

WTO EU/US Trade Dispute Concerning Alleged Subsidies to the Large Civil Aircraft Manufacturers Airbus and Boeing

1. Background to this dispute

Why did the dispute start?

In 1992, the United States ("US") and the European Communities (now the European Union, "EU") concluded a bilateral agreement ("1992 Agreement") in which the parties recognised a formula for balancing US financial grants to its aircraft industry with repayable loans to the European aircraft industry. While the EU, in good faith, met its commitments under this agreement, the US repeatedly disregarded the established limitations, both in terms of amounts and types of subsidies. One blatant example was the unprecedented package of subsidies granted by Washington State for the 787 and other Boeing commercial aircraft, which amounted to more than USD 3 billion. The State of Washington made it very clear at the time that the incentive package was designed to help "Boeing to beat Airbus." Independent commentators noted that the Boeing Incentive Package was an "unprecedented" deal that has "never been done for any company by any state."

On 6 October 2004, Boeing prompted the United States to unilaterally and unexpectedly withdraw from the 1992 Agreement and to immediately file a complaint at the WTO over all EU support ever granted to Airbus, including the support that was previously agreed to by the US in the 1992 Agreement.

The EU was left with little choice but to respond with a parallel WTO challenge to US government support of the US aerospace industry (i.e., Boeing) by federal, state and local authorities. This included benefits to Boeing under the so-called US Foreign Sales Corporation Scheme, which the US government had continued to provide to Boeing, despite these subsidies having repeatedly been found to violate WTO rules.

These two parallel WTO challenges, the "Airbus case" (DS316: the US challenge of EU support for Airbus) and the "Boeing case" (DS353: the EU challenge of US support to Boeing), have followed different timetables due to several delays at the WTO.

Who is conducting the case at the WTO?

Cases before the WTO are brought by governments. The European Commission on behalf of four EU Member States (France, Germany, UK and Spain, together "Member States") is leading the EU case, while the US Trade Representative ("USTR") is heading the US case. Airbus is fully supporting the European Commission in its preparation for and prosecution of its legal cases. Boeing is providing similar support to the USTR.

2. The US Case against the EU - DS316 (“the Airbus case”)

The US claims that Airbus receives billions of Euros in subsidies that are prohibited or otherwise inconsistent with WTO rules. This claim is a myth, and has been largely rejected by the WTO. The reality is that the financing Airbus received from the Member States is repayable with interest, as agreed to by the US in the 1992 Agreement.

In the original proceedings, the WTO panel found that financing by the Member States in the form of repayable launch investment (“RLI”) does not constitute a subsidy *per se*, in contrast to grants or industry-specific tax breaks. Instead, specific instances of RLI involved subsidies only to the limited extent that the interest due fell short of market rates. Moreover, the WTO confirmed that RLI does not constitute a prohibited subsidy.

Ultimately, however, the WTO found that individual instances of RLI, historic capital contributions to Airbus made in the 1980s and early 1990s, and a small number of infrastructure support measures, constitute subsidies that cause competitive harm in the market place. Specifically, the WTO attributed a small number of sales that Airbus won and Boeing lost, as well as market share losses by Boeing in a small number of markets, to the EU support. The WTO directed the EU to remove these adverse effects of the subsidies, or to withdraw the subsidies.

In response, in December 2011, the EU presented a comprehensive set of actions taken to address the WTO findings and recommendations. The US asserted that these steps were insufficient and decided to launch WTO proceedings to review the EU’s compliance measures.

The resulting compliance proceedings concluded in 15 May 2018. The Appellate Body established that the EU demonstrated that, because of the passage of time, non-subsidised investments by Airbus in the competitiveness of its products, and other market developments, there were no longer any adverse effects attributable to the subsidies and that withdrawal had been achieved.

The Appellate Body once more rejected US claims that RLI for the A380 and A350XWB were prohibited and rejected US claims that RLI for the A380 and A350XWB enabled Airbus to bring to market aircraft that it could not otherwise have launched and developed. The Appellate Body clarified that all aspects of the Airbus A320 and A330 programmes were in full compliance with WTO rules and that only some minor changes would need to be made by the EU and Airbus in relation to the A380 and A350XWB, to which the EU and Airbus responded within days by announcing a full set of compliance measures that will ensure that any remaining minor issues highlighted in the Appellate Body report are resolved. The changes announced by the EU and Airbus put the EU and Airbus in full compliance with all WTO rules.

