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UNCIVIL AVIATION: HOW THE ONGOING TRADE DISPUTE STALEMATE BETWEEN BOEING AND AIRBUS HAS UNDERMINED GATT AND MAY CONTINUE TO USHER IN AN ERA OF INTERNATIONAL AGREEMENT OBSELOSCENCE UNDER THE WORLD TRADE ORGANIZATION

Marc C.S. Mathis†

I. INTRODUCTION

Since the introduction of the 707 in 1954, Boeing has enjoyed its status as the preeminent jet aircraft manufacturer worldwide.1 Boeing's global stature was solidified in the late 1960s when it introduced the 747 jumbo jet, “one of the most significant [jet] aircraft ever created.”2 At about the same time Boeing introduced the 747, the European consortium Airbus came onto the civil aviation scene by introducing its own twin aisle passenger jet, the A300.3 While the Airbus aircraft represented a new entry into the Boeing dominated civil aviation industry, the unfamiliarity with the manufacture of large civil aircraft, and the oil embargo4 of the 1970s kept Airbus from becoming a formidable threat to Boeing's market

† J.D. candidate 2006, University of Tulsa, College of Law, Tulsa, Oklahoma. I would like to thank my parents and family for all of the support they have provided me, making possible all that I have achieved. I would also like to extend my gratitude to my friends and members of the Tulsa Journal of Comparative and International Law for their feedback and hard work prepping this comment for publication.

1. JOE CHRISTY & LEROY COOK, AMERICAN AVIATION: AN ILLUSTRATED HISTORY 340 (Joanne Slike et al. eds., 2d ed. 1994) [hereinafter AMERICAN AVIATION].
2. GUY NORRIS & MARK WAGNER, BOEING 121 (Mike Haenggi ed., 1998) [hereinafter BOEING].
dominance. Nonetheless, over the last 35 years Airbus has proven to be a serious competitor, and has even supplanted Boeing as the world’s number one aircraft manufacturer. Currently, Airbus outpaces Boeing in aircraft deliveries. However, it is the newest product rolling out of Toulouse that is at the epicenter of the latest international trade dispute between the United States and the European Union. In January 2005, Airbus unveiled the Airbus A380, which will soon become “the largest passenger airliner ever put into service.”

It is not Airbus’ success that has caused the rift between the United States and European Union, but rather the nature in which this success has come about. Since its inception, Airbus has received financial support in the form of governmental subsidies to fund the research and development of new aircraft. The financial arrangement between the Airbus consortium and European governments has allowed Airbus to introduce five new products, including the A380, in the past ten years, versus just one from rival Boeing.

Several rounds of negotiations and international agreements have been entered into, created with the hope of resolving the brewing trade dispute regarding subsidies and civil aircraft. The most contentious

5. STRATEGIC ISSUES IN EUROPEAN AEROSPACE 37 (Philip K. Lawrence & Derek Braddon eds. 1999) [hereinafter STRATEGIC ISSUES].


12. STRATEGIC ISSUES, supra note 5, at 38.


15. Id.

disputes have been centered on the Agreement on Trade in Civil Aircraft, the 1992 bilateral agreement between the United States and European Communities (E.C.), and the formation of the World Trade Organization (WTO) and its Agreement on Subsidies and Countervailing Measures. Failure to strictly adhere to these agreements has, for all intents and purposes, rendered these agreements obsolete.

By the mid 1980s, the United States began to view Airbus as a threat to their market share and entered into bilateral “negotiations with the [E.C.] to ‘limit and eventually eliminate subsidies... paid to Airbus.’” However, the United States filed a request for consultation with the WTO’s dispute settlement body on October 12, 2004 for violations of the Agreement Affecting Trade in Large Civil Aircraft, and the Agreement on Subsidies and Countervailing Measures. The E.C. filed a similar action against the United States later that day, claiming violations of the same agreements. These reciprocal filings make it apparent that these negotiations have failed in achieving its stated objective.

This comment will examine the nature of the allegations made by the United States and the European Union before the WTO’s dispute settlement body. Part II of this comment will begin with a reflection on the historical background of Boeing and Airbus. It will reveal the circumstantial and foundational differences in which these two companies developed, provide insight into the rationale of governmental subsidies provided to Airbus, and the sustenance provided to Boeing in the form of

17. Id.
18. See AIRBUS CONFLICT, supra note 4, at 136.
19. See infra note 198.
22. Request for Consultations by the European Communities, United States - Measures Affecting Trade in Large Civil Aircraft, WT/DS317/1 (Oct. 12, 2004) [hereinafter Request by European Communities].
23. The WTO’s DSB is a panel that “consists of representatives of every WTO Member” to handle “disputes arising under any of the WTO agreements.” DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 15 (Cambridge Univ. Press 2004) (1999). The Dispute Settlement Understanding (DSU) is the system that establishes the “institutional and jurisdictional scope of WTO dispute settlement[s].” Id. at 16.
governmental contracts. Part III addresses the underlying issues and weaknesses of the international agreements that are purportedly aimed at controlling subsidies and regulating trade of civil aircraft. This section will focus on the agreements forged at the General Agreement on Tariffs and Trade (GATT) Tokyo round, the 1992 bilateral agreement reached between the United States and the E.C., and the GATT Uruguay round, which led to the creation of the WTO, and the Agreement on Subsidies and Countervailing Measures. It will also discuss how the lack of sufficient dispute resolution and enforcement mechanisms of the Uruguay round and bilateral agreement has undermined the objectives of these agreements and has created an air of skepticism in future civil aircraft agreement adherence. In Part IV, the formal requests for consultation by the United States and E.U. will be examined to see how the assertions in each apply to the Agreement on Trade in Civil Aircraft, and Agreement on Subsidies and Countervailing Measures. Specifically, it will address the issue of whether state and local tax incentives provided to Boeing are subject to these agreements, and if so, what protections exist that may limit the reach of dispute settlement body rulings at the state level. This section will also address the framework of the direct governmental subsidies received by Airbus by certain member states of the E.C. and the limitations set by the agreements. Finally, Part V of this comment will conclude by reviewing what possible options may be available to the United States in light of this current dispute.

II. BACKGROUND

A historical view of Boeing and Airbus reveals how the circumstantial differences behind the formation of these companies lend insight to their individual philosophies. Boeing’s reliance on government military contracts and Airbus’ dependence on direct governmental subsidies provide a glimpse into the origin of the current trade dispute before the WTO.24

A. Story of Boeing

The success story of how Boeing came to be the world’s foremost aerospace manufacturer does not seem all that uncommon, relative to other large companies. Bill Boeing came from a wealthy family who was heavily invested in the timber and mining industries in the Pacific

24. See Request by U.S., supra note 21; Request by European Communities, supra note 22.
Northwest.\textsuperscript{25} Fascinated with aviation, Boeing and two partners started Pacific Aero Products in 1916.\textsuperscript{26} Boeing's venture was perfectly timed with the onset of World War I in August of 1914.\textsuperscript{27} While the aircraft did not play a significant role in the outcome of the war, the war accelerated aircraft development, and established that aviation was undoubtedly a part of the world's future.\textsuperscript{28} Boeing ensured that his company would be a part of that future by opening up an office in Washington D.C. to bid on lucrative military plane contracts.\textsuperscript{29} Following the close of the First World War, ninety percent of the U.S. aviation manufacturers went out of business.\textsuperscript{30} However, thanks to Bill Boeing's business acumen, he set out on alternative business ventures; the income from these ventures, coupled with his great personal wealth, ensured that the newly reconfigured and renamed Boeing Airplane Company survived.\textsuperscript{31} The U.S. Army began to recognize the need for aircraft in order to become a superior military force.\textsuperscript{32} Boeing won the military contract to manufacture or modernize other manufacturers' aircrafts\textsuperscript{33} by outbidding his competitors by approximately one million dollars.\textsuperscript{34}

Boeing gained invaluable experience by rebuilding and upgrading hundreds of planes for military use.\textsuperscript{35} Most notably was a new arc welding technique that Boeing developed, which allowed it to manufacture stronger, more durable fuselages\textsuperscript{36} in less time.\textsuperscript{37} Using this to its advantage, Boeing parlayed this success into a series of government contracts that yielded several different models of military aircraft that
continued to introduce new technologies and improvements over previous models.  

Boeing began to move into the realm of bigger aircraft in the early 1930s when the U.S. government expressed a need for large capacity, long range bombers. 39 Once again, Boeing proved proficient to the task and was awarded another military contract. 40 Boeing met and exceeded the challenges that the U.S. military provided, and in doing so, produced some of the most famous and well-known military aircraft in the world. 41 Boeing produced two of the most legendary bombers, the B-17 “Flying Fortress,” and the famous B-29 “Superfortress.” 42 Soon thereafter, Boeing began producing larger jet powered bombers, such as the B-47 and the B-52. 43

“By 1943, Boeing contracts for military planes totaled $1 billion . . . .” 44 This led many to believe that Boeing’s future was destined to be in large military aircraft. 45 But the introduction of Britain’s De Havilland’s commercial jet powered Comet 46 led Boeing to think otherwise. 47 Before Boeing moved ahead into the realm of jet commercial aviation, the military once again called upon Boeing to produce a jet powered aircraft that was capable of flying fast enough to refuel the jet powered B-52 bomber. 48 The result was the jet powered Dash 80. 49 The Dash 80 grew out of a design project Boeing had been working on that was centered around the same airframe 50 that could serve as a jet transport and the jet powered tanker that the military required. 51 From the Dash 80 airframe design, Boeing produced the KC-135 tanker for the military and the 707 for commercial use. 52 Given that commercial jet aviation was still

38. See id. at 10-26.
39. Id. at 51.
40. Id.
41. See id. at 51-80.
42. See id. at 53-60. The B-29 “Superfortress” will always be stigmatized as the bomber that carried and subsequently dropped the world’s first and second atomic bombs on Hiroshima and Nagasaki, Japan. BOEING, supra note 2, at 57.
43. See id. at 64-80.
44. WINGS OF POWER, supra note 25, at 19.
45. BOEING, supra note 2, at 83.
46. See infra text accompanying note 68.
47. BOEING, supra note 2, at 83.
48. AMERICAN AVIATION, supra note 1, at 340.
49. BOEING, supra note 2, at 83-84.
50. Id. at 84.
51. Id. at 83-84.
52. AMERICAN AVIATION, supra note 1, at 340. It is noteworthy to mention that the Boeing 707 was used as the United States presidential aircraft for almost 30 years before it
in its relative infancy, the KC-135 provided Boeing with a steady stream of income for the first ten years of its jetliner manufacturing.  

