



## Airbus?: Setbacks Bring the Airbus/Boeing Subsidy Dispute Back Into the Spotlight

By: Jeffrey V. Sok<sup>1</sup>

On July 12, 2006, Gustav Humbert, the Chief Executive of Airbus, announced his resignation.<sup>2</sup> This announcement comes weeks after Airbus informed its clients delivery of the A380 would be delayed by at least six months because of problems with the installation of electrical wiring.<sup>3</sup> Recent trouble at Airbus, however, likely put more than a few smiles on the faces of the executives at Boeing as these two companies have been fierce rivals for decades. Airbus, a European company, and Boeing, an American company cannot seem to get along. Actually, it is not the companies that cannot get along but rather their respective countries. In fact, this rivalry has spilled over into the international arena with both the United States ("US") and the European Communities ("EC") requesting consultations within the World Trade Organization ("WTO").<sup>4</sup> This article will briefly discuss the current conflict between the US and the EC, actions taken by both sides, and what can be done to resolve this issue. Recent developments in the construction of the Airbus A380 have brought this issue back into the spotlight as both countries continue to play the "blame game." Currently, the issue is entrenched in the WTO dispute settlement system, with a decision expected in the upcoming months.

### WTO Action Taken by Both Parties

The central issue arising from this dispute is whether the US or EC has violated the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").<sup>5</sup> The SCM

<sup>1</sup> B.A. University of Illinois at Urbana-Champaign, J.D. The John Marshall Law School. The author is currently a full time lecturer in the graduate school of law at Assumption University (Bangkok, Thailand).

<sup>2</sup> BBC, *EADS and Airbus Bosses Both Quit* (July 2, 2006), available at <http://news.bbc.co.uk/2/hi/business/5138840.stm> (last visited July 3, 2006).

<sup>3</sup> BBC, *Airbus Confirms Super-Jumbo Delay*, (June 1, 2006), available at <http://news.bbc.co.uk/2/hi/business/4598779.stm> (last visited July 3, 2006).

<sup>4</sup> *American Flies to War*, *ECONOMIST*, Oct. 7, 2004.

<sup>5</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization - Results of the Uruguay Round, art. 1.1, available at [http://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](http://www.wto.org/english/docs_e/legal_e/24-scm.pdf) [hereinafter SCM].



Agreement is important because it defines what a subsidy is and distinguishes between prohibited<sup>6</sup>, actionable<sup>7</sup>, and non-actionable subsidies<sup>8</sup>. The SCM Agreement, unlike previous agreements, defines a subsidy as: "(i) A financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit."<sup>9</sup> Using this definition, both nations have accused the other of violating the SCM Agreement. The US and EC attempted to solve the dispute with bilateral trade talks but the US left the bargaining table when Airbus applied for further aid in the development of its A350 airplane.<sup>10</sup> Finally, these accusations culminated by the US filing a request for consultations<sup>11</sup> with the WTO.<sup>12</sup> The European Communities wasted no time in replying and filed a request for consultations the very same day.<sup>13</sup> Consultations were held on November 5th, 2004 and during these meetings the matter could again not be resolved.<sup>14</sup> The dispute has been bouncing back and forth within the WTO dispute settlement system and culminated with the EC filing a request for the establishment of a panel on January 23, 2006.<sup>15</sup> Whatever the outcome, the new dispute settlement system offers the winning

<sup>6</sup> "Subsidies contingent upon export performance, or upon the use of domestic over imported goods, are prohibited by Article 3 of the SCM Agreement." *Id.* at Art. 3

<sup>7</sup> "Actionable subsidies are not prohibited, but they can be challenged through dispute settlement if they cause adverse effects to another member." "Adverse effects include injury to the domestic industry, serious prejudice in the subsidizing members market, or impairment of market access due to the subsidy." *Id.* at Art. 5

<sup>8</sup> Non-actionable subsidies cannot be challenged nor are they subject to any countervailing measures. This is allowed because they are unlikely to cause an adverse effect or they are considered to be of value. These subsidies exist in the form of; research subsidies, assistance to disadvantaged regions, and environmental subsidies. *Id.* at Art. 8.

