

The Trade Dispute between Airbus and Boeing

This is a 30 years “trade war” between two airplane producers-giants. These two multinational companies employ more than 200.000 people. The recent ruling of WTO panel is perhaps a milestone in the 30 years debate but a definite solution is not within sight. Some experts think this is a risky business: because the two big TNCs and the governments supporting them, could weaken each other so long as a new big competitor, let’s say from Asia, taking the leading role over.

“It’s time for Europe to let the aircraft maker leave the nest” wrote the Wall Street Journal after the World Trade Organization ruled that some subsidies for Airbus have been illegal. But, at the end of July, WTO is likely to rule that Boeing has itself enjoyed illicit support from Pentagon in the form of research and other grants.^[1] Airbus is convinced of that the U. S. will also be found in violation of WTO subsidies rules.

We would like study this case, first of all, from a legal point of view, trying to summarize and crystallize the main elements and conclusions of the WTO dispute.

I. AGREEMENT BETWEEN EC AND US ON TRADE IN LARGE CIVIL AIRCRAFT IN 1992

Before to start to into the detailed analysis of the dispute, we should mention an important agreement between EC and Us on Trade in Large Civil Aircraft in 1992 in which both parties promised to reduce government support and not to initiate antidumping or countervailing duty procedure against the other state’s practices. After having gained the Airbus a substantial share on the market of large civil aircraft with its very popular products (A 320, A 330), Boeing grew increasingly dissatisfied with the 1992 EC-US agreement. The United States withdrew from the 1992 EC-US agreement in 2004 and started consultations within the World Trade Organization (WTO), with a view to seeking relief under the WTO Agreement on Subsidies and Countervailing Measures.^[2] It is worth to note that the EU emphasizes the 1992 Agreement remains relevant, particularly

[1] European Voice: *Flight club*, 8 July 2010, Volume 16 Number 27, 20.

[2] DISPUTE SETTLEMENT: DISPUTE DS316. European Communities – Measures Affecting Trade in Large Civil Aircraft, www.wto.org/index

for the assessment of Member State Financing (MSF) measures. The EU does not consider the provisions of the 1992 Agreement as meaningless.^[3]

II. WTO SETTLEMENT OF DISPUTE

During the consultations with the Governments of Germany, France, the United Kingdom, Spain (member States), and with the European Communities concerning the measures affecting trade in large civil aircraft, the United States filed a complaint with the WTO alleging that certain measures and loans by the EC and member States providing subsidies that are inconsistent with their obligations under the Agreement on Subsidies and Countervailing Measures and GATT 1994.

According to the US complaint, these measures can be arranged into the following categories:^[4]

- Launch Aid or Member State Financing (LA/MFS),^[5]
- loans from the European Investment Bank,
- infrastructure and infrastructure-related grants;
- corporate restructuring measures; and
- research and technological development funding.

The United States claims that each of the challenged measures is a *specific subsidy* within the meaning of Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures (SCM), and that the European Communities, caused *adverse effects* to the US interests within the meaning of Articles 5 and 6 of the Agreement on Subsidies and Countervailing Measures. In addition, the United States claims that seven of the challenged “Launch Aid” or “member State Financing” measures are prohibited export subsidies within the meaning of Article 3 of the Agreement on Subsidies and Countervailing Measures. The US complaint was focusing on the launch aid and loans granted to Airbus since Boeing had not been subsidized by such funds. The US were also trying to prevent the EU from granting further launch aids to Airbus and to improve the position of American producer in the United State’ bidding competition for aerial refueling tankers.^[6]

In response to the US’ claims, the EC initiated a WTO dispute settlement procedure against the USA for its unlawful subsidization of Boeing. The EC asked

[3] *Report on the oral statements of the European Union, the United States and the third parties, at the second hearing on European Communities and certain Member States – Measures Affecting Trade in Large Civil Aircraft (AB-2010-1/DS316)* by Malorie Schaus and Tobiasz Kaczor.

[4] WTO Panel Report EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, Report of the Panel, WT/DS316/R, 30 June 2010.