Development of the 707 alongside the KC-135 and other military aircraft was advantageous for Boeing. Much of the ground and in-flight testing for the military aircraft could be done and used for application on the commercial products as well. In addition, Boeing used the 707 airframe to produce derivative aircraft, namely the 720, 727, and the venerable "737, which has since become the best-selling airliner in aviation history." Over the years, Boeing has produced several other aircraft that have set milestones within the aviation industry. In 1969, Boeing launched the 747, which was the largest commercial airliner ever offered at the time, and it revolutionized airline travel forever. Most recently, Boeing announced the release of the 777-200LR, which is touted as being the world's longest range commercial airplane capable of flying long haul "routes that have never before been possible."

B. Story of Airbus

The theme of collaboration, governmental support, and protectionism for the European aviation industry can be traced back to the dawn of aviation. The story of how Airbus came to be is long and filled with several hurdles that had to be overcome. Following the end of World
War II, Europe saw a need to enter the commercial aviation industry in order to challenge the aviation manufacturers in the United States, which up to that time had dominated the global market. The answer to this challenge came in the form of Airbus Industrie (AI) in 1970. AI is a consortium “formed under French law... as a Groupement d'Intérêt Économique (GIE)” between Aérospatiale of France, Deutsche Aerospace of Germany, British Aerospace of the United Kingdom, and Construcciones Aeronauticas S.A. of Spain (CASA). But to truly appreciate the story behind Airbus, it is necessary to understand the state of the European aviation industry and the economic and political difficulties Britain, France, and Germany faced after World War II.

1. Britain

In the years following the allied victory in World War II and leading into the dawn of the Cold War, Britain knew that a strong and sound aerospace industry would be vital given the military and political implications. Since there was a natural decline in military aircraft orders after the war, the British government began to apportion civil aircraft research and development projects to several British industrial firms.

“From 1945 to 1950, [there were] nine [different] British firms... in production on fourteen different types of... aircraft” and of these, the most notable civil product was the famous Comet by De Havilland in 1952. The Comet was significant for several reasons, but most notably, it was evidence that the British plan of being a worldwide leader in civil aviation was a practicality. The Comet was also historical for being the world’s first jet commercial airliner, and it was undoubtedly the source of immense British pride. But after only two years of airline service, the Comet experienced a series of crashes due to structural failures during

63. Id.
64. “[a] GIE is not a company, and escapes many of the obligations of a company. For example, it does not have to publish accounts nor does it have to pay taxes, unless it choses to do so... It simply pools the capital contributed by its members, and its results are taken on to the books of its member companies in proportion to their share of the enterprise.” LYNN, supra note 60, at 113.
65. AIRBUS POLITICS, supra note 62, at 1.
66. Id. at 34-35.
67. Id. at 35.
68. Id. at 35-36.
69. CHARLES BURNET, THREE CENTURIES TO CONCORDE 53 (1979).
70. Id. at 177.
flight, resulting in several fatalities,\textsuperscript{71} and the Comet was ultimately grounded.\textsuperscript{72} While the Comet resumed flying after intense investigation and testing, the damage had been done.\textsuperscript{73} Within a year, Boeing released its first jet commercial transport, the Boeing 707, which was larger and more reliable than the British offerings.\textsuperscript{74} Despite the "buy British" campaign the government had instituted,\textsuperscript{75} the British were forced to purchase Boeing 707s, resulting in a temporary, yet notable, set back in the British jet transport industry.\textsuperscript{76} 

The decline in the British aviation industry continued throughout the 1950s and into the 1960s resulting in the consolidation of many industry manufacturers.\textsuperscript{77} By 1964, Hawker-Siddeley Aviation Limited and British Aircraft Corporation (who later merged to form British Aerospace)\textsuperscript{78} emerged as the primary manufacturers of fixed wing aircraft,\textsuperscript{79} while Bristol-Siddeley and Rolls-Royce remained as engine producers.\textsuperscript{80} 

By 1965, the British government came to the realization that if they wanted to compete with the American aircraft manufacturers, they would have to collaborate with other European countries in forming a collective European aviation industry.\textsuperscript{81} While parliamentary reaction was mixed over the idea to proceed, Britain elected to move forward on a collaborative civil aviation project with France and Germany by signing a Memorandum of Understanding (MoU) in 1967.\textsuperscript{82} However, soon after the signing of the MoU, fears over upsetting the transatlantic relationship with the United States,\textsuperscript{83} coupled with spiraling research and development

\textsuperscript{71} Id. at 178.  
\textsuperscript{72} Grounding of an aircraft prohibits the grounded model from flying due to an unsafe condition that is likely to cause injury or damage to persons or property. See Federal Aviation Administration, Airworthiness Inspector's Handbook 8300.10, available at http://www.faa.gov/library/manuals/examinersInspectors/8300/volume1/media/1_001_00.pdf.  
\textsuperscript{73} BURNET, supra note 69, at 178.  
\textsuperscript{74} Id.  
\textsuperscript{75} AIRBUS POLITICS, supra note 62, at 35.  
\textsuperscript{76} BURNET, supra note 69, at 181.  
\textsuperscript{77} AIRBUS POLITICS, supra note 62, at 36-37.  
\textsuperscript{78} Id. at 43.  
\textsuperscript{79} BURNET, supra note 69, at 231.  
\textsuperscript{80} AIRBUS POLITICS, supra note 62, at 37.  
\textsuperscript{81} Id. at 38.  
\textsuperscript{82} Id. at 38, 75.  
\textsuperscript{83} Id. at 37-38. Britain had developed a strong bond with the United States originating from World War II that was important to maintain. Id. In addition, chairman of the committee of inquiry into the aircraft industry, Lord Plowden, recommended that Britain purchase its complex military weaponry from the United States. Id.
costs of the collaboration project, led the British to reconsider their decision. 84

British Prime Minister Harold Wilson expressed the British sentiment over the collaboration project saying that it resembled "a desert track littered with the whitening bones of abortive joint projects mostly undertaken at high cost." 85 Finally, in 1969, minister of technology Tony Benn cemented Britain's fate with regard to the collaborative venture saying "Her Majesty's Government [was] not yet satisfied with... the project... [and n]othing could be more fatal to European collaboration than for the British Government to be ready to finance anything that was international and advanced regardless of its prospects." 86 Consistent with this view, Britain withdrew from the collaborative agreement leaving France and Germany to "pursue the project on a bilateral basis." 87

2. France

France, unlike Britain, was under German occupation during the 1940s, and upon the advent of liberation by the allied forces was eager to restructure many facets of government and social institutions. 88 Beginning with the enthusiastic leadership of General Charles De Gaulle 89 in 1945, France began laying the groundwork to establish itself as the dominant player of European aviation.

The French quickly realized the comparative advantage gained by providing a successful manufacturer with a monopoly. 91 As a result, the French manufacturer assault developed expertise in military aircraft production and was able to produce the popular Mirage fighter that gained several orders from countries outside France. 92 This same approach was applied to the civil aviation industry where the national aviation firm of Sud-Est was awarded a contract to produce a jet aircraft to supply Air France, the national airline of France. 93 Similar to the Mirage fighter, this

84. DOGFIGHT, supra note 3, at 21-23.
85. Id. at 23 (citing Financial Times, February 14, 1961).
86. Id.
87. Id.
88. AIRBUS POLITICS, supra note 62, at 45.
89. President of the Fifth French Republic. 1957-1969: The Early Years of the Fifth Republic, at http://www.charles-de-gaulle.org/article.php3?id_article=374 (last visited Dec. 6, 2005).
90. AIRBUS POLITICS, supra note 62, at 50.
91. Id. at 51.
92. Id.
93. Id.
project also gained popularity with other national airlines outside of France, most notably, Scandinavian Air Systems.\textsuperscript{94}

Similarly to the British, the French also saw a decline in the aviation market in the late 1950s.\textsuperscript{95} Given the interventionist nature of the French government in the aviation industry, it sought to merge several of the firms to maintain specialization.\textsuperscript{96} The result was the creation of Aérospatiale, which specialized in civil and military airframes, and SNECMA,\textsuperscript{97} which specialized in civil and military engines.

