

The On-Going Drama of WTO Cases against Airbus and Boeing

The WTO delays action in the Boeing case, in which the Europeans allege U.S. federal, state, and local governments illegally subsidized the aircraft manufacturer.

This follows release of WTO findings that European subsidies to Airbus broke trade rules.

The Airbus decision. On June 30, 2010, a WTO panel released the full text of its decision finding that European aid to Airbus production of large commercial aircraft, in several instances, violated the Agreement on Subsidies and Countervailing Measures and “impaired benefits accruing to the United States” under the agreement. The panel recommended that prohibited EC subsidies be withdrawn within 90 days.

Delay in Boeing case. A little more than a week after the WTO release of the Airbus decision, the WTO announced on July 8 a delay in issuing a report by a panel hearing the European counter-claim, alleging that the United States and its states and local governments had violated the WTO rules by subsidizing Boeing. The Europeans are outraged by the delay. Alan McArtor, the chairman of the U.S. subsidiary of Airbus, said the announcement of the delay “smells like last week’s fish.” Airbus is confident that the U.S. will also be found in violation of WTO subsidies rules. It fears that the delay in the report will put it at a disadvantage, as the only identified offender of WTO rules, as it competes with Boeing for a U.S. Air Force contract to build fuel tanker aircraft worth \$35 to \$50 billion.

The Airbus Case

According to USTR, Boeing, and unions representing U.S. aerospace workers, Airbus over its more than 40 year history has benefited from massive amounts of European Union (EU) member-states and EU subsidies that have enabled the company to create a full product line of commercial aircraft. Every major Airbus aircraft model was financed, in whole or in part, with EU government subsidies. The result, they say, has been lost sales and market share for Boeing, which in 2003 was replaced by Airbus, for a period, as the largest manufacturer of commercial aircraft.¹ As a consequence, the United States in October 2004 terminated its 1992 civil aircraft agreement with the EU and filed suit in the WTO.²

Almost six years later, on June 30, 2010, a WTO panel released the full text of its 1,050 page and devilishly nuanced decision finding that European aid to Airbus production of large commercial aircraft, in several instances, violated the Agreement on Subsidies and Countervailing Measures (SCM).³ In its June 30 decision, the panel concluded that the European Communities (EC) where

¹ USTR, “Statement of USTR General Counsel Tim Reif at USTR Press Conference about WTO Panel Rulings Regarding Airbus,” available at <http://www.ustr.gov/>. Christopher Drew, “In Ruling: W.T.O. Faults Europe Over Aid to Airbus,” New York Times, Global Business, June 30, 2010. James Parks, “WTO Rules Airbus Subsidies are Illegal,” Legislation and Politics, June 30, 2010, available at, <http://blog.aflcio.org/2010/06/30/wto-rules-airbus-subsidies-are-illegal/print>.

² “Timeline- Key dates in Airbus subsidy dispute,” Reuters, June 30, 2010, available at <http://uk.reuters.com/assets/print?=-UKLDE65T1Z720100630>.

³ United States v. European Community and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, available at http://www.wto.org/english/news_e/news10_e/316_e.htm. Andrea Rothman, Jennifer

they have acted inconsistently with the SCM have ‘impaired benefits accruing to the United States’ under the agreement. The panel recommended that prohibited EC subsidies be withdrawn within 90 days, though it did not reach the question of how its recommendation might be implemented. Given that an EC appeal is likely, final resolution of the Airbus case could be months or years away.⁴

The broad outlines of the decision are no surprise. On September 4, 2009, the WTO panel issued a “confidential” interim ruling in the Airbus case, which was widely leaked in summary form to the press.⁵ The specific language of the June 30 decision, however, is still being parsed by analysts who are suggesting alternative interpretations. The United States and the European Communities, for example, frequently disagree in their analyses of the final published decision and at best place very different emphasis on different parts of the decision.

Launch Aid. According to the United States, European governments have provided \$15 billion in reimbursable launch investment or “launch aid” to Airbus for every new product lines since 1970. Launch aid is offered at low interest rates that must be repaid only when a new model of aircraft has proved to be a success in the marketplace. As Tim Reif, USTR General Counsel, explains, the WTO panel recognized that launch aid “is a form of subsidy that is particularly trade distorting in the large civil aircraft market. To launch a new model of large commercial aircraft, a producer must invest billions of dollars before the first aircraft is delivered and the first revenue is received.”⁶ According to USTR, the panel found that launch aid is a subsidy because it was provided at below market interest rates. The panel further found, the U.S. says, that launch aid offered by Britain, Germany, and Spain for the A380 jumbo jet “was prohibited per se under WTO rules because it was conditioned on the export of aircraft.”⁷ The EC argues that launch aid is compatible with WTO rules, so long as the terms are compatible with market conditions, but regrets that launch aid for the A380 was found to be export related.⁸

Freedman, “WTO Plane Subsidies Ruling Faults European Airbus Aid,” Bloomberg, June 30, 2010. Available at <http://www.bloomberg.com/news/2010-06-30/wto-says-airbus-befitted-from-illegal-subsidies>.

⁴ Id.