[5] Provision of financing for design and development to Airbus companies – “launch aid” is finance publicly supplied or guaranteed, repayable as copies of the new aircraft are produced and sold.

[6] Wessing, Taylor: *The WTO Airbus – Boeing Subsidies Conflict* by Andreas Haak and Dr. Michael Brüggemann, Berlin, October 2010, 2.

consultation with US relating to prohibited and actionable subsidies provided to US producers of large civil aircraft (Boeing). According to the EC complaint, Boeing has got tax breaks, R&D and infrastructure supports given by the US federal and state governments that benefit the development, production and sales of the its civil aircraft.^[7] According to the European Communities, while the European “lunch aid” was to be paid back and consistent with the 1992 Agreement on Large Civil Aircraft, the US subsidies were not repayable and not compatible with the 1992 Agreement.

III. THE LEGAL BACKGROUND

The Agreement on Subsidies and Countervailing Measures concluded in 1994 and the GATT 1994 are the main sources of the international subsidy law. Comparable to the subsidy provisions of European Law,^[8] the SCM Agreement is applicable only to subsidies that are specifically provided to an enterprise or industry or group of enterprises or industries. Therefore, common support measures like infrastructure and tax programs applying to the whole economy do not establish subsidies. There are two basic types of subsidies in the SCM Agreement: (i) those that are forbidden (Part II SCM), and (ii) those that are actionable, i.e., subject to challenge in the WTO (Part III SCM).^[9] These subsidies are not prohibited and if they cause adverse effects to the interests of other Members, they are subject to challenge through multilateral settlement of dispute or countervailing action.^[10]

The *adverse effects* means: no Member should cause, through the use of any subsidy adverse effects to the interests of other Members, i.e.: (i) injury to the domestic industry of another Member; (ii) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994; (iii) serious prejudice to the interests of another Member.^[11] These provisions do not apply to subsidies maintained on *agricultural products*!

The serious prejudice may arise in any case where one or several of the following apply:

- a) The effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

[7] The total amount of all aids was \$ 23.7 bn. *Inter alia*, Boeing had been supported by NASA and the US Department of Defense programs and contracts. The funds provided through such programs had been used for the development of specific technology from which the B-787 airframe had been constructed and several other technologies that used for the B-787 design and manufacture. Wessing: *i. m. 2*.

[8] Article 107 TFEU.

[9] Wessing: *i. m. 5*.

[10] Wessing: *i. m. 5*.

[11] Articles 5 of the SCM Agreement.

- b) The effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
- c) The effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market.^[12]

Actually, it is considerably difficult to prove the adverse effects resulting from subsidization. This usually requires a fact - intensive exercise.^[13]

It is important to note that the SCM Agreement allows subsidies that are granted for research purposes and to assist disadvantaged regions or adapt to new environmental requirements.^[14] It is generally accepted and supported by the GATT rules, as well, that a *nascent industry* could be lawfully subsidized by state in the so called “take-off” period.

The EU legislation on state subsidies is unique and a part of the European Competition Law because this is the only one legislation on state aid which has a supranational character.

The Lisbon Treaty doesn't change the legislation on the state aid *in merito*. It refers to other types of aid measures which *may* be compatible with the common market. Even where aid is compatible with the common market, it may not be “misused”.

The Article 107 1. is a general clause containing a general prohibition.^[15] There is no “sector” approach anymore but the state aid is supposed to support the horizontal aims of the European Union. (SMEs, jobs, education, energy, environmental protection, Chanel between Great Britain and France.)

IV. PROHIBITED SUBSIDIES

According to the Article 3 of the SCM Agreement 3.1, the following subsidies, shall be prohibited:

- a) *Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance,*^[16]
- b) Subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

[12] Articles 6 of the SCM Agreement.

[13] Wessing: *i. m.* 5.

[14] Article 8 of the SCM Agreement

[15] Article 107 TFEU: “1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

[16] A detailed list of export subsidies is annexed to the SCM Agreement.

Export subsidies and local content subsidies are banned because they directly affect trade having adverse effects on the interests of other member states.