By the late 1950s, France recognized that they were being outpaced by American aviation firms in terms of aircraft design and manufacturing. To further their economic, political, and social interests, France sought a collaborative venture with many of its European neighbors.\textsuperscript{100} Beginning in 1958, France collaborated with Germany, Belgium, and Holland to design and build a military patrol aircraft that competed directly with the U.S. firm Lockheed.\textsuperscript{101} At the same time, a group of French, German, and Italian firms and subcontractors co-designed a large troop transport aircraft that was intended to compete directly with the widely popular Lockheed C-130 Hercules.\textsuperscript{102} While both of the collaborative projects failed to have the intended impact, they nevertheless illustrated the practicality of collaborative ventures, and provided a benchmark for future Franco-German collaborative ventures, namely the formation of Airbus Industrie in 1970.\textsuperscript{103}

3. Germany

When drawing a comparison between the challenges that Britain, France, and Germany faced in recovering from the effects of World War II and retooling their respective economic, political, and social policies, none were greater than the challenges faced by Germany.\textsuperscript{104} During the first half

\begin{itemize}
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} AIRBUS POLITICS, supra note 62, at 51-52.
\item \textsuperscript{97} "SNECMA" is the acronym for Société National d'Etude et Construction des Moteurs d'Aviation. Id. at xii.
\item \textsuperscript{98} Id. at 51-52.
\item \textsuperscript{99} Id. at 52-53.
\item \textsuperscript{100} Id. at 53-54.
\item \textsuperscript{101} Id.
\item \textsuperscript{102} AIRBUS POLITICS, supra note 62, at 54-55. The Lockheed C-130 continues to serve as the primary troop and freight hauler for the U.S. military. AMERICAN AVIATION, supra note 1, at 390.
\item \textsuperscript{103} AIRBUS POLITICS, supra note 62, at 55.
\item \textsuperscript{104} Id. at 57.
\end{itemize}
of the twentieth century, Germany endured the rise and subsequent control of Adolf Hitler, the Third Reich, the Nazi party, wars with several European neighbors, damage and destruction of industry by the Allied forces, and the occupation and division of Germany into separate allied military zones. Despite these events, the Germans would use the Cold War, Korean conflict, and expanding international markets to reestablish its political and economic development. During the World Wars, Germany displayed that its aviation industry, in particular the military sector, was well established, given the massive amount of research into wing design and jet engines. The readiness to employ this knowledge and ability to rebuild the aviation industry in Germany was apparent, but was greatly limited pursuant to the Versailles agreement.

The German aerospace industry began to take off again in the late 1950s when the German aviation manufacturers were called upon to produce aircraft for NATO forces. As the aerospace industry began to gain momentum in the 1960s, German aerospace manufacturers underwent a large consolidation movement similar to what was seen in Britain and France, with the intent of benefiting from a smaller, yet more specialized and concentrated industry. German government support for this movement was undeniable when they formally announced that they would openly provide financial aid and contracts “to induce the enterprises to combine into larger, and thus competitive units.”

The Germans also supported the idea of collaborative aviation ventures as was seen in the joint ventures with its European neighbors in producing military transport and patrol aircraft. The Germans had added impetus for collaboration projects in addition to producing a

105. Id. at 57-58.
106. Id. at 58-61.
108. See generally AIRBUS POLITICS, supra note 62, at 62-63 (The Versailles agreement was the peace treaty that effectively ended World War I. PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE 383 (Randall Lesaffer ed., 2004) The agreement was signed by Germany on June 28, 1919 and established limitations on German geography, industry, and expenditures. Id. at 383-396.)
109. Id. at 63.
110. Id. at 63-64.
111. Id. at 64 (citing Aerospace America, April 1990).
112. Id. at 54-55.
competitive product to challenge the American manufacturers. Through collaboration, Germany was able to increase its “technical competence and political respectability,” not to mention subjecting their aerospace industry to increased transparency, which given the not too distant past, was much to the liking of its surrounding neighbors.

Reflecting on similarities of the conditions as they existed in Britain, France, and Germany, it is easy to see that the time was ripe for a major collaborative effort to create a European aircraft that could compete with American built aircraft, namely Boeing, and possibly enter into the American market. While Britain was keen to undertake the project at that time, it did so with some reservation when costs began to escalate before manufacturing even began. Haunted by the relative commercial failure of the Comet and the veritable financial black hole that was Concorde, Britain elected to withdraw from the Airbus project in 1969 when costs began to skyrocket and disagreements between Britain, France, and Germany arose over who would supply the power plants for Airbus aircraft. While some initially believed that this would doom the future of Airbus before it even got off the ground, the Franco-German resolve pressed on with a new reorganized bilateral agreement that formally formed Airbus Industrie in 1970. Within a year, France and Germany welcomed Spain as a full member “with a 4.2 per cent stake held through the state-owned firm Construcciones Aeronauticas.”

Beginning with the rejoining of Britain into the consortium in the late 1970s, Airbus began to materialize as a legitimate competitor of Boeing. Airbus has since capitalized on the launch aid provided by the

113. Id. at 1.
114. AIRBUS POLITICS, supra note 62, at 64.
115. See BIRDS OF PREY, supra note 60, at 18-19, 51.
116. See BURNET, supra note 69, at 177-78.
117. See generally id. at 178.
118. Id.
119. AIRBUS POLITICS, supra note 62, at 78.
120. Id. at 77-78.
121. AIRBUS CONFLICT, supra note 4, at 38.
122. Id. at 65.
123. Id. at 101.
124. Stanley Holmes, Boeing vs. Airbus: Time to Escalate, BUSINESS WEEK, March 21, 2005, at http://www.businessweek.com/bwdaily/dnflash/mar2005/nf20050321_4418_db046.htm ("Launch aid . . . shifts [Airbus] risk away from the market. Airbus has been able to tap into $15 billion in government loans since its inception in 1970, including $3.2 billion for the mega A380. That government money has shielded Airbus from the same market risks that
member state governments by developing an entire family of aircraft that can directly compete with the aircraft offered from U.S. manufacturers.125 Airbus is now incorporated as a "simplified joint stock company,"126 and is one division of the larger European Aeronautic Defense and Space Company (EADS).127

In retrospect, it is noteworthy to acknowledge Airbus Industrie's accomplishments and the conditions in which they accomplished them. Airbus launched its first aircraft during the height of the oil crisis of the 1970s, which saw a large scale back on aircraft orders and deliveries. Airbus had to contend with the fact that Boeing was an accepted household name within the aviation industry, and that airlines that did not fly Boeing products "were not as well regarded" as those who did.128 Despite these hurdles, with the assistance of governmental subsidies, Airbus continued to plow forward. Within 30 years of the flight of its first jet, Airbus dethroned Boeing as the worldwide leader in large civil aircraft manufacturing,129 and proved its technological skill in creating the world's largest passenger jet.130

III. INTERNATIONAL TRADE AGREEMENTS AFFECTING CIVIL AIRCRAFT

Although Airbus had only been in existence for four years by the time the GATT Tokyo round of multilateral trade negotiations began, the U.S. government, at the behest of the U.S. aviation industry, began to show concerns over "increasing international competition in [the] aerospace" industry.131 These concerns were mainly centered on the issue of face Boeing and any other commercial competitor. One of the many benefits of European launch aid is that Airbus isn't required to pay back the loans if the aircraft program is unsuccessful. However, if sales of Boeing's 787s flop, Boeing loses billions and faces the risk of going out of business. If A380 sales falter, Airbus doesn't have to repay the $3 billion in loans").

125. See generally AIRBUS CONFLICT, supra note 4, at 48-118.
128. AIRBUS CONFLICT, supra note 4, at 48-49.
131. AIRBUS CONFLICT, supra note 4, at 68-70.
"'predatory [export] financing,'" and the fact that Airbus was government-owned or government-supported. Inevitably, the United States' concerns materialized when Airbus penetrated the U.S. market with a major sale of aircraft to U.S. air carrier Eastern Airlines. The elimination of the Civil Aeronautics Board in the United States opened the door for airlines to compete on price thus making the idea of cheaper aircraft competition a welcomed option. Given Airbus' encroachment on Boeing's home turf, the need for the United States to address the issue of Airbus' governmental subsidization was unavoidable. The United States approached the E.C. on the issues of subsidization and export finance for civil aircraft for the first time at the Tokyo round of the GATT. The ultimate failure of this agreement led to several follow-up agreements, including a bilateral negotiation with the E.C. in 1992 (Airbus Accord), and the Uruguay round of the GATT in 1994 (GATT 1994).

132. Id. at 48-53. When Airbus entered the aviation market in the 1970s, it was customary for manufacturers of aircraft to involve themselves in the securing of financing the purchase of their aircraft. Id. at 51. While this was not problematic for wealthy American manufacturers who had longstanding relationships with finance institutions that provided them with attractive financing terms as a new entrant, Airbus was at a disadvantage. Id. To remedy this problem, Airbus enlisted the export finance bureaucracies of Germany and France to provide them with financing terms at below market rates. Id. This act was aimed at attracting export business, specifically from the American market. Id. U.S. aircraft manufacturers considered this activity to be "'predatory [export] financing.'" AIRBUS CONFLICT, supra note 4, at 53 (citing FINANCIAL TIMES, Apr. 26, 1978, at 6.)

133. Id. at 69.

134. Id. at 52.

135. The Civil Aeronautics Board (CAB) was one-half of the Civil Aeronautics Authority that was responsible for all aviation matters in the United States related to "safety rulemaking, accident investigation, and economic regulation of the airlines." Edmund Preston, The Federal Aviation Administration and Its Predecessor Agencies, at http://www.centennialofflight.gov/essay/Government_Role/FAA_History/POL8.htm (last visited Dec. 6, 2005). "Prior to the passage of the Airline Deregulation Act, ... (CAB) maintained tight control over the U.S. airline industry, awarding new routes and permitting fare adjustments ...." Gabriel S. Meyer, U.S.-China Aviation Relations: Flight Path Toward Open Skies?, 35 CORNELL INT'L L.J. 427, 436 (2002). When the airline industry was deregulated in the late 1970s, it "grant[ed] airlines full freedom to select domestic routes ... and dropp[ed] all domestic fare regulations." Id. This in turn "intensified competition in the form of increased imports from foreign competitors." Sandra E. Black & Elizabeth Brainerd, Importing Equality? The Impact of Globalization on Gender Discrimination, 57 INDUS. & LAB. REL. REV. 540, 541-542 (2004).

