Ethiopia shortly after takeoff, with the cause determined to be the same

¹³² *Id.*

¹³³ Peggy Hollinger, *What Is at Stake in WTO Ruling on Airbus-Boeing Trade Dispute?*, FIN. TIMES (Oct. 2, 2019), <https://www.ft.com/content/de3f9c12-e3a0-11e9-9743-db5a370481bc> [perma.cc/N8LC-P5QB].

¹³⁴ See, e.g., Keith Johnson, *Trump Turns Global Trade Upside Down*, FOREIGN POL'Y (Dec. 23, 2019), <https://foreignpolicy.com/2019/12/23/trump-trade-war-china-us-2019/> [perma.cc/RLD6-CMD9]; Jim Tankersley, *Trump Bets the U.S. Economy on Tariffs*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/business/trump-economy-tariffs-election.html> [perma.cc/7JPC-EJSS]; Toby Chopra & Keith Weir, *Trump Threatens Big Tariffs on Car Imports from EU*, REUTERS (Jan. 22, 2020), <https://www.reuters.com/article/us-davos-meeting-trump-trade/trump-threatens-big-tariffs-on-car-imports-from-eu-if-no-trade-deal-struck-cnbc-idUSKBN1ZL1GK> [perma.cc/6VCW-BSY8].

¹³⁵ Johnson, *supra* note 134.

¹³⁶ *Timeline: Boeing 737 Max Jetliner Crashes and Aftermath*, CHI. TRIB. (Oct. 14, 2019), <https://www.chicagotribune.com/business/ct-biz-viz-boeing-737-max-crash-timeline-04022019-story.html> [perma.cc/YC4B-B68H].

autopilot issue.¹³⁷ This led to an immediate grounding of the 737 MAX in U.S. airspace, with a global grounding following shortly thereafter.¹³⁸ As a result of the global grounding and additional cancellations of 737 MAX orders from airlines around the world, Boeing was projected to have lost out in over one billion dollars of revenue.¹³⁹ Boeing has also been forced to temporarily shutter manufacturing plants that support the 737 MAX, bringing its tax status and benefits in some states into question.¹⁴⁰

Further, as a result of Boeing's problems with their newest aircraft product, the company is beginning to fall even further behind Airbus in terms of the global market share.¹⁴¹ Airbus' market share is estimated to have grown "to almost 62.5% in 2019 due to the sizable reduction in deliveries for Boeing."¹⁴² Airbus's chief rival to the 737 MAX—the A320neo—has seen a surge in orders since the American company's grounding order.¹⁴³ In total, Airbus logged a net gross of 1,131 aircraft orders in 2019, delivering 863 aircraft in the same timeframe.¹⁴⁴ Comparatively, Boeing reported a gross order number of 246 air-

¹³⁷ Alex Davies, *Crashed Ethiopian Air Jet is Same Model as Lion Air Accident*, WIRED (Mar. 10, 2019), <https://www.wired.com/story/crashed-ethiopian-air-jet-same-model-lion-air-accident/> [perma.cc/3CWU-JRZY].

¹³⁸ See, e.g., FED. AVIATION ADMIN., EMERGENCY ORDER OF PROHIBITION (Mar. 13, 2019), https://www.faa.gov/news/updates/media/Emergency_Order.pdf [perma.cc/C53H-8LBF]; Chris Isidore, *The Boeing 737 Max Grounding: No End in Sight*, CNN BUS. (June 11, 2019), <https://www.cnn.com/2019/06/11/business/boeing-737-grounding/index.html> [perma.cc/N8JM-RVJ2]; Elijah Shama, *Boeing Reports No New Orders of 737 Max as Worldwide Grounding Enters Sixth Month*, CNBC (Aug. 13, 2019), <https://www.cnbc.com/2019/08/13/boeing-reports-no-new-orders-of-737-max-as-grounding-enters-sixth-month.html> [perma.cc/6ZJF-MBF5].

¹³⁹ Dominic Rushe & Rob Davies, *Boeing: Global Grounding of 737 Max Will Cost Company More Than \$1bn*, GUARDIAN (Apr. 24, 2019), <https://www.theguardian.com/business/2019/apr/24/global-grounding-of-boeing-737-MAX-will-cost-company-more-than-1bn> [perma.cc/KN3K-Q3F9].