The grant of a subsidy must be ‘tied to’ export performance. In *case Canada – Autos*,^[17] the Appellate Body addressed the precise distinction between a *de jure* and a *de facto* subsidy with reference to the wording of a particular measure:

“Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure.”

Regarding the interpretation of the term “*contingent... in fact*”, the Panel on *Australia – Automotive Leather II*^[18] established a standard of “close connection” between the grant or maintenance of a subsidy and export performance. It added that a subsidy, in order to be export contingent in fact, must be “conditioned” upon export performance.

V. FINAL REPORT IN THE AIRBUS CASE

The report includes a detailed assessment of each of the more than 300 measures of alleged subsidization comprised by the US’ claims. The panel, in the Airbus-case (DS 316), found relating to the subsidization of the EU member states that each of the challenged lunch aid or Member State Financing measures constitutes a *specific subsidy*.^[19] The panel concluded that the United States had estab-

[17] Award of the Arbitrator, *Canada – Certain Measures Affecting the Automotive Industry – Arbitration* under Article 21.3© of the DSU, WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079

[18] *Australia – Subsidies provided to producers and exporters of Automotive Leather*, WT/DS126/RW, 21. January 2000.

[19] *Article 1 of the SCM Agreement*.

Definition of a subsidy:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist 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;

(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;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

lished that the German, Spanish and UK A380 “Launch Aid” or “member State Financing” measures are subsidies contingent in fact upon anticipated export performance, and therefore *prohibited export subsidies*.^[20] Furthermore, the panel considered that Airbus would not have been able to develop and launch its models in lack of launch aids. These subsidies made it possible that Airbus could win sales on Boeing’s expense and displaced or impeded imports of US large civil aircraft into the EC market. According to the panel report these subsidies displaced or impeded exports of US LCA from 3rd country markets.

The panel found that each of the 12 challenged loans provided by the European Investment Bank (“EIB”) to various Airbus entities between 1988 and 2002 is a subsidy, but that none of these subsidies was *specific*,^[21] and therefore dismissed the US claims in respect of the EIB loans from further consideration.

The panel also concluded that the challenged *grants* provided by national and regional authorities in Germany and Spain for the construction of manufacturing and assembly facilities in several locations in Germany and Spain are *specific subsidies*. However, the panel found that *road improvements* by French authorities related to the ZAC Aéroconstellation industrial site were measures of *general infrastructure*, and thus *not subsidies*, and that GBP 19.5 million provided to Airbus UK in respect of its operations in Broughton, Wales, and a grant provided by the government of Andalusia to Airbus in Puerto Santa Maria, were *not specific subsidies*.^[22]

With regard to the pricing of Airbus LCA the panel came to the conclusion that the United States had demonstrated the existence of displacement of imports and exports from the European and certain third country markets, as well as significant price depression, price suppression and lost sales, but had failed to demonstrate the *existence of significant price undercutting*.^[23] The specific subsi-

[20] The Appellate Body referred also to its statement in case Canada – Aircraft that “contingent” means “conditional” or “dependent for its existence on something else” and said that the grant of the subsidy must be conditional or dependent upon export performance. The grant of a subsidy must be ‘tied to’ export performance. (Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377)

[21] For instance it is necessary to mention, in the case *US versus Offset Act (Byrd Amendment)*, the Panel explained that “a measure constitutes an actionable subsidy if it is a subsidy, if it is “specific”, and if its use causes “adverse effects”. (Appellate Body Report, *United State – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003).