On 29 May 2018, the EU requested WTO consultations with the US to review the appropriateness of these measures. These consultations took place end of June 2018. The compliance panel was composed on 28 September 2018. The compliance panel is not expected to complete its work before the end of 2019.

It is important to note that throughout these proceedings, the WTO has quashed 94% of Boeing's original claims, leaving only 14 of Boeing's original 234 claims remaining.

Following the Appellate Body report of 15 May, the US has publicly stated that it would consider settlement of this long-running dispute although this is something that Airbus has proposed on several instances. Despite these statements, the USTR has publicly stated its discontent regarding the second list of compliance measures and it has requested to the WTO the resumption of the arbitration proceedings to seek countermeasures.

Essential facts about the "Airbus case"

Consistent with the 1992 Agreement, financing by the Member States of Airbus aircraft through RLI is limited and repayable with interest. The WTO confirmed that RLI does not *per se* constitute subsidies; instead, individual instances of RLI have involved subsidization in the form of interest rate shortfalls from market benchmarks for RLI. This distinguishes RLI from most US support to Boeing in the form of grants and tax breaks, which do *per se* constitute subsidies and are never repayable.

The WTO confirmed that RLI does not involve export or local content contingencies, and therefore does not involve prohibited subsidies.

The WTO also confirmed in the original proceedings that all R&D programmes in the EU (European, national and regional) are fully compatible with WTO rules. This finding is especially relevant when compared to the WTO findings in the Boeing case that NASA and Department of Defense R&D subsidies caused adverse effects in the market.

The WTO also rejected the US challenge to support for the A380 production site (Aéroconstellation) in Toulouse, France. While the WTO previously found that support for the A380 production site in the Mühlenberger Loch facility in Hamburg, Germany, was a subsidy that contributed to adverse effects, Airbus has since agreed to increase rental payments, and the United States therefore abandoned its challenge. The WTO reversed previous findings stating that the EU has fully complied with respect to all pre-A380 subsidies. While the Appellate Body found that RLI for A380 and a tiny portion of A350XWB continued to cause adverse effects in the market, the measures submitted by the EU to the WTO in late May address these in full and puts an end to 14 years of WTO litigation against subsidies to Airbus.

3. The EU Case against the US – DS353 (“the Boeing case”)

In its WTO case against the US, the EU has challenged various US federal, state and local subsidies benefitting Boeing, totalling—as confirmed by the Appellate Body report—**USD 5-6 billion** in WTO-inconsistent subsidies disbursed between 1989 and 2006. In March 2013, the EU estimated that subsidies granted to Boeing after 2006 amounted to billions of additional dollars.

To help understand the extent of US government support to Boeing, it is worth quoting US President Barack Obama, who stated during a visit to Boeing's production facility in Everett in February 2012:

"{T}his {787 Dreamliner} is the first commercial airplane to be made with 50 percent composite materials. It's lighter, it's faster, it's more fuel-efficient than any airplane in its class. And it looks cool. The Dreamliner is the plane of the future. And by building it here, Boeing is taking advantage of a huge opportunity that exists right now to bring more jobs and manufacturing back to the United States of America.

...

*{W}e've always believed in the power of innovation. Innovation requires basic research. Look at this plane {a Boeing 787}. **This plane was first designed virtually using the same technology that was developed by NASA. Government research helped to create this plane.***

...

{A} lot of those ideas came out of government research. We've got to support this kind of cutting-edge research. We need to maintain our innovative edge, so that jobs and industries take root right here in the United States, not someplace else."