136. AIRBUS CONFLICT, supra note 4, at 42-44.


138. AIRBUS CONFLICT, supra note 4, at 136.
that gave rise to the WTO and the Agreement on Subsidies and Countervailing Measures.\textsuperscript{140}

\textbf{A. The General Agreement on Tariffs and Trade: Tokyo Round}

The Agreement on Trade in Civil Aircraft was a product of the GATT Tokyo round (Tokyo round) of multilateral trade negotiations.\textsuperscript{141} Since the original GATT was proficient in the reduction of tariffs, the Tokyo round zeroed in "on the reduction of subsidies and other nontariff barriers."\textsuperscript{142} The Tokyo round's preamble expressly establishes that one of the goals is to "eliminate adverse effects on trade in civil aircraft resulting from governmental support in civil aircraft development, production, and marketing."\textsuperscript{143} However, central to the trade dispute between the United States and E.C. is Article VI, which covers "Government Support, Export Credits, and Aircraft Marketing."\textsuperscript{144} The relevant sections read:

6.1 Signatories note that the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Agreement on Subsidies and Countervailing Measures) apply to trade in civil aircraft. They affirm that in their participation in, or support of, civil aircraft programmes they shall seek to avoid adverse effects on trade in civil aircraft in the sense of Articles 8.3 and 8.4 of the Agreement on Subsidies and Countervailing Measures. They also shall take into account the special factors which apply in the aircraft sector, in particular the widespread governmental support in this area, their international economic interests, and the desire of producers of all Signatories to participate in the expansion of the world civil aircraft market.

6.2 Signatories agree that pricing of civil aircraft should be based on a reasonable expectation of recoupment of all costs, including non-recurring programme costs, identifiable

\begin{itemize}
\item \textsuperscript{149} Shane Spradlin, \textit{The Aircraft Subsidies Dispute in the GATT's Uruguay Round}, 60 J. AIR L. \\ & COM. 1191, 1200-1202 (1995).
\item \textsuperscript{141} AIRBUS CONFLICT, supra note 4, at 68.
\item \textsuperscript{142} Spradlin, supra note 139, at 1195.
\item \textsuperscript{143} Agreement on Trade in Civil Aircraft, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at preamble (1980) [hereinafter ATCA].
\item \textsuperscript{144} Id. art. VI.
\end{itemize}
and pro-rated costs of military research and development on aircraft, components, and systems that are subsequently applied to the production of such civil aircraft, average production costs, and financial costs.\textsuperscript{145}

As a method of "[s]eeking to eliminate adverse effects on trade in civil aircraft,"\textsuperscript{146} members agreed to forbid export subsidies, but continued to allow domestic subsidies\textsuperscript{147} under the Tokyo round subsidies code.\textsuperscript{148} The remaining flaw in the subsidies code was the failure to provide a definition of the term "subsidy,"\textsuperscript{149} which proved to be the foundation for future disputes between the United States and E.C., including the current dispute before the WTO's dispute settlement board.\textsuperscript{150}

Had the United States vigorously pursued any trade dispute under the GATT system as it existed following the Tokyo round, it would have exposed the weaknesses in the dispute mechanism of the GATT.\textsuperscript{151} First, if the United States had prevailed from a GATT dispute panel ruling, the E.C. would be free to block the ruling and continue the subsidies given to Airbus.\textsuperscript{152} Second, the GATT dispute panel is "governed by the practice of consensus decision making,"\textsuperscript{153} requiring the parties of the action to agree to each step in the process.\textsuperscript{154} This practice tends to lead to vague decisions

\textsuperscript{145} Id.
\textsuperscript{146} Id. at Preamble.
\textsuperscript{147} Although domestic subsidies were allowed under the Tokyo round subsidies code, they were actionable by assessing countervailing duties. Spradlin, \textit{supra} note 139, at 1196.
\textsuperscript{148} Fisher, \textit{supra} note 137, at 872-73. The agreement to allow domestic subsidies was permitted due to the prevailing opinion that they are "widely used as important instruments for the promotion of social and economic policy objectives." Id. at 873 (citing Agreement in Interpretation and Application of Articles VI, XVI, and XXII of the General Agreement on Tariffs and Trade, Nov. 6, 1979, GATT B.I.S.D. (26th Supp.) art. 9 (1979)). Additionally, many governments were under pressure to provide subsidies to domestic industries that were suffering from the worldwide recession. Spradlin, \textit{supra} note 139, at 1195.
\textsuperscript{149} Spradlin, \textit{supra} note 139, at 1196.
\textsuperscript{150} In 1991, the U.S. filed a complaint over alleged $26 billion in domestic subsidies granted to Airbus from all member states of the E.C. from 1968-1989. \textit{Airbus II, supra} note 13, at 150. The U.S. failed to aggressively pursue the action due to the uncertain definition of the term "subsidy" and the fact that domestic subsidies are neither "per se prohibited . . . [nor] expressly actionable." Id.
\textsuperscript{151} Id. at 150-51.
\textsuperscript{152} Id. at 150.
\textsuperscript{154} Id.
that are open to individual interpretation. Finally, and probably most noteworthy, is the lack of a method of enforcement. Even in the event that a signatory to the GATT is found to be providing a prohibited subsidy, the recourse calls for "recommendations to the parties as may be appropriate to resolve the issue and, in the event the recommendations are not followed, it may authorize such countermeasures as may be appropriate" to resolve the issue. Outside of the recommendations and possible countermeasures authorized by the GATT committee, there is no legal requirement to comply with the decision or recommendations contained therein. This inevitably has led to the belief that the GATT cannot serve as a legitimate forum to resolve international trade disputes.

GATT law and dispute procedures were heavily criticized for being outdated and ineffective. It is questionable how any signatory could rely on a system where the recipient of a complaint could simply reject an unfavorable decision by the GATT committee. This, in addition to the conspicuous absence of an established time table for committee action, heavily influenced whether a party would even bring an action. Additionally, the original GATT method of dispute resolution reflected its diplomatic roots, favoring mediating disputes as opposed to settling them, "which did not promote compliance with GATT rules."

B. The 1992 Bilateral Agreements Between the United States and the E.C.: The Airbus Accord

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155. *Airbus II*, supra note 13, at 151.
156. Id.
158. *Airbus II*, supra note 13, at 151.
159. See Fisher, supra note 137.
161. Fisher, supra note 137, at 885.
162. Id. The main disincentive to pursue an action under the GATT resolution system without a time table was that it caused significant delay. Id. This could result in a waste of financial resources because the matter often became moot by the time a resolution was offered. Id.
163. PALMETER & MAVROIDIS, supra note 23, at 6.
164. Id. at 6-7.
The limited success of the Tokyo round gave the United States need to enter into additional negotiations with the E.C. in order to resolve the issue over subsidies. At the outset, the negotiations sought to establish a mutual understanding of permissible levels of government subsidization for large civil aircraft. However, the negotiations soon became aimed at eliminating direct subsidies provided to Airbus and limiting the amount of indirect subsidies paid to Boeing in the form of defense spending and NASA programs. The necessity to pursue such an agreement “outside of the GATT framework [was done in order] to hedge against the” potential failure of the GATT.

Although the negotiations began in 1984, no substantive agreement was created until April of 1992, with the creation of the Airbus Accord. The Airbus Accord embodies three main provisions for the United States and E.C. applicable to aircraft with greater than one hundred seats. First, direct government subsidies for aircraft development cannot exceed one-third of the total cost of development, and this direct financial support is subject to specific conditions of repayment. With respect to Airbus, these government subsidies will only be available when Airbus has reached a point of relative market share parity with Boeing. Second, the level of indirect subsidies cannot exceed three percent of the total turnover of the civil aviation industry, and sales of civilian aircraft were limited to four percent of the annual turnover of a civil aviation manufacturer in that