[22] DISPUTE SETTLEMENT: DISPUTE DS316 European Communities – Measures Affecting Trade in Large Civil Airera, Summary of the dispute to date www.wto.org

[23] The Panel on the case *Indonesia – Autos* determined the existence of serious prejudice within the meaning of Article 5(c) SCM upon finding a significant price undercutting under Article 6.3(c) SCM: serious prejudice may arise only where the price undercutting is ‘significant.’ Although, the term ‘significant’ is not defined. (Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DRS 1998:IX, 4029)

dies, in this respect, did not provide Airbus with significant additional cash flow and other resources on non-market terms allowing it to price its aircraft more aggressively as it would have been able without those subsidies.^[24]

VI. CAUSATION OF THE PANEL

With regards to *causation*, the panel pointed out that

“lunch aid” or “Member State Financing” displaces substantially the risk of launching an aircraft from the producer to the government granting funding on non-commercial terms,

Airbus’ possibility to lunch, develop, introduce to the market of its large civil aircraft models was dependent on subsidized LA or MSF;

all of the specific subsidies were fully linked to the product and the particular market consequences. This fact makes it proper to analyze the effects of the subsidies on an aggregated basis.^[25]

Furthermore, the panel concluded that Airbus would have been unable to bring to the market its LCA models without the specific subsidies from the EC and the government of France, Germany, Spain and the United Kingdom. At the same time the panel did not conclude: “that Airbus necessarily would not exist at all but for the subsidies, but merely that it would, at a minimum, not have been able to lunch and develop the LCA models it actually succeeded in bringing to the market.”^[26]

It is worthy of note that on 21 July 2010, the EU filed an appeal against the panel decision and at the second hearing of the Appellate Body (on 9th December 2010), the EU discussed, particularly, the Panel’s causation findings for subsidies caused Airbus to be able to launch its LCA models. The EU gives great importance to the above mentioned statement of the panel. The EU underlined that the panel presumed causation for both lost sales and displacement and did not establish the required “chain of causation” between the subsidies the lost sale and displacement. These are seen as errors under Article 5 and 6.3 of the SCM Agreement. In this hearing the EU notes that the Appellate Body should reject a causal standard that is satisfied by evidence and arguments that competition but for the alleged subsidies might look “different”. This approach would make it easier to judge that a subsidy causes adverse effects because most subsidies automatically affect the competition making it “different”. Because the SCM

[24] Wessing; *i. m.* 6.

[25] DISPUTE SETTLEMENT: DISPUTE DS316. European Communities – Measures Affecting Trade in Large Civil Aircraft, Summary of the dispute to date www.wto.org

[26] DISPUTE SETTLEMENT: DISPUTE DS316. European Communities – Measures Affecting Trade in Large Civil Aircraft, Summary of the dispute to date www.wto.org

Agreement does not prohibit subsidies as such, the EU wants the Appellate Body to agree to this argument.^[27]

VII. SUMMARY OF THE PANEL'S CONCLUSIONS AND THE RECOMMENDATION OF THE PANEL

The United States established that the effect of the *specific subsidies* found was displacement of imports of US LCA into the European market;

- (ii) displacement of exports of US LCA from the markets of Australia, Brazil, China, Chinese Taipei, Korea, Mexico, and Singapore;
- (iii) likely displacement of exports of US LCA from the market of India; and
- (iv) significant lost sales in the same market, and that these effects constituted serious prejudice to the interests of the United States within the meaning of Article 5(c) of the Agreement on Subsidies and Countervailing Measures.

The United States did not establish that the effect of the specific subsidies found was

significant price undercutting;
significant price suppression; and
significant price depression.

In addition, the panel concluded that the United States had not established that, through the use of the subsidies, the European Communities and certain EC member States cause or threatens to cause injury to the US domestic industry.^[28]

The panel recommended that the relevant member State granting each subsidy found to be prohibited withdraw it without delay. Concerning the subsidies that caused adverse effects to United States' interests, the panel recommended, pursuant to Article 7.8 of the Agreement on Subsidies and Countervailing Measures, the Member granting each subsidy found to have resulted in such adverse effects "take appropriate steps to remove the adverse effects or ... withdraw the subsidy". However, the panel declined to make any suggestions steps that might be taken to implement its recommendations.^[29]

Now, both parties are claiming victory in the WTO panel ruling. The experts estimate that a compromise between the two parties would be the best. Today, Airbus, but Boeing, as well, is awarding the development and production increasingly to suppliers and subcontractors worldwide, to which the existing regulation

[27] Report on the oral statements of the European Union, the United States and the third parties, at the second hearing on European Communities and certain Member States - Measures Affecting Trade in Large Civil Aircraft (AB -2010 -1 /DS316) by *Malorie Schaus and Tobiasz Kaczor*.