¹⁴⁰ See Brittany Chang, *Photos Show Why Boeing Had to Stop Production of Its Grounded 737 Max and Its Supplier Was Forced to Layoff Thousands of Employees*, BUS. INSIDER (Jan. 10, 2020), <https://www.businessinsider.com/boeing-737-MAX-airplanes-halt-production-aircraft-backlog-2019-12> [perma.cc/3UVT-2LSJ].

¹⁴¹ Trefis Team, *supra* note 15.

¹⁴² *Id.*

¹⁴³ Benjamin Katz, *Airbus Pulls Far Ahead of Boeing in New Jet Orders, Deliveries*, WALL ST. J. (Oct. 29, 2019), <https://www.wsj.com/articles/airbus-pulls-far-ahead-of-boeing-in-new-jet-orders-deliveries-11572369091> [perma.cc/26V7-VSHZ].

¹⁴⁴ Tim Hopher, *Airbus Net Orders Rise but Lag Behind Deliveries in 2019*, REUTERS (Jan. 10, 2020), <https://www.reuters.com/article/us-airbus-orders/airbus-net-orders-rise-but-lag-behind-deliveries-in-2019-idUSKBN1Z92CW> [perma.cc/BW48-2W29].

craft, with its “worst annual net orders in decades . . . [and] its lowest numbers for plane deliveries in 11 years.”¹⁴⁵ As a result, the United States has an added urgency to be harsher on European aircraft imports in order to attempt to protect Boeing’s flailing business.

Currently, the EU and the United States are at an impasse, with the United States having already implemented billions of dollars’ worth of tariffs on EU goods, and the EU threatening to propose retaliatory tariffs on U.S. products.¹⁴⁶ Since the Boeing and Airbus disagreement is not the only trade qualm that the United States currently has with the EU,¹⁴⁷ one could potentially assume that the best way to solve the issue would be a broad, bilateral trade agreement that encompasses many different areas of concern for both countries. This, however, is the incorrect approach. Given the complex and complicated history surrounding the Boeing and Airbus trade dispute, the best solution is to craft a new agreement, specific to large civilian aircraft manufacturing and sale, that encompasses the spirit of the original 1992 bilateral agreement while improving on what made it fail in 2004.

V. A NEW PROPOSAL

Moving forward, it is crucial that the United States and the EU make it a priority to craft a new bilateral trade agreement that addresses the concerns both sides have about civilian aircraft manufacturing. In today’s political climate, with one side continuing the trend toward outright protectionism and the other side growing increasingly concerned about impending changes to its membership and economy,¹⁴⁸ both parties must find common ground that allows them to protect their impor-

¹⁴⁵ Tim Hepher et al., *Boeing Net Orders Slump to Lowest in Decades*, REUTERS (Jan. 14, 2020), <https://www.reuters.com/article/us-boeing-deliveries/boeing-net-orders-slump-to-lowest-in-decades-idUSKBN1ZD233> [perma.cc/2GLA-D4BZ].

¹⁴⁶ Saloni Sardana, *US Weighting New Tariffs on \$3.1 Billion of European Goods, with Products Like Olives, Beer, Gin, and Planes on the List*, BUS. INSIDER (June 24, 2020), <https://markets.businessinsider.com/news/stocks/trade-war-us-tariffs-europe-3-billion-new-notice-2020-6-1029337397#> [https://perma.cc/9B3V-45QT] (quoting EU Trade Commissioner Phil Hogan).

¹⁴⁷ See James Politi et al., *France Signals Breakthrough in US Digital Tax Talks*, FIN. TIMES (Jan. 20, 2020), <https://www.ft.com/content/345a5850-3ba1-11ea-b232-000f4477fbca> [perma.cc/G32N-RHSS].

¹⁴⁸ See Laurence Norman & Stephen Fidler, *After Brexit, Fractured EU Faces New Challenges*, WALL ST. J. (Dec. 14, 2019), <https://www.wsj.com/articles/after-brexit-fractured-eu-faces-new-challenges-11576341003> [perma.cc/4GKA-7E7Y].

tant domestic industries while remaining participants in the global market.