<sup>9</sup> *Id.* at Art. 1

<sup>10</sup> *Boeing v. Airbus*, ECONOMIST, Jun. 2, 2005.

<sup>11</sup> The process of dispute settlement (in brief) for the WTO is as follows: consultation (60 days), panel appointed (45 days), appeal (60-90days). There are various steps within each level of dispute settlement and the matter is only appealed if one of the parties chooses to do so. See *Understanding the WTO: Settling Disputes*, available at [http://www.wto.int/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.int/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited July 9, 2005).

<sup>12</sup> Request for Consultations by the United States, European Communities & Certain Member States - Measures Affecting Trade in Large Civil Aircraft, WT/DS316/1 (Oct. 12, 2004).

<sup>13</sup> Request for Consultations by the European Communities, United States - Measures Affecting Trade in Large Civil Aircraft, WT/DS317/1 (Oct. 12, 2004).

<sup>14</sup> Request for the Establishment of a Panel by the European Communities, United States - Measures Affecting Trade in Large Civil Aircraft, WT/DS317/5 (Jan. 23, 2006).

<sup>15</sup> *Id.*



party some recourse if the offending party chooses not to comply with the decision.<sup>16</sup>

### U.S. Complains of Launch Aid Given to Airbus

Launch aid in its simplest form is a repayable loan made by governments to Airbus to provide financial assistance in the development and building of new aircraft.<sup>17</sup> So if the government is loaning money to Airbus that is to be paid back why is the U.S. so intent on calling this aid a subsidy? Launch aid is really a loan that may need to be paid back, but only if the aircraft it was earmarked for is profitable. This shifts the burden of risk from Airbus to the taxpayers.<sup>18</sup> If Airbus is not successful and does not sell enough planes to repay the debt, the cost is borne by the taxpayers - and not Airbus.<sup>19</sup> The A380 is not the first aircraft in which Airbus has received this type of aid. Airbus has used this aid to develop and introduce five products within the last ten years.<sup>20</sup> In that same time period Boeing has only been able to develop one new product.<sup>21</sup> With the recent A380 developments announced by Airbus, many airlines have threatened to cancel their orders. Airbus received about US\$ 3.7 billion (140 billion baht) to develop the A380. It is too early to determine if the delay will have any substantial effect on the amount of aircraft Airbus actually delivers; but if it does, they might be saved from financial hardship by the launch aid.

<sup>16</sup> Richard O. Cunningham, *Subsidies to Large Civil Aircraft Production: New WTO Subsidy Rules and Dispute Settlement Mechanism Alter Dynamics of U.S. -E.U. Dispute*, 14-FALL AIR & SPACE LAW 4 (Fall 1999).

"Under the new DSU, however, panel reports are effective unless there is a consensus against the panel report. This means...the EU would not be able to block a WTO panel report finding Airbus subsidies to be inconsistent with the EU's WTO obligations. Accordingly, failure to comply with the recommendations of a panel decision...would require the EU to defy the WTO system. Moreover, such defiance would be met by the WTO authorizing the United States 'to take appropriate countermeasures'.

<sup>17</sup> 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](http://www.businessweek.com/bwdaily/dnflash/mar2005/nf20050321_4418_db046.htm)

<sup>18</sup> *Id.* "That government money has shielded Airbus from the same market risks that 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."

<sup>19</sup> *Id.*

<sup>20</sup> Marc C. Mathis, Comment, *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 Obsolescence Under the World Trade Organization*, 13 TULSA J. COMP. & INT'L. 177 (2005).

<sup>21</sup> *Id.* at 178



## EC Complains of State Subsidies Given to Boeing

The EC counters the United States' launch aid argument with the argument that Boeing receives subsidies from individual states and government agencies. The subsidies claimed by the EC include benefits derived from the State of Washington, the State of Kansas<sup>22</sup>, the State of Illinois (City of Chicago)<sup>23</sup>, the National Aeronautics and Space Administration (NASA)<sup>24</sup>, and the Department of Defense.<sup>25</sup> Boeing does not receive what is known as launch aid in the subsidies complained of but rather tax-breaks from local municipalities to build facilities for the construction of aircraft. The EC argues this type of aid violates the SCM Agreement.