⁵ Rothman, Freedman, *supra*. “Timeline” Reuters, *supra*. Doug Palmer, “WTO says Airbus subsidies hurt Boeing: US lawmaker,” Reuters, September 11, 2009, available at http://citizenstrade.org/pdf/20090911_wtoairbusubsidiesboeing_reuters.pdf. The two parties received confidential versions of the final ruling in March 2010. Drew, *supra*.

⁶ USTR, “Statement of Tim Reif...” *supra*.

⁷ USTR, “Fighting Unfair Trade Practices...” *supra*. “Prohibited” subsidies are of two narrow types: (1) *export subsidies* that aid domestic companies contingent on export performance, or (2) *local content subsidies* that provide a preference for the use of domestic over imported goods. SCM, Part II, articles 4, 5. By contrast, “actionable” subsidies are not prohibited. They are however *subject to challenge*, either in WTO dispute resolution or through countervailing measures, if they are specific, and if they are proved to *adversely affect* another WTO member. Proving that a subsidy adversely affects the interests of another country can be difficult, usually requiring quantities of detailed information and sophisticated economic analysis. A causal link must be established between the subsidy and the injury. SCM, Part III, articles 5, 6, 7; for non-actionable subsidies, see SCM part IV.

⁸ Kanaga Raja, “US Claims ‘landmark’ victory in WTO Airbus dispute,” July 6, 2010, The Third World Network, available at <http://www.twinside.org.sg/title2/wto.info/2010/twninfo100703.htm>. (“According to the EC, the panel

Other Subsidies. According to an analysis by the United States, the WTO panel found that subsidies⁹ provided by European Communities resulted in *adverse effects* to the interests of the United States in terms of lost sales¹⁰ and lost market share in four areas, including not only launch aid, but also infrastructure, share transfers/equity infusions, and research and development.¹¹ According to an EC analysis, the WTO panel found no "material injury" to the US aircraft industry, although it was disappointed that the panel found that general infrastructure measures can be classified as actionable subsidies.¹²

Questions.

(1) Does the Airbus decision vindicate USTR's view that the WTO process benefits American businesses and workers, or does the protracted litigation, alleged ambiguities in the decision, and uncertainty about how the decision can be enforced suggest the opposite? Will U.S. businesses and workers also benefit from resolution of the EC countersuit alleging U.S. (and especially U.S. state and local) subsidies for Boeing are WTO illegal? How do U.S. states and localities protect their interests, especially if USTR and the EC enter into settlement negotiations?

(2) What prospects are there for meaningful reform of EC subsidies policy, given that the United States and Boeing cannot collect damages in compensation for the Airbus violations or seek orders of specific performance to reform EC practices, and given that the panel did not address the question of how its "recommendations" should be implemented? In the alternative, wouldn't the U.S.A. also have difficulty in living with a WTO regime for regulating subsidies that had "real teeth?"

rejected the allegation that support for Airbus caused "material injury" to the US aircraft industry. It has found that EU support did not damage Boeing's pricing or profitability and did not lead to a loss of jobs at the company."... "According to the EC, the panel has found that the use of Repayable Launch Investment (RLI) as a financing system is fully compatible with WTO rules, as long as the terms of financing are based on market conditions. It has nevertheless found certain RLI measures, in particular contracts dating from the 1970s and 1980s, when Airbus was being established, to have contained an element of subsidy.")

⁹ The WTO Subsidies and Countervailing Measures agreement breaks its definition of a subsidy into three parts: (1) a financial contribution; (2) by a government or any public body within the territory of a WTO member; (3) which confers a benefit. Examples of subsidies listed in the SCM include: (1) direct transfers of funds; (2) foregone government revenue, such as tax credits; (3) grants of goods and services, excluding infrastructure; and (4) entrustment of the transfer or granting of funds, goods, or services to a third party. World Trade Organization, Agreement on Subsidies and Countervailing Measures (SCM), part I, article 1, available at http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm.

¹⁰ Specifically, the sale of large commercial aircraft by Airbus to Easy Jet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, and Quantas.

¹¹ Office of U.S. Trade Representative (USTR), "Fighting Unfair Trade Practices, Winning at the WTO: Key Findings against European Subsidies to Airbus, available at, <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/june/fighting-unfair-trade-practices-winning-wto-key-findings>.

¹² Kanaga Raja, *supra*.

(3) How will the final resolution of the EC countersuit alleging U.S. subsidies for Boeing are also WTO illegal affect the domestic political response to the Airbus decision? In other words, isn't the Airbus decision only half the story?

(4) How will the Airbus decision affect the Boeing/Airbus competition for the up to \$50 billion dollar U.S. Department of Defence contract for production of fuel tanker aircraft? Is this potentially the real vindication for Boeing and its workers resulting from the WTO Airbus litigation?

(5) Is it a significant plus for the U.S.A. and Boeing that the Airbus decision was released at a time when China, Russia and others are considering whether their industrial policies should promote national champion manufacturers of large commercial aircraft to compete with Boeing and Airbus? On the other hand, could Brazil, a low-cost producer which already dominates mid-size commercial aircraft sales, compete in the large commercial aircraft market more effectively if the Airbus decision has a chilling effect on future state subsidies? Is the real value –or at least effect- of the WTO subsidies regime, then, more prospective than retrospective?