166. Spradlin, supra note 139, at 1208.
167. Cunningham, supra note 140, at 5.
168. Spradlin, supra note 139, at 1207.
169. AIRBUS CONFLICT, supra note 4, at 147.
170. Spradlin, supra note 139, at 1207. This acknowledgment further exposes the “failures of the GATT dispute settlement system ... [and] its procedural weaknesses.” Benjamin L. Brimeyer, Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations, 10 MINN. J. GLOBAL TRADE 133, 137 (2001) [hereinafter Bananas, Beef].
171. Spradlin, supra note 139, at 1206.
172. AIRBUS CONFLICT, supra note 4, at 155.
173. Id.
174. Id. at 150.
175. Estimated levels of contribution by the member state governments prior to the Airbus Accord are believed to be “approximately sixty to seventy percent of production costs.” Airbus II, supra note 13, at 154.
176. Id.
177. See HOLMES, supra note 124.
178. AIRBUS CONFLICT, supra note 4, at 155.
Finally, a certain level of transparency is required to allow a bilateral panel to monitor compliance with the agreement.\textsuperscript{179} While this agreement appeared to advance relations between the United States and E.C. on the matters of subsidization, many problems with the Airbus Accord and its interpretation undermined its effectiveness.\textsuperscript{181} One of the largest weaknesses of the Airbus Accord is that it provides "escape clauses" for the United States and the E.C. in the event certain criteria were met.\textsuperscript{182} A second weakness of the agreement was in the transparency requirements.\textsuperscript{183} While it is expected that the transparency requirements would be met with cooperation by Airbus, the French business organization that it was formed under\textsuperscript{184} does not compel financial disclosure.\textsuperscript{185} Nevertheless, the Airbus Accord allowed for the United States and E.C. to opt out of the transparency requirement if they considered the disclosure of such information to be "contrary to its essential security interests."\textsuperscript{186} Section nine of the Airbus Accord provided a broader scope of nonconformity with the agreement if either party could identify "exceptional circumstances," which exempted them from the terms.\textsuperscript{187} Although mostly seen as a weakness from a United States perspective, the Airbus Accord failed to achieve its original objective of eliminating direct subsidies to large civil aircraft manufacturers.\textsuperscript{188} Irrespective of the cap that the Airbus Accord did establish on direct subsidies,\textsuperscript{189} it still permits "an enormous amount of subsidization"\textsuperscript{190} and only applies to subsidization on future projects, leaving the subsidization of former projects untouched.\textsuperscript{191} Finally, the Agreement falls short of having a true enforcement mechanism allowing either party to unilaterally terminate the Airbus Accord upon submission of a written request.\textsuperscript{192} Despite the original impetus behind a bilateral agreement with the E.C.

\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Spradlin, supra note 139, at 1208-10; see also AIRBUS CONFLICT, supra note 4, at 156; see also Airbus II, supra note 13, at 154-56.
\textsuperscript{182} AIRBUS POLITICS, supra note 62, at 147.
\textsuperscript{183} Airbus II, supra note 13, at 155.
\textsuperscript{184} See generally AMERICAN AVIATION, supra note 1.
\textsuperscript{185} Airbus II, supra note 13, at 155.
\textsuperscript{186} AIRBUS POLITICS, supra note 62, at 147.
\textsuperscript{187} Id.
\textsuperscript{188} Cunningham, supra note 140, at 6.
\textsuperscript{189} See AIRBUS CONFLICT, supra note 4.
\textsuperscript{190} Spradlin, supra note 139, at 1210.
\textsuperscript{191} Airbus II, supra note 13, at 154.
\textsuperscript{192} Cunningham, supra note 140, at 6.
aircraft subsidies, it has since been rendered obsolete with the United States, “exercise[ing] its right, as provided by the 1992 Agreement’s terms, to terminate [the] agreement.”

C. The WTO and the Agreement of Subsidies and Countervailing Measures

Given the relative failures of the Tokyo round and the Airbus Accord between the United States and the E.C., the formal establishment of a coherent forum for dispute resolution and available remedies for subsidy disputes was a priority entering the Uruguay round of the GATT in 1994 (Uruguay round). During the Uruguay round, the GATT signatories identified that the GATT had a weak institutional basis, and that a new trading system with a “clear, logical and strong institutional structure” needed to be created. The result was the WTO.

The formation of the WTO brought about two essential improvements over the Tokyo round and the 1992 bilateral agreement. The first notable improvement was that the WTO created the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that provides the definition of a subsidy, which is at the heart of the United States and E.C. request for considerations. The second improvement that the WTO created was a modernization of the inadequate dispute resolution arrangement that existed under the GATT. The adoption of the Dispute Settlement Understanding (DSU) and its procedures has


196. Id.


199. See supra notes 21-22.

200. CROOME, supra note 195, at 17.

201. See PALMETER & MAVROIDIS, supra note 23.
made the resolution of international trade disputes more "legalistic," and consequently binding.\textsuperscript{202} It is the characteristics of the WTO's dispute settlement mechanism that makes it "one of the most sophisticated international legal systems in" the world.\textsuperscript{203}

1. The SCM Agreement and the Definition of a Subsidy

As mentioned above, the WTO's SCM Agreement provides a definition of a subsidy,\textsuperscript{204} which was notably absent in the prior GATT subsidies code and bilateral agreements.\textsuperscript{205} The SCM Agreement is not specifically tailored to the civil aircraft industry alone, but stands as "the WTO's 'generic agreement regarding subsidies.'\textsuperscript{206} The SCM Agreement considers financial support a subsidy if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);[ ];
(iii) a government provides goods or services other than general infrastructure, or purchases goods;

\textsuperscript{202} Id. at 85.
\textsuperscript{203} Blackmore, supra note 165, at 488.
\textsuperscript{204} The SCM Agreement classifies subsidies into three categories; prohibited, actionable, and non-actionable. Prohibited subsidies are contingent on export performance and "upon the use of domestic over imported goods." SCM, supra note 198, at Art. II. Exceptions to the rule on prohibited subsidies apply to countries who are developing and to those who are in a transition to a market economy. CROOME, supra note 195, at 94. Actionable subsidies are those that cause adverse effects upon another Member. SCM, supra note 198, at art. V. Specifically, adverse effects include "injury to the domestic industry . . . [or] serious prejudice to the interests of another Member." Id. at art. V. Non-actionable subsidies are those that are not specific within the meaning of prohibited subsidies. Id. at art. III. These subsidies mainly include but are not limited to research that is conducted by universities or other research facilities so long as the subsidies are "not more than 75 per cent of the costs of industrial research." Id. at art. XIII.
\textsuperscript{205} See Cunningham, supra note 140, at 6.
(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; ... and
(b) a benefit is thereby conferred.207

By assigning a definition to the term “subsidy,” the SCM Agreement has finally paved the way “to effect an international discipline in [the] extremely sensitive area of international economic relations,”208 and helped legitimize the SCM Agreement by providing an unambiguous definition.

2. Establishment of an Improved Forum of Dispute Resolution

The method of how disputes are handled in the WTO is reminiscent of the more conciliatory methodologies utilized in the original GATT.209 The DSU210 encourages and prefers disputing members to resolve the dispute on their own.211 For this reason, dispute settlement begins with a formal request for consultation212 in which the complaining member provides the reasoning behind the request, and establishes the legal basis for the request.213 If the disputing parties are unable to resolve the dispute on their own within a 60-day period, the dispute moves to the next stage.214 Upon request by the complaining member, a panel convenes to make a formal decision of what the Agreement at issue requires.215 This empanelment, through the member’s request, serves to fulfill the due process requirement by placing the responding member on notice of the claims at issue.216 Again, if the disputing members are still unable to resolve the dispute, the matter goes before the panel,217 who in turn issues

207. SCM, supra note 198, at art. 1.
209. PETER GALLAGHER, GUIDE TO DISPUTE SETTLEMENT 6 (2002).
211. GALLAGHER, supra note 209.
212. Id.
213. PALMETER & MAVROIDIS, supra note 23, at 87.
214. Id. at 95-96.
216. PALMETER & MAVROIDIS, supra note 23, at 94.
217. The panel process calls for multiple written submissions from the disputing members where the members lay out their interpretation of the facts, and their arguments in light of those facts. Id. at 156. Following the written submissions, the parties meet with the panel
a report to the dispute settlement body (DSB), complete with its findings and recommendations within a specified time frame.\textsuperscript{218} In the event that the WTO’s DSB finds that a government is providing a prohibited subsidy, the offending government has a window of opportunity to cease the prohibited subsidy, or face authorized countervailing measures from the complainant.\textsuperscript{219} Two other important improvements over the traditional GATT dispute mechanism are that the WTO creates the right to appeal to an Appellate Body, and implements a system of “reverse consensus”\textsuperscript{220} when implementing DSB decisions, making it more difficult for a member to block a panel decision.\textsuperscript{221}

The creation of the WTO during the Uruguay round has signaled a step forward in terms of establishing a more reliable forum for settling trade disputes, specifically those that involve the use of subsidies. By providing a concrete definition of a “subsidy” in the SCM Agreement, coupled with the creation of the DSB and procedures under the DSU, the WTO has resolved many of the problems and shortcomings under previous bi-lateral and GATT Agreements.

IV. PROBLEMS WITH THE WORLD TRADE ORGANIZATION’S DISPUTE MECHANISM, SUBSIDIES, AND INTRUSION UPON STATE SOVEREIGNTY

Even though the formation of the WTO and the DSB signify a vast improvement over the GATT and the bilateral agreement between the United States and E.C. in terms of enforcement, it is not without faults. First, while the WTO does represent a “clear, logical and strong

where each party presents their case, and the panel can ask questions. \textit{Id.} The panel then submits a panel report to each party to ensure accuracy of the members’ argument summary. \textit{Id.}

218. \textit{See id.} at 167-70. The DSU also allows for the possibility of appeal by an appellate body that is comprised of members who are not affiliated with any government. Blackmore, \textit{supra} note 165, at 492.

219. CROOME, \textit{supra} note 195, at 94. A party that is the recipient of an unfavorable decision from the DSB may still file an appeal to the WTO’s Appellate Body, that in turn must be “unconditionally accepted by the parties.” LOWENFELD, \textit{supra} note 198, at 154.