Essential facts about the "Boeing case"

- Washington State tax breaks granted for the period 2006-2024 amount to a subsidy valued at approximately USD 3 billion. These tax breaks were subsequently extended through the State's 777X incentive package, valued at an additional USD 8.7 billion which is the largest ever state-level subsidy package in the history of the United States. Industry specialists consider that these amounts could be sufficient to cover the entire cost of design and development of the 777X, essentially giving Boeing a "free ride" by offsetting completely its costs of developing and bringing the aircraft to market.
- The City of Wichita (Kansas) granted almost USD 500 million in the form of tax abatements on Industrial Revenue Bonds between 1989 and 2006, subsidies from which Boeing continues to benefit.
- Boeing was eligible for USD 2.2 billion in Foreign Sales Corporation export subsidies, despite previous WTO rulings that these are prohibited subsidies under WTO law. Eligibility continues today for certain Boeing transactions.
- The Appellate Body (AB) has confirmed that the Washington Tax subsidies and Foreign Sales Corporation subsidies, as well as the Wichita subsidies, enabled Boeing to win orders in the "single aisle" 100-200 seat market (Boeing 737 vs A320) over Airbus.

- NASA has provided Boeing with more than USD 2.6 billion in subsidies through eight NASA-funded federal research programmes, through direct payments and free access to facilities, equipment and employees. These subsidies continue to this day.
- The AB confirmed that the above programmes provided subsidies in the form of a direct transfer of funds or the provision of goods and services by NASA to Boeing, for which no fee is payable and for which Boeing acquired the commercial IP rights.

The AB confirmed moreover that the US Department of Defense (DOD), under its Research Development, Test and Evaluation programmes, has transferred to Boeing, at no cost, dual use technology worth up to USD 1.2 billion for direct use in Boeing's production of Large Civil Aircraft as well as free access to DOD's facilities. Boeing continues to benefit from subsidies under such programmes.

The AB clarified that the relations between NASA and DOD, on the one side, and Boeing, on the other, were akin to that of a joint venture, with the essential feature being that the fruits of the joint labour largely went to one partner, Boeing, which had generally provided none of the funding.

- NASA and DOD research and development subsidies enabled Boeing to develop key technologies, without which it would not have been possible to launch the 787 "Dreamliner" in 2004.
- The above research and development subsidies gave Boeing a competitive advantage, causing Airbus to lose sales campaigns. Airbus suffered losses to sales of the A330 and A350 models (i.e. in the 200-300 seat market) and was under threat of losing its share of certain export markets. Even where it was able to make sales, it had to make them at reduced prices because of the presence of the subsidized 787 on the market.
- Boeing's illegal subsidies adversely impact sales, market share and prices of the Airbus A320, A320neo, A330, and A350XWB families.

The US provided no evidence whatsoever of any real compliance with WTO findings and recommendations, which prompted the EU, on 11 October 2012, to request the establishment of a WTO compliance panel. That panel published a report in June 2017 in which it agreed with the EU that the illegal subsidies granted by the US to Boeing have not been removed. Instead, following the publication of the panel's findings in 2012, the US has actually provided additional illegal subsidies to Boeing. The compliance panel report agreed with the EU's demonstration that the harm that these measures caused to Airbus since 2012 is at least USD 15-20 billion.

The compliance panel's findings were appealed and, on 28 March 2019, the Appellate Body issued a report which rejected the US's arguments and preserved the EU's win before the panel. The Appellate Body also went a step further and broadened the scope of the EU's victory by finding that additional US federal and state programmes constitute subsidies, including:

- a South Carolina multi-county industrial park job tax credit subsidy;
- a South Carolina economic development bond subsidy;
- ongoing Foreign Sales Corporation/Extraterritorial Income tax exemptions;
- procurement contracts with the US DOD for research, development, test and evaluation and access to DOD facilities, equipment and employees; and
- industrial revenue bonds issued on Boeing's behalf by the City of Wichita.

4. Next steps

The EU, Member States, and Airbus have always publicly and vocally favoured resolution of the conflict through negotiation rather than litigation. The European side has made several concrete offers to the USTR and Boeing to this end.

The US position, on the other hand, has always been that European government support must be withdrawn entirely as a pre-condition to negotiation. A demand for unilateral surrender is obviously an unacceptable basis for discussions.

Whatever happens, Europe and the US will almost certainly be compelled to negotiate a new civil aircraft agreement of some description, eventually. The question is simply how long the US will drag out the dispute. Until the US is ready to adopt a reasonable position, the EU will request resumption of an arbitration concerning the amount of annually-recurring countermeasures it is permitted to take against US imports.