A. BOEING'S EFFORTS TO AVOID SANCTIONS ARE NOT ENOUGH

In a very recent development in the ongoing dispute, the United States indicated that it may be willing to give a little in order to avoid a potentially devastating adverse WTO ruling on sanctions. At Boeing's urging, lawmakers in Washington State introduced a bill to the state legislature that would completely eliminate tax breaks for Boeing in the state.¹⁴⁹ It is clear that the United States is hopeful that by eliminating the tax breaks for Boeing, they might avoid a harsh ruling by the WTO that enables the EU to impose high tariffs on agricultural goods.¹⁵⁰ But lawmakers may incorrectly assume that revoking the tax breaks will be enough to solve the current dispute, let alone additional disputes in the future.

Further, this attempt by U.S. lawmakers to ease tensions is directly at odds with the recent decision by the Trade Representative to increase the import duty on Airbus aircraft from ten to fifteen percent.¹⁵¹ The Trade Representative added that these duties will only increase should the EU be granted the right to retaliate with similar duties on Boeing aircraft, an authorization which is expected sometime in 2020.¹⁵² Airbus has rightly noted that the increase in import duty would create "more instability for U.S. airlines that are already suffering from a shortage of aircraft,"¹⁵³ striking a tone that hardly seems conciliatory in light of the United States and Boeing's recent attempt at a truce. Indeed, taken with the import duty increase, Airbus and the EU likely see the revocation of the tax breaks as a temporary and insincere effort to get the WTO to back off of a potentially devastating adverse ruling. Because of their unlikely long-term success, hasty attempts like this should be abandoned in favor of a new and broad bilateral agreement that will prevent similar future disputes.

¹⁴⁹ Nelson D. Schwartz, *Boeing, to Fend Off Sanctions, Backs Ending State Tax Breaks*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/business/boeing-subsidies-wto.html> [perma.cc/4GKA-7E7Y].

¹⁵⁰ *Id.*

¹⁵¹ Cathy Buyck, *U.S. Ups Import Duty Rate on New Airbus Aircraft*, AVIATION INT'L NEWS (Feb. 17, 2020), <https://www.ainonline.com/aviation-news/air-transport/2020-02-17/us-ups-import-duty-rate-new-airbus-aircraft> [perma.cc/ZZM3-G44D].

¹⁵² *Id.*

¹⁵³ *Id.* (quoting an Airbus spokesperson).

B. A NEW AGREEMENT IS THE BEST WAY FORWARD

Perhaps the best way to craft a new agreement would be to start by using the 1992 Agreement as a model. Although the 1992 Agreement was not ultimately successful in governing the U.S.–EU trade relationship, it could serve as a starting point for a new agreement in this uncertain climate. The biggest issue with the 1992 Agreement was that it failed to define what qualified as a “subsidy” that would give rise to a violation of the agreement.¹⁵⁴ While both the EU and the United States want the other side to refrain from providing subsidies to their respective aircraft manufacturers, it is unlikely that either side will be willing to quit the practice altogether. As a result, the most beneficial solution will be to clearly define how much of a subsidy is acceptable given the current economic circumstances and the realities of doing business in the twenty-first century.

First, if the EU and the United States agree that their respective governments have a role to play in maintaining the success of their civilian aircraft manufacturers, the limits of their allowed contributions must be clearly defined and not left up to interpretation. The 1992 Agreement allowed countries to contribute up to 33% of the cost of the financing of a new aircraft model as long as the loan is repaid at an interest rate no lower than the cost of borrowing.¹⁵⁵ But just last year, Airbus strongly indicated that they would not be open to repaying loans given by EU nations because the issuance of the loans are part of a “risk partnership” between the manufacturer and the governments.¹⁵⁶ Thus, because Airbus never profited off of the planes that benefited from the loans, they are not obligated to pay the governments back.¹⁵⁷ This kind of exchange understandably frustrates the United States, which has outwardly been against large-scale subsidization of national industry. A new agreement should make Airbus’ repayment of any government loan mandatory, regardless of the success or failure of the financed aircraft, in order to ensure that they are facing risks similar to other manufacturers. Further, because the loan model is used

¹⁵⁴ See Part III, *supra*.

¹⁵⁵ 1992 Agreement, *supra* note 45, art. 4.