220. The term “reverse consensus” or “negative consensus” refers to a system where a DSB decision is upheld “\textit{unless} there is consensus to the contrary,” whereas the “positive consensus” method used under the GATT system required a consensus to adopt a decision. PALMETER & MAVROIDIS, \textit{supra} note 23, at 15.

institutional structure" where disputing countries can settle trade conflicts, it has shown that in some circumstances, specifically those between superpower nations, that it has had limited success in enforcing its decisions. Secondly, the E.C. complaint specifically targets state and local governments within the United States for providing prohibited and actionable subsidies. The E.C. request for consultation complains that:

The measures that are the subject of this request are prohibited and actionable subsidies provided to US producers of large civil aircraft (LCA) and in particular the BOEING company, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies, grants, and any other assistance to the US producers (US LCA industry). The measures include the following:

1. State and Local Subsidies
   a. State of Washington
      i. Tax benefit/incentive package for production of Boeing 7E7
         – Washington House Bill No. 2294 (2003);
   b. State of Kansas
      i. Financial incentive package, including preferential bond financing, for Boeing 7E7
         – Kansas Senate Bill No. 281 (2003);
   c. State of Illinois/City of Chicago

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223. See infra notes 228-48.

224. See Request by European Communities, *supra* note 22. Ironically, Airbus benefits from the same subsidies that it complains about in its request before the WTO. "For example, in 2003, EADS, Europe’s largest defense contractor, received $8.6 million in tax breaks for locating a Eurocopter assembly factory in Mississippi. That included $6 million from local governments for new buildings to lease to Eurocopter and $2.6 million in state incentives." Holmes, *supra* note 124. Additionally, in early 2005, Airbus pitched a $600 million manufacturing plant in the United States that “drew representatives from 35 [U.S. states].” Staff & Wire Reports, *State Vies for Airbus Plant*, Tulsa World, February 16, 2005. The primary impetus behind this venture is to develop and produce a refueling tanker to compete with Boeing for a multi-billion dollar contract from the United States Air Force. Id. Many Washington lawmakers have identified this effort as a “ploy to capture American tax dollars for a French company and French jobs.” Id.
i. Tax incentives, relocation assistance, development grant, rental-free headquarters for Boeing corporate relocation.\textsuperscript{225}

The E.C. focus on the state and local level raises the question of whether state and local action is subject to the SCM Agreement, and if so, whether there are constitutional constraints that could further limit the enforcement of a WTO mandate.

A. Enforcement and Compliance Problems with WTO Decisions

Since there has not been an official action from the WTO over the matter of subsidies and civil aircraft, one can look to see how other WTO disputes have been handled to uncover some of the difficulties that are likely to plague the current aircraft dispute. There are two well known and high profile disputes between the United States and European Union that should lend insight to the possible problems that lie ahead for the dispute of subsidies and civil aircraft; the Banana War,\textsuperscript{226} and the dispute over the use of beef hormones.\textsuperscript{227}

1. The Banana War

The Banana War between the United States and European Union originated in 1993 when the European Union elected to create a common market for banana imports referred to as the “European Union Banana Regime” (Regime).\textsuperscript{228} The purpose behind this regime was to provide former British Commonwealth banana producing countries\textsuperscript{229} with “non-reciprocal duty-free and quota-free access to [EU] markets.”\textsuperscript{230} The United States\textsuperscript{231} issued a complaint under the GATT in 1993, and subsequently challenged the Regime claiming that it ran contrary to WTO Agreements.\textsuperscript{232} The WTO DSB issued an unfavorable decision to the European Union in 1997, to which the European Union appealed.\textsuperscript{233} The

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\textsuperscript{225} See Request by European Communities, supra note 22 (emphasis removed).
\textsuperscript{226} Bananas, Beef, supra note 170, at 147.
\textsuperscript{227} Id. at 155.
\textsuperscript{228} Id. at 148.
\textsuperscript{230} Id.
\textsuperscript{231} “[I]n conjunction with several Central American banana producers . . . .” Bananas, Beef, supra note 170, at 148.
\textsuperscript{232} Id.
\textsuperscript{233} Id. at 149.
WTO Appellate body upheld the decision, which under the DSU, compels E.U. compliance or face retaliatory countermeasures from the United States.\(^{234}\) The European Union commenced a series of delaying tactics, and failed to bring the Regime within WTO compliance.\(^{235}\) This inaction led the United States to impose one hundred percent duties on $191.4 million worth of European imports in 1999.\(^{236}\) It was not until 2001, that the United States and the European Union finally came to a bilateral agreement over the Regime.\(^{237}\) Under this agreement, the United States agreed to lift its sanctions against E.U. imports in return for the European Union making "a transition to a tariff-only system by 2006."\(^{238}\)

2. The Dispute over Beef Hormones

In the late 1980s, the E.U. instituted a ban on all beef that used certain natural or synthetic hormones.\(^{239}\) The E.U. ban was implemented under the auspices of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which provides that:

> Members have the right to take sanitary and phytosanitary measures necessary for the protection of human... life or health.... Members shall [also] ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human... life or health, is based on scientific principles and is not maintained without sufficient scientific evidence... [And that these] sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.\(^{240}\)

\(^{234}\) Id. at 148.

\(^{235}\) Id. at 150-51.

\(^{236}\) Id. at 152.


\(^{238}\) Id.

\(^{239}\) Bananas, Beef, supra note 170, at 155.

In 1996, the United States complained to the WTO that the European ban on "Frankenfoods" was not supported under the SPS Agreement due to the lack of scientific evidence showing that there were harmful effects to human life or health. The WTO held that the ban constituted an unfair trade barrier, to which the European Union, predictably, appealed. In 1998, the WTO’s Appellate Body affirmed the decision of the DSB, but overturned some of the DSB’s reasoning. The European Union interpreted the Appellate Body’s decision as an authorization to maintain the ban for a period of fifteen months to allow for scientific findings on the adverse effects on human health and life. In 1999, fifteen months after the Appellate Body’s decision, the European Union announced that it had no intention to lift the ban on U.S. beef imports. In response, the United States applied for, and was granted, authority to assess tariffs on $128 million of E.C. exports. The E.C. maintains its ban on hormone-treated beef imports from the United States, and has even issued an E.C. directive that upholds the ban that was deemed illegal by the WTO.

Analyzing the Banana War and Beef Hormone cases, expose some of the weaknesses that undermine the WTO’s dispute process and challenges its legitimacy. For example, in the Banana War case, the WTO issued a

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241. “Frankenfoods” is a term that is commonly used in Europe to define foods that have been genetically modified. See Hunter R. Clark, International Law Association Panel Discussion on “Divergence Between the United States and the European Union on Trade and Other Matters,” 10 ILSA J. INT’L & COMP. L. 459, 463 (2004).
242. Bananas, Beef, supra note 170, at 156.
244. Bananas, Beef, supra note 170. The decision of the Appellate Body was largely based “on the ground that the legislation was not based on a complete assessment of the cancer risks associated with the use of certain growth hormones in cattle.” Alemanno, supra note 243, at 553.
246. Id.
247. Alemanno, supra note 243, at 553.
248. Id. at 554. While the E.C. has issued a directive upholding the illegal ban, the E.C. maintains that this legislation is in line with the WTO’s ruling because “it is based on new scientific evidence.” Id.
249. Bananas, Beef, supra note 170, at 163.
decision that ruled the E.C. Regime contrary to WTO Agreements.\textsuperscript{250} Instead of abolishing the Regime, the E.C. adopted a liberal, if not wholly inaccurate, interpretation of the decision, holding that it required them to only amend rather than abolish the Regime.\textsuperscript{251} When, or if, the existing Regime is officially abandoned in 2006, it will have been operating for almost a full decade after the WTO ruled it to be an illegal regime.\textsuperscript{252} There are also similarities in the beef hormone dispute where the WTO ruled against the European Union, and the European Union refused to abide by the WTO ruling, choosing instead to interpret the ruling in a manner that led to further delay and blatant non-conformity to WTO Agreements.\textsuperscript{253}

It is evident that the WTO needs to adopt a better method of issuing decisions that are less ambiguous and closed to member interpretation.\textsuperscript{254} As it stands now, and was shown apparent in the aforementioned disputes, the current method promotes a scheme that leads to non-compliance, and thus further undermines the WTO dispute resolution authority.\textsuperscript{255} In addition, these cases also suggest that economically stable and powerful members such as the United States and E.C. may prefer sanctions over strict adherence to a WTO decision.\textsuperscript{256}

The banana and beef hormone disputes may provide an unappealing glimpse of what may be awaiting the outcome of the current subsidies and civil aircraft dispute before the WTO. As will be discussed below, a negative ruling against the United States or E.C. will likely set off a similar trend of using delay tactics and interpretive meandering that will once again snub observance of the WTO’s ruling.

\textbf{B. State and Local Government Action Subject to the SCM Agreement}

The current U.S. claim before the WTO’s DSB alleges that the E.C. provides prohibited export subsidies\textsuperscript{257} to Airbus in the form of direct financing from European member States for research and development costs for large civil aircraft, loans at below-market rates, and the

\begin{itemize}
\item \textsuperscript{250} See Alemanno, \textit{supra} note 243.
\item \textsuperscript{251} \textit{Bananas, Beef, supra} note 170, at 161-62.
\item \textsuperscript{252} See \textit{supra} note 233.
\item \textsuperscript{253} See \textit{supra} text accompanying note 246.
\item \textsuperscript{254} \textit{Bananas, Beef, supra} note 170, at 162.
\item \textsuperscript{255} \textit{Id.} at 162-63.
\item \textsuperscript{256} \textit{Id.} at 161.
\item \textsuperscript{257} See SCM, \textit{supra} note 198.
\end{itemize}
forgiveness of previously incurred debt. However, the E.C. claim alleges that the United States is in violation of the SCM Agreement due to Boeing receiving tax and financial benefits, as well as other incentive packages from several state and local governments. One of the fundamental differences between these two claims is the United States' focus on the national government action of European member states, whereas the E.C. focus is on the independent action of state and local governments within the United States. The purpose of the language in section 1.1(a)(1) of the SCM Agreement that covers "financial contribution[s]...[of] any public body within the territory of a Member" was added to extend the reach of the Agreement to sub-national governments. For reasons offered in part III above, if the United States ever faced an unfavorable ruling from the GATT dispute panel, it would run little risk of trouncing on individual state sovereignty. However, that is not the case under the WTO, where an unfavorable decision of the DSB would "establish[] an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes."