Boeing counters that what they receive is not subsidies but economic development tax breaks<sup>26</sup> and furthermore, Airbus has received the same type of economic development in the US and Europe.<sup>27</sup> For instance, EADS<sup>28</sup> (Airbus' parent company) received more than US\$8 million (302 million baht) to build a new assembly factory in Mississippi.<sup>29</sup> Additionally, it can be stated, without argument, that economic development tax breaks do not provide the same protection that launch aid does.<sup>30</sup> Launch aid shields the entity receiving it from suffering financial hardship if a product

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<sup>21</sup> *Id.* at 178

<sup>22</sup> Financial incentives include: bond financing, property tax abatement, sales tax abatement and industrial revenue bonds.

<sup>23</sup> Tax incentives include: reimbursement of relocation expenses, property tax abatements and payments pursuant to the Illinois Large Business Development Act.

<sup>24</sup> The EC claims NASA transfers economic resources on terms more favorable than available on the market or not at arm's length to the US large civil aircraft industry. WT/DS317/5, *supra* note 14.

<sup>25</sup> Constitution of the Panel Established at the Request of the European Communities, Note by the Secretariat, United States - Measures Affecting Trade in Large Civil Aircraft, WT/DS317/4 (Oct. 25, 2005). This document details each and every complaint of subsidies provided by each state or governmental entity but makes no determination of whether the aid violates the SCM agreement.

<sup>26</sup> Economic development tax breaks are commonly used by municipalities to entice corporations to locate offices, factories, or warehouses. These relocations produce jobs and increased tax revenue over the long run. For example, the City of Chicago offered Boeing tax abatements to convince them to move their corporate headquarters to Chicago. See note 21.

<sup>27</sup> Holmes, *supra* note 16.

<sup>28</sup> America Flies to War, *supra* note 4. Airbus is owned by EADS (80%) and BAE Systems (20%). The consortium includes the governments of Germany, France, Britain and Spain.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

fails, whereas the tax breaks only allow a freezing or abatement of taxes due and do not affect the financial outcome of the entity if a developed product fails.<sup>31</sup> This being said, it can be argued Airbus not only receives launch aid to allow it to develop new products without the fear of going bankrupt if the product fails but they also receive economic development tax breaks in the US. Airbus seems to be double dipping in the “subsidy grab bag” and stands to lose big if the WTO rules against them. However, it is unlikely the WTO would rule only against the EC because the US does not come to the table with entirely clean hands. Boeing, in developing its 787 Dreamliner, entered into a risk-sharing agreement with three Japanese firms.<sup>32</sup> This US\$1.5 billion (56 billion baht) deal is seen as some, as amounting to the same launch aid the US complains Airbus receives from the EC.<sup>33</sup> The aid from Japan is designed to develop and build the wings of the aircraft and shifts some of the burden from Boeing to the Japanese companies.<sup>34</sup>

### The Future of the Trade Dispute

Airbus recently announced it was having problems installing the electrical wiring of its planes that will ultimately delay the delivery of the A380. Early estimates show the delay will cost Airbus about US\$640 million a year (24 billion baht) “between 2008 and 2010” in lost profits.<sup>35</sup> This delay will spark interest in the already long-running dispute, as Airbus can rest assured no one will be knocking on its door to collect the US\$3.7 billion in launch aid given to develop the A380. With any luck, this dispute will come to an end with a final determination by the WTO and with both parties adhering to the decision. Although it is possible either side may choose to ignore the decision, it would be in the best interests of both parties to comply. Blatant disregard for the decisions from the WTO does not send the right message to the other members of the organization and may signal a weakness in the world of international trade and diplomacy. The international community can only hope that both sides recognize that problem and that both sides ultimately make the correct choice.

<sup>31</sup> Id.

<sup>32</sup> Boeing v. Airbus, *supra* note 10.

<sup>33</sup> America Flies to War, *supra* note 4.

<sup>34</sup> Id.

<sup>35</sup> Stuck on the Runway, *ECONOMIST*, Jun. 15, 2006.