¹⁵⁶ Pfeifer, *supra* note 37 (quoting Airbus Chief Executive Officer Tom Enders).

¹⁵⁷ Andreas Rinke & Tassilo Hummel, *Germany in Talks with Airbus on 600 Million Euros of A380 Loans*, REUTERS (Mar. 4, 2019), <https://www.reuters.com/article/us-airbus-germany/germany-in-talks-with-airbus-on-600-million-euros-of-a380-loans-idUSKCN1QL0YR> [perma.cc/GH5M-8WQH].

almost exclusively in Europe, the two governments should agree to set the total contribution percentage at a similar rate as any tax subsidy given to American manufacturers in the United States.

In the same vein, the new agreement will need to clearly define how much of a tax break is appropriate given the American tendency to resort to such measures in order to fund new developments in aircraft manufacturing. Recently, public sentiment in the United States has started to turn against these measures, which its most fervent detractors call “corporate welfare.”¹⁵⁸ Washington Governor Jay Inslee, once Boeing’s most devoted public champion,¹⁵⁹ has gone as far as to compare the Boeing tax break to a mugging.¹⁶⁰ The dissatisfaction is not just contained to the Boeing tax breaks, either; taxpayers have begun to speak out against similar tax breaks in other industries as well.¹⁶¹ This growing public opposition in the United States could become leverage for Airbus. If the United States and Boeing are politically disincentivized to seek large tax breaks for the industry domestically, Airbus could push even harder for caps on the amount that the United States is allowed to subsidize through such tax breaks.

Further leverage can be found in the overwhelming evidence of the limited success of Boeing’s tax breaks. Despite the large amount of money that Boeing saves as a result of its deal with Washington State, Airbus still managed to overtake Boeing in

¹⁵⁸ Paul Constant, *It’s Time to End Corporate Welfare. Boeing is Exhibit A for Why*, BUS. INSIDER (Jan. 23, 2020), <https://www.businessinsider.com/its-time-to-end-corporate-welfare-boeing-is-exhibit-a-2020-1/> [perma.cc/R2M3-LEAF].

¹⁵⁹ Jerry Cornfield, *Inslee Urges Boeing to Build Its New Jet in Washington*, HERALDNET (Sept. 8, 2017), <https://www.heraldnet.com/news/inslee-urges-boeing-to-build-its-new-jet-in-state/> [perma.cc/FX97-AYUL].

¹⁶⁰ Constant, *supra* note 158 (“‘These corporations put a gun to your ribs and say you’re going to lose 20,000 jobs’ unless you hand over the tax breaks, Inslee explained.”).

¹⁶¹ See generally Richard Fausset, *A School Board Says No to Big Oil, and Alarms Sound in Business-Friendly Louisiana*, N.Y. TIMES (Feb. 5, 2019), <https://www.nytimes.com/2019/02/05/us/louisiana-itep-exxon-mobil.html> [perma.cc/6WKP-6D7J] (highlighting how opposition to even small tax breaks is taking hold in areas previously thought to be relentlessly business-friendly); Joseph Spector, *Amazon Pulls Out of Plan to Build HQ2 in New York City Amid Political Opposition*, USA TODAY (Feb. 14, 2019), <https://www.usatoday.com/story/money/business/2019/02/14/amazon-hq-nyc-dropped-amid-local-political-opposition/2870130002/> [perma.cc/W9WA-3TY6] (detailing New York City’s recent organized opposition to tax breaks to induce Amazon to build a second headquarters locally).

market share for the first time in its history.¹⁶² The same year that Boeing received the record-breaking tax cut, the company laid off 6,000 local workers; it is further estimated that “Boeing cut nearly 13,000 Washington jobs between the announcement of the tax break and the end of 2017.”¹⁶³ Negotiators for the EU should point to this limited success as a reason why the current U.S. model for tax breaks should be abandoned in favor of a bilateral agreement.