Delay in WTO Decision in Boeing Case Alleging Subsidies Violations by U.S. Federal, State, and Local Governments

A little more than a week after a World Trade Organization (WTO) dispute resolution panel found, in a complaint brought by the United States, that the European Union and EU member countries had subsidized the commercial aircraft manufacturer Airbus in violation of international trade law, the WTO announced on July 8 a delay in issuing an interim “confidential” report by a panel hearing the European counter-claim that the United States and its states and local governments had violated the WTO agreements by subsidizing Boeing.¹³

The interim report of the Boeing panel had been scheduled for release by July 16, but has now been delayed until as late as mid-September because of the difficulties and complexities of the case, the WTO says.¹⁴

The Europeans are outraged by the delay.

¹³ John W. Miller, “WTO to Delay Boeing Subsidy Ruling,” Wall Street Journal, July 9, 2010. As noted in the Forum’s recent e-mail alert, the core of the EU’s challenge relates to the research and development support provided to Boeing by the U.S. Department of Defense and NASA, as well as subsidy packages tailor-made for Boeing in the states of Washington, Kansas and Illinois. The EU alleges that the State of Washington gave Boeing \$3.4 billion in tax incentives; the City of Everett gave Boeing \$67.5 million in tax reductions; and state and local governments in Washington provided another \$395 million in other subsidies including workforce training, infrastructure improvements, and assumption of legal costs, among others. The EU also alleges that the City of Wichita, Kansas provided tax breaks to Boeing worth \$783 million; and, the State of Kansas pays the interest on bonds financing aircraft production facilities worth another \$122 million to Boeing. The EU finally alleges that the State of Illinois, the City of Chicago, and Cook County provided tax incentives and direct payment of relocation and other costs to Boeing worth \$24.8 million.

¹⁴ Reuters, “Update 2- WTO delays Boeing subsidy report in trade row,” July 8, 2010 (“Although the WTO’s findings in the EU counter-claim were not expected to be made public for several months, the tit-for-tat subsidy row has been marked by repeated leaks and both sides had been expected to claim victory over the latest draft report.”), available at <http://www.reuters.com>.

Airbus CEO Tom Enders said, “We are surprised and disappointed by the last minute announcement of yet another delay by the Boeing subsidies panel.” Enders insisted that when it is released, the WTO report will show that “Boeing has received billions of dollars in WTO illegal subsidies.”¹⁵

Alan McArtor, the chairman of the U.S. subsidiary of Airbus, said the announcement of the delay “smells like last week’s fish... The parties on this side of the Atlantic owe you an honest answer.”¹⁶

Vince Cable, the UK’s Business and Industry Secretary and a distinguished trade scholar, complained that the time lag between the progress of the Airbus case compared to the Boeing case “has constantly increased.”¹⁷

The European Commission issued a statement saying the delay in the Boeing panel interim report “creates the wrong impression that Airbus has received some WTO incompatible support, whereas Boeing has not.” A complete picture of the dispute the EC concludes will be visible “only when we have received both panel reports.”¹⁸

Nefeterius McPherson, speaking for the Office of the U.S. Trade Representative, replied that WTO panels frequently change their schedules, and the delay in the Boeing case is not a “big deal.”¹⁹

But, it is a big deal for Europe, particularly as Airbus and Boeing compete for a \$35 to \$50 billion dollar contract from the U.S. Department of Defense to manufacture tanker and refueling aircraft. News of the delayed WTO report on Boeing came on the day that Airbus filed a bid on the U.S. Air Force tanker contract.²⁰ U.S. lawmakers from the Northwest are urging Defense Secretary Gates to reject the Airbus bid because of European subsidies, despite the fact that the Airbus tanker would be assembled in Mobile, Alabama.²¹

¹⁵ “Statement by Airbus President and CEO Tom Enders in response to the WTO announcement of a further delay of the report in the Boeing subsidies case,” July 8, 2010, available at <http://www.eads.com/eads/int/en/news/press>.

¹⁶ Diane Bartz, Tim Hopher, “RPT-EADS submits tanker bid, WTO report delayed,” CNNMoney, July 8, 2010, available at, <http://money.cnn.com/news>.

¹⁷ Francesca James, “BIS Response To Delay Of WTO Boeing Subsidies Report,” July 9, 2010, available at <http://www.freshbusinessthinking.com/news>.

¹⁸ Carolyn Henson, “Update: EU Says Disappointed By delay To WTO Report On Boeing,” Dow Jones Newswires, July 8, 2010, available at <http://www.nasdaq.com/aspx/stockmarketnewsstoryprint>.

¹⁹ Id.

²⁰ Reuters, “Update 2...” *supra*.

²¹ Bartz, Hopher, “RPT-EADS submits tanker bid...” *supra*.

The Europeans had also hoped that the Boeing panel report would coincide with the commercial debut of the fuel-efficient Boeing 787 Dreamliner this summer. Airbus CEO Enders says that, “the B787 would not exist without government subsidies.”²²

²² Enders, *supra*.