In the event that the current subsidies and civil aircraft consultation is submitted to the DSB, and the United States is handed an unfavorable decision, it will raise the question of what action individual sovereign states will be expected to take to be in compliance with the WTO decision. This question inevitably raises the separate question as to what extent the federal government must act to compel states to come into conformity.

258. See Request by U.S., supra note 21. In the request for consultations, the U.S. asserts that the E.C. and the Airbus consortium member state governments "provide subsidies that are inconsistent with their obligations under the SCM Agreement and the GATT 1994." Id.

259. In 2003, Boeing announced that it would be moving forward in the development of a new mid-sized super efficient aircraft. See generally Deborah Maranville, Unemployment Insurance Meets Globalization and the Modern Workforce, 44 SANTA CLARA L. REV. 1129, 1139 (2004). As a result, several states entered into a competitive bidding process to entice Boeing to build the new aircraft in their respective states to benefit the local business and employment markets. Id. at 1139-40. Washington state was one state that Boeing chose when Washington offered a "$3.2 billion package including 'a 40 percent reduction in the... business and occupations (B&O) tax, as well as providing property tax breaks and research and development tax credits [that] will last for 20 years.'" Id. at 1140 (citing Carolyn Nielsen, Pleasing Boeing Worth the Price, BELLINGHAM HERALD, June 19, 2003, available at 2003 WL 11648173).

260. See Request by European Communities, supra note 22.

261. Id.

262. CROOME, supra note 195, at 96.

263. See supra text accompanying notes 141-49.

264. LOWENFELD, supra note 198, at 156.
However, before either one of these questions is answered, some attention should be given to the question of whether the state and local action is considered to be a subsidy, or just an established and constitutionally protected method of stimulating the local economic base and encouraging domestic industry.

1. States' Authority to Tax and Encourage Domestic Industry or Prohibited Subsidy?

The United States Supreme Court has held that "[t]he power of a state to tax, [is] basic to its sovereignty,"265 and that there is no "dispute[] that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."266 It is common practice for state and local governments to structure their tax systems to influence businesses to locate in their community267 in order "to encourage the growth and development of intrastate commerce and industry."268 The logical assumption is that providing tax incentives and attracting businesses

266. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984). See also Allied Signal Inc. v. Director, Division of Taxation, 504 U.S. 768, 778 (1992) (noting "that the State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities (citing Wis. v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).
267. Peter D. Enrich, Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 377, 382 (1996). In 1991, the state of Colorado used “the Colorado Business Incentive Fund (CBIF) to fund . . . local governments for the purposes of providing incentives for entities to establish new business facilities in the state employing a substantial number of new employees.” Matthew Schaefer, State Investment Attraction Subsidy Wars Resulting From a Prisoners Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response, 28 N.M. L. REV. 303, 313 (1998). The “program was established for the purposes of luring United Airlines to build a new facility in Denver” which would provide the local communities with several “new job opportunities in the United Airlines . . . maintenance facility in Denver.” Id. at 314. In 1986, the State of Kentucky passed legislation that authorized a financial incentive package “to lure Toyota Motor Corporation to establish a plant in Scott County.” Id. at 316. “Kentucky pledged to acquire a 1600 acre project site in Scott County for Toyota and then develop the site for $35 million . . . [expecting] to increase income tax collections by $75 million and expected substantial increases in corporate taxes as well.” Id. at 316.
will boost local employment, which in turn raises the local tax base, which leads to a healthier economy.\textsuperscript{269}

One of the central issues in the E.C. complaint is the financial and tax incentive package that the State of Illinois and City of Chicago offered Boeing to relocate their headquarters in 2001.\textsuperscript{270} The total incentive package was reported to be $63 million, which is about $50 million greater than the nearest competitive offer.\textsuperscript{271} While the bottom line figure seems to be an astronomical amount, it is expected that the total impact of the relocation of Boeing to Chicago, Illinois could return as much as $4.5 billion in economic growth.\textsuperscript{272} Operating under the same rationale to stimulate economic growth, the states of Kansas\textsuperscript{273} and Washington\textsuperscript{274}

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\textsuperscript{271} \textit{Id.}

\textsuperscript{272} \textit{Id.}

\textsuperscript{273} The Kansas "economic revitalization and reinvestment act" provides that any "eligible business" that produces an "eligible project" that has:

(A) Paid at least $600,000,000 in average annual gross Kansas compensation ... and

(B) paid at least $50,000 of average annual gross compensation per Kansas employee during the base eligibility period; and

(C) has invested at least $1,000,000,000 in real and tangible personal property located within and currently used in the operation of a business in Kansas; and

(D) is described by north American industrial classification system subsector.


Aircraft manufacturing may receive benefits under this Act in the form of "Kansas development finance authority issu[ing obligations] ... to finance the eligible project for the benefit of the eligible business in an aggregate principal amount not to exceed $500,000,000." \textit{Id.} The Kansas State Constitution provides further authority to cities by "empower[ing them] to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions." \textsuperscript{Kan. Const. art. XII, § 5(b) (amended 1975).}

\textsuperscript{274} Washington House Bill 2294 is "An Act relating to retaining and attracting the aerospace industry to Washington state" after a finding "that the people of the state have benefited from the presence of the aerospace industry." H.B. 2294, 58th Leg., 1st Spec. Sess. (Wa. 2003). "The legislature declares that it is in the public interest to encourage the continued presence of this industry through the provision of tax incentives ..."

(13)(a) Beginning October 1, 2005, upon every person engaging within this state in the business of manufacturing commercial airplanes, or components of such airplanes, as to such persons the amount of tax with respect to such business shall, in the case of manufacturers, be equal to the value of the product manufactured, or in the case of processors for hire, be equal to the gross income of the business, multiplied by the rate of:
statutorily structured their tax systems in a manner that provides Boeing with substantial financial incentives to produce the Boeing 787, which is a complaint of the E.C.\textsuperscript{275}

As previously mentioned, the language in section 1.1(a)(1) of the SCM Agreement is specifically aimed at including subsidies that are provided by sub-national governments, in addition to the national government.\textsuperscript{276} Notwithstanding, should a distinction be drawn between state and local financial incentives acting as a vehicle to stimulate the local economic base and being deemed an actionable or prohibited subsidy under the SCM Agreement? Providing a prohibition on states using financial and tax incentives "interfere[s] with a [state] government's abilit[y] to promote development inside of its [own] borders."\textsuperscript{277} As mentioned above, and as encompassed in the statutory language of the bills passed by Kansas and Washington, the financial incentives that are available to Boeing\textsuperscript{278} are made on the premise that it is in the best interest of the public to promote strong economic health, and for the purpose of economic revitalization,\textsuperscript{279} not to impede fair trade. In fact, a close reading of Washington’s bill reveals that the financial incentives are only available

\begin{quote}
0.4235 percent from October 1, 2005, through the later of June 30, 2007, or the day preceding the date final assembly of a superefficient airplane begins in Washington state, as determined under section 17 of this act; and

0.2904 percent beginning on the later of July 1, 2007, or the date final assembly of a superefficient airplane begins in Washington state, as determined under section 17 of this act.

(b) Beginning October 1, 2005, upon every person engaging within this state in the business of making sales, at retail or wholesale, of commercial airplanes, or components of such airplanes, manufactured by that person, as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the airplanes or components multiplied by the rate of:

0.4235 percent from October 1, 2005, through the later of June 30, 2007, or the day preceding the date final assembly of a superefficient airplane begins in Washington state, as determined under section 17 of this act; and

(ii) 0.2904 percent beginning on the later of July 1, 2007, or the date final assembly of a superefficient airplane begins in Washington state, as determined under section 17 of this act."\textit{Id.}
\end{quote}

\textsuperscript{275} See Request by European Communities, \textit{supra} note 22.

\textsuperscript{276} SCM, \textit{supra} note 198, at art. 1.1(a)(1).

\textsuperscript{277} Showalter, \textit{supra} note 194, at 597.

\textsuperscript{278} A reading of the language in the Bills passed by the states of Kansas and Washington show that financial incentives are not solely available to just Boeing, but to any business that produces an “eligible project” \texttt{KAN. STAT. ANN. § 74-50,136 (2003)} or is “in the business of manufacturing commercial airplanes, or components of such airplanes.” \texttt{H.B. 2294, 58th Leg., 1st Spec. Sess. (Wa. 2003)}.

\textsuperscript{279} See \textit{supra} notes 270-75.
to Boeing for a fixed period, and that the partial tax breaks are not even applicable until Boeing invests a substantial amount of its own capital in development and production.\textsuperscript{280}

There is little doubt that Boeing benefits from the financial incentives that are available to it, yet the question remains whether the motive of the incentives are subject to the SCM Agreement, or whether it is just a state acting in a common practice of stimulating\textsuperscript{8} its own economic base. There is also little doubt that a strict reading of the SCM Agreement would lead to the conclusion that a state’s financial incentive package may be considered to be a prohibited or actionable subsidy.\textsuperscript{282} However, in the event that the WTO does rule on the subsidies and civil aircraft dispute, this question could provide a basis for the type of interpretive slant that accompanied the WTO decisions in the Banana War and beef hormone cases and could complicate this issue even further.