C. WHY IT MATTERS

The dispute between the EU and the United States over such a critical industry has broader implications that go beyond the industry itself. First, resolving this dispute and coming to an amicable arrangement could go a long way in striking a conciliatory tone in future trade disputes between the two government entities. The aircraft industry is not the only issue between the EU and the United States. With President Trump’s high aspirations at the global negotiating table to protect America’s domestic industries,¹⁶⁴ future disputes between the two governments have the potential to be just as prolonged. Trump has set his sights on the EU specifically as the next front of his broader trade war, threatening to impose tariffs on automobiles that “would cause immense and immediate pain for U.S. manufacturers and consumers, destroying hundreds of thousands of jobs and raising the cost of new cars by thousands of dollars.”¹⁶⁵

Further, neither country can afford the high tariffs that they are currently imposing on the other country’s aircraft. Airlines from both the EU and the United States rely on Boeing and Airbus to supply aircraft, and since Boeing is currently in the midst of its own supply crisis with the grounding of the 737 MAX,¹⁶⁶ making it more difficult and expensive to adjust for this deficit will likely only make matters worse. Additionally, because of the long lead time that aircraft orders and deliveries re-

¹⁶² See Trefis Team, *supra* note 15.

¹⁶³ Constant, *supra* note 158.

¹⁶⁴ See Larry Elliott, *Trump Latest in Long Line of Protectionists Steering U.S. Trade Policy*, GUARDIAN (May 10, 2019), <https://www.theguardian.com/business/2019/may/10/trump-latest-in-long-line-of-protectionists-steering-us-trade-policy> [perma.cc/P2M9-PE68].

¹⁶⁵ Keith Johnson, *Europe is the New Front in Trump’s Trade War*, FOREIGN POL’Y (Jan. 23, 2020), <https://foreignpolicy.com/2020/01/23/europe-new-front-trump-trade-war-davos-wef/> [perma.cc/RLD6-CMD9].

¹⁶⁶ See Part IV, *supra*.

quire,¹⁶⁷ airlines placed orders for impacted aircraft years ago and are now stuck with the increased price unexpectedly. For example, Delta Air Lines (Delta)—the second largest airline in the United States—has almost three hundred aircraft on order from Airbus, exposing Delta the most to the additional costs associated with the tariffs.¹⁶⁸ Although Delta and other airlines have lobbied for the tariffs to be applied only to orders of new aircraft,¹⁶⁹ such a move is unlikely given the desired impact of the tariffs. Currently, the most likely scenario is that these tariffs will continue to be imposed and enforced with a possibility of rising as the dispute stretches on. This will only get worse if an agreement is not reached before the WTO issues its ruling on the amount of tariffs the EU can impose on U.S. aircraft.

VI. CONCLUSION

In conclusion, it is clear that the current actions by the EU and the United States are not satisfactory solutions to the long-running trade dispute that has plagued the large civilian aircraft industry for more than two decades. Despite the fact that the United States seems to have secured a temporary victory in the form of retaliatory tariffs, the EU will almost surely secure a similar victory in just a few months' time, placing the dispute firmly back at square one. The devastating effects of prolonging the dispute even more, compounded by the already heightened tensions between the two governments on the world stage, underscore the urgency of coming to a new bilateral agreement specific to civilian aircraft. Because it is unlikely that the EU and the United States will actually abandon the practice of subsidizing their respective aircraft manufacturers—especially in a time of uncertainty and turmoil in the large civilian aircraft industry—it is important that the two governments clearly define what will be acceptable moving forward and agree to adhere to such terms. Without such an agreement, the uncertain impact of further tariffs on such a wide range of goods will surely dam-

¹⁶⁷ See Jason Rabinowitz, *The Incredible Process Behind Buying a Fleet of Airplanes*, BUS. INSIDER (Nov. 18, 2013), <https://www.businessinsider.com/the-incredible-process-behind-buying-a-fleet-of-airplanes-2013-11> [perma.cc/Ry8B-NHFT].

¹⁶⁸ David Shepardson & Tracy Rucinski, *U.S. Airlines Grapple with 'Unfair Tax' that Adds to Aircraft Supply Disruption*, REUTERS (Oct. 4, 2019), <https://www.reuters.com/article/us-wto-aircraft-airlines/u-s-airlines-grapple-with-unfair-tax-that-adds-to-aircraft-supply-disruption-idUSKBN1WJ1YS> [perma.cc/QCK5-EX77].

¹⁶⁹ *Id.*

age each country's economy, the confidence of the consumers who purchase these goods, and the future relationship between the EU and the United States at large.