[28] DISPUTE SETTLEMENT: DISPUTE DS316. European Communities - Measures Affecting Trade in Large Civil Aircraft, Summary of the dispute to date www.wto.org

[29] EC and Certain Member States - Measures Affecting Trade in Large Civil Aircraft, Report of the Panel, WT/DS316/R, 30 June 2010 para 8.7 and 8.8

on subsidies is not applied. The whole is so complex that the 30 years trade war between Airbus and Boeing will not be sure the last one in the future.^[30]

As David Gow, senior adviser to cabinetDN consultancy thinks: “The trade dispute between Airbus and Boeing has been inconclusive and very costly. One result of this dispute is expected to be that, even if the EU wins the counter-dispute, the pair will declare a score draw – and agree never to take such dispute to the WTO ever again. The problem is that, if Brazil, Russia and China follow the Airbus-Boeing lead and repeat the US-EU imbroglio, we could be in for even more interminable and intractable trade disputes.”^[31]

The EU politicians like the German member of European Parliament, Daniel Caspary, claimed a renegotiation of the 1994 Agreement on Large Civil Aircraft implementing new rules for subsidies to the aviation industry. With a view to emerging competitors like Embraer and Bombardier of Canada which were closing in on the development of mid-size aircraft, as well as new threats from China and Russia, Airbus and Boeing should stop blaming each other but instead concentrate on the development of new aircraft. According to the EU trade Commissioner’s (Karel de Gucht) spokesman, John Clancy, “only negotiations at the highest political level can lead to a real solution.”^[32]

Finally, I would like to refer to Gary Clyde Hufbauer’s proposal relating to the WTO Large Civil Aircraft litigation. Hufbauer thinks that the WTO litigation alone will not provide a solution. The only satisfactory outcome will be a *new truce*-shaped by WTO decisions as to the legality of various subsidies. *Hufbauer recommends combining discipline with a Peace Clause*. What is achievable, however, is a truce that imposes greater discipline on public support. OECD experience with disciplining export credit subsidies shows the merit of combining minimum standards with real-time surveillance and appropriate penalties-plus a peace clause to reward compliance. To work the next truce will require a *small aircraft directorate* housed in the WTO, analogous to the export credit group in the OECD.

The pact itself will need several key elements:

A pact between the United States and the European Union that other aircraft-producing countries, namely Brazil, Canada, China, and Japan are invited to join.

To notify the WTO aircraft directorate in advance of all proposed subsidies. Public support of all kinds would be subject to agreed strictures that reflect the WTO legal decisions. The public support disciplines are the heart of the pact, just as with OECD discipline on export credits.

Subsidies in excess of the agreed standards would be subject in total (not just the excess) to WTO countermeasures, including mandatory repayment. Any subsidy that is not properly notified would be “traced” to the final aircraft (e.g., the A-380 or the Boeing 787), and the assembly firm itself would be subject to countermeasures.

[30] J. Flottau und A. Hagelüken: *Der dreißigjährige Handelskrieg*, sueddeutsche.de 02.09.2009.

[31] European Voice: Flight club, 8 July 2010, Volume 16 Number 27, p. 20

[32] Wessing: *i. m.* 7.

Subsidies properly notified that are less than the agreed standards would not be actionable in the WTO.

The proposed system of reporting, punishment, and rewards is designed to encourage aircraft “newcomers,” such as China and Japan, to join and cooperate. By doing so, they would benefit from the exchange of information.

The proposed *truce* would not, of course, be the last word in limiting public support for civil aviation or bringing peace to a contentious industry. But a new pact would be vastly superior to years of WTO litigation that leads to a trade war in civil aviation, a grand “battle of the skies” where everyone gets shot down.^[33]

[33] Gary Clyde Hufbauer, Peterson Institute for International Economics, *Handelsblatt* June 19, 2007.