2. Constitutional and Other Limitations of a WTO Ruling

There has been much discussion over the issue of balancing member sovereignty with the authority of the WTO to compel a member to comply with its rulings.\textsuperscript{283} However, a majority of this debate centers around the issue of national sovereignty, while the issue of state and local sovereignty has largely been ignored.\textsuperscript{284} It is fully understood that as a member of the WTO, “US sovereignty is fully protected under the WTO Agreement”\textsuperscript{285} and international law.\textsuperscript{286} The same cannot be said about state sovereignty. The WTO exists to “deal[] with the rules of trade between nations,” not between nations and individual states within that nation.\textsuperscript{286} Nonetheless, when Congress implemented the Uruguay round agreements that established the WTO, it gave the agreements similar effect as federal law.\textsuperscript{287} However, treaties and other international agreements are subject to

\begin{footnotesize}
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\item \textsuperscript{280} See Wash. Rev. Code § 82.04.260 (2003).
\item \textsuperscript{281} See \textit{supra} note 266.
\item \textsuperscript{282} See SCM, \textit{supra} note 198.
\item \textsuperscript{283} Hayes, \textit{supra} note 221, at 2.
\item \textsuperscript{284} \textit{Id.} at 3.
\item \textsuperscript{285} CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 79 (Pitou van Dijek & Gerrit Faber eds., 1996) (citing the Statement of Administration Action, which accompanied the U.S. Uruguay Round Act).
\item \textsuperscript{286} World Trade Organization, \textit{What is the WTO?}, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 6, 2005).
\item \textsuperscript{287} Hayes, \textit{supra} note 221, at 18. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the
\end{itemize}
\end{footnotesize}
the prohibitions of the Bill of Rights and other restraints on federal power. The United States operates under "a system of dual sovereignty between the States and the Federal Government" which affords states "substantial sovereign authority." Under this consideration, individual states may be able to seek shelter from the WTO's reach under the Tenth Amendment of the U.S. Constitution which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Since the Supreme Court has held that a state's power to tax is basic to its sovereignty, individual states may be able to protect their tax incentive packages offered to the industry under the basic tenants of federalism. However, if this protection is limited or invalidated by the Supremacy clause, the states may still be exempt from wholly eliminating their tax incentive packages in order to comply with a WTO ruling.

One of the key issues on this topic is the level of the WTO's authority in responding to non-conforming measures that are enacted by state and local governments. The WTO agreements reaffirmation of the "federal clause" in the original GATT 1947, provide guidance to the responsibility of each member to act in deference to enforcement of WTO decisions upon state and local governments. Article XXVI: 12 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, requires that "[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory." However, Article XXVI:12 is ambiguous as to what action by a national government constitutes a reasonable

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289. Hayes, supra note 221, at 13 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)).
290. U.S. CONST. Amend. X.
291. Bode, 344 U.S. at 583.
293. Hayes, supra note 221, at 4.
294. Id. at 5 (citing General Agreement on Tariffs and Trade, Apr. 15, 1994, art. XXIV:12)
295. Id.
measure. To understand what constitutes a reasonable measure, we must turn to decisions of prior GATT panels for guidance.

In the case of Canada – Measures Affecting the Sale of Gold Coins (Canada Gold Coin), the GATT dispute panel reviewed a dispute between South Africa and Canada “concerning the application of [a] retail sales tax by the provincial government of Ontario to the sale of gold coins in a manner which afforded protection to domestic production of gold coins.” The dispute panel subsequently found that the sales tax violated the Agreements, and then turned its attention on applicability of Article XXVI:12. The dispute panel concluded that “Article XXIV:12 applies... only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence.” In coming to its conclusion, the panel added:

that in determining which measures to secure the observance of the provisions of the General Agreement are “reasonable” within the meaning of Article XXIV:12, the consequences of their non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance.

While the GATT dispute panel did approach the topic of what types of disputes a Member can invoke Article XXVI:12 in the Canada Gold Coin case, it left unanswered what action is considered to be a reasonable measure. The dispute panel did, however, offer slightly more insight into what is deemed a reasonable measure in the case of Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (Canada Import). This case involved a U.S. complaint that

297. Hayes, supra note 221, at 25.
299. Id. ¶ 1.
300. Id. ¶ 65.
301. Id. ¶ 56.
302. Id.
303. Id. ¶ 69.
304. See Gold Coins, supra note 298.
alleged the illegal imposition of higher tariffs existed on beer imported from the United States by provincial liquor boards to maintain their monopoly on “the supply and distribution of alcoholic beverages within their provincial borders.” In its decision, the dispute panel held that in order to determine if Canada took reasonable measures it would have to show “that it had made a serious, persistent and convincing effort to secure compliance by the provincial liquor boards with the provisions of the General Agreement.”

In a later, but related dispute between the United States and Canada about excise taxes levied on beer and wine imported into particular states, the United States made the argument that due to the system of dual sovereignty between the individual states and the federal government, its authority to bring state and local laws into compliance with the GATT was limited. The Dispute Panel considered several U.S. Supreme Court opinions in context of the Twenty-first Amendment acknowledging that:

[e]ach state has independent legislative and regulatory authority, and, in response to the Twenty-first Amendment, each of the states has enacted laws governing the basis on which alcoholic beverages can be sold. In addition to regulating the sale and distribution of alcoholic beverages within their border for social welfare purposes, states [can] impose excise taxes on alcoholic beverages.

The E.C. complains that Boeing is a recipient of several forms of state and local subsidies that are in contravention of the SCM Agreement. As was suggested in this section, it is not entirely known yet, if state and local financial and tax incentives are indeed a prohibited or actionable subsidy. In the event that they are deemed to violate the SCM Agreement, the incentives offered by state and local governments may still be out of the reach of the WTO. In light of U.S. Supreme Court findings that “[t]he power of a state to tax, [is] basic to its sovereignty,” and “that

306. Id. ¶ 2.1-2.3.
307. Id. ¶ 5.37.
309. Hayes, supra note 221, at 29.
311. See Request by European Communities, supra note 22.
312. See supra notes 265-69.
313. Bode, 344 U.S. at 583.
a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," the state and local action may be a protected right that is unable to be abrogated by the WTO's DSB.

V. CONCLUSION

Finding a remedy to subsidy disputes, such as this one between the United States and European Union, is problematic and may promote the return of protectionism. Since its implementation, the WTO's SCM Agreement has undergone scrutiny for trouncing on national, and in the case of this comment, state and local sovereignty, and has not necessarily resulted in fairer trade. The continuing friction over this and other trade issues has led some to question the long term efficacy of the WTO and other multilateral trading systems. Since the creation of the GATT, 1992 Airbus Accord, and WTO, the United States has moved toward a policy that favors "regionalism" oriented trade pacts, such as the Free Trade Area of the Americas (FTAA) and the North American Free Trade Agreement (NAFTA), as opposed to multilateral and global trade organizations. This shift in policy, coupled with the difficulties seen in this current dispute over subsidies and large civil aircraft, poses a long-term threat to the WTO's relevance and viability.

Since the commencement of this comment, the stakes of the trade dispute before the WTO have escalated and could potentially stall or derail the talks, or in the alternative, escalate them to the WTO's DSB. Recall that the current dispute at the WTO was brought by the United States over the subsidized research and development of Airbus' super-jumbo A380 that will directly compete with Boeing's jumbo 747. Following the decision by the United States and European Union to engage in bilateral talks, Airbus announced that it would apply for government aid for the research and development of the A350, a new

314. See Bacchus Imports, Ltd. v. Dias, 468 U.S. at 263.
315. Showalter, supra note 194, at 626.
316. Id.
317. Clark, supra note 241, at 463.
318. "[E]mphasizes bilateral or regional trade pacts with smaller states, like [NAFTA and] the proposed Free Trade Area of the Americas (FTAA), over comprehensive trade reform or liberalization in the global context." Id.
319. Id.
320. Id.
322. See BOEING, supra note 2.
aircraft that is set to compete directly with Boeing's new super efficient 787. Following this decision on March 3, 2005, Airbus announced an agreement of intent to move forward with the aircraft. As recently as March 18, 2005, U.S. trade representatives announced that the talks with the European Union and Airbus have stalled, noting that the European Union and Airbus refuse "to give up [the] government[al] 'launch aid' because the assistance has been instrumental in the plane maker's rapid ascent to becoming the world's No. 1 supplier of commercial jets." The European Union's staunch refusal to give up its launch aid could be tied in with Airbus' interest in developing, marketing and meeting the rapidly growing demand in civil aviation in developing nations, and to third country markets.

Subject to a report by a U.S. trade representative, "Congress has left the door open for both a temporary non-observance of WTO rules and eventual complete US withdrawal." The United States could continue bi-lateral talks with the European Union, or attempt to end the subsidies given to Airbus by advancing this dispute to the WTO's DSB, or ultimately take a more drastic measure and completely withdraw from the WTO altogether, as it did in the 1992 Airbus Accord. The question of whether the U.S. should walk away from the WTO and continue its trend of favoring regional trade pacts like the FTAA and NAFTA may or may not be imminent. However, the outcome of the current subsidies and trade in large civil aircraft dispute could help in this decision.

323. Advisory Board, U.S. And EU Agree To Aircraft Subsidy Talks, 2 No. 1 INT'L GOV'T CONTRACTOR ¶ 3, January 2005.


325. See supra note 124.


327. Airbus II, supra note 13, at 155.
