



EU requests WTO consultations on extension of State of Washington subsidies to Boeing 777x

Memo

Geneva, 19 December 2014

On 19 December 2014, the European Union requested WTO consultations on the extension until the end of 2040 of subsidies originally granted by the State of Washington to Boeing and other US aerospace firms until 2024. In 2012, the WTO found the original subsidies schemes – which were supposed to expire in 2024 – to be inconsistent with its rules.

The extended subsidies are prohibited under the WTO Subsidies and Countervailing Measures Agreement, because they require the beneficiary to use domestic goods rather than imported ones. The subsidies scheme extension is estimated to be worth US \$8.7 billion and will be the largest subsidy for the civil aerospace industry in US history.

A request for consultations is the first procedural step in WTO dispute settlement procedures to settle trade irritants. Both parties normally have 30 days (or longer if mutually agreed) to find a satisfactory solution. In the event that the consultations fail to resolve the EU's concerns, it can request a WTO Panel to rule on the WTO-compatibility of the disputed measure.

General Context

Since October 2004, the EU and US have been contesting in the WTO their governments' respective support to their aerospace industries. Both WTO challenges relate to alleged WTO-incompatible support to Airbus and Boeing over a 20 to 30 year period.

Prior to these WTO challenges, US and EU government support to their aircraft producers had been regulated by the so-called 'Bilateral EU-US Agreement on Trade in Large Civil Aircraft'. This agreement, concluded in 1992, allowed each party to provide a certain level of support to their respective aircraft industries.

In the EU's case, the agreement permitted granting of so-called 'Repayable Launch Investment' to Airbus i.e. loans repaid with interest under terms specified in the agreement.

In the US' case, it allowed a certain level of government-financed support to the US aerospace producer Boeing for research and development. To monitor compliance

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with the terms of the bilateral agreement, annual meetings and regular exchanges of information took place.

On 6 October 2004, the US unexpectedly and unilaterally announced its withdrawal from the 1992 agreement and immediately filed a challenge at the WTO on all EU support ever granted to Airbus, even though the US had previously agreed to this support.

The EU was left with little option other than to immediately challenge US government support to the US aerospace industry (i.e. Boeing) by Federal, State and local authorities. The challenge 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 repeatedly having been found to violate WTO rules.

These two parallel WTO challenges – the 'Airbus case' (DS 316: the US challenge of EU support for Airbus) and the 'Boeing case' (DS 353: the EU challenge of US support to Boeing) – have followed different timetables, though both were initiated on 6 October 2004.

In the 'Airbus case', the WTO panel made its report public on 30 June 2010, followed by the Appellate Body report in 18 May 2011. The EU has fully complied with its WTO obligations thanks to the comprehensive set of actions presented in December 2011. On 17 April 2012, the US expressed its concerns as to whether the EU was fully complying and requested the establishment of a compliance panel to review whether the measures adopted by the EU achieved full compliance with the panel and Appellate Body reports. Litigation is on-going.

In the 'Boeing case', the panel issued its final public report on 31 March 2011, followed by the Appellate Body report on 12 March 2012. On 24 September 2012 the US submitted a compliance notice. The EU requested the establishment of a WTO compliance panel on 11 October 2012. On 23 October 2012, a compliance panel was set up to address the failure of the US to remove WTO-inconsistent subsidies to Boeing. Litigation is currently ongoing. The compliance phase of the dispute is expected to continue until 2016.

In this context, the EU is also concerned about the November 2013 decision of the State of Washington to extend until the end of 2040 a subsidies scheme (originally available until 2024), despite the fact that similar subsidies have already been declared WTO inconsistent in the context of this dispute in 2012. The value of the subsidy extension is estimated at US \$8.7 billion. The compliance panel rejected the EU's request to examine the extended measures for procedural reasons, and stated that the EU would need to start new proceedings.

The EU's challenge to US subsidies to Boeing (Dispute Settlement Case No. 353)

In its WTO challenge against the US, the EU has challenged various US Federal, State and local subsidies benefitting Boeing. The Appellate Body (AB) report confirmed the total value of the WTO-inconsistent subsidies disbursed between 1989 and 2006 to be **US\$ 5-6 billion**. Subsidies to be granted after this date are estimated to be worth at least **US\$3.1 billion**. It is in addition to this amount, the extension of the Washington State subsidies would grant US \$8.7 billion to Boeing.

Essential facts about the Boeing case

1. NASA has provided Boeing with more than US\$2.6 billion in subsidies under eight NASA-funded federal research programmes through direct payments and free access to facilities, equipment and employees.
2. The WTO's Appellate Body 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 Intellectual Property rights.
3. The Appellate Body confirmed moreover that under its Research Development, Test and Evaluation programmes the US Department of Defence (DOD) has transferred to Boeing, at no cost, dual use technology worth up to US\$1.2 billion for direct use in Boeing's production of Large Civil Aircraft as well as free access to the DOD's facilities.
4. The Appellate Body clarified that the relations between NASA and the DOD and NASA and Boeing were akin to that of a joint venture, with the essential feature that the benefits largely went to Boeing, which had provided none of the funding.
5. Boeing continued to be eligible for US\$2.2 billion in Foreign Sales Corporation export subsidies, despite previous WTO rulings that these are prohibited subsidies under WTO law. Between 1989 and 2006, the City of Wichita (Kansas) granted almost US\$ 500 million in the form of tax abatements on Industrial Revenue Bonds..
6. Washington State tax breaks to be granted for the period 2006-24 amount to a subsidy value of close to US\$3.1 billion.
7. 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.
8. The above research subsidies gave Boeing a competitive advantage causing Airbus to lose sales campaigns, thus losing sales of the A330 and A350 models

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(i.e. in the 200-300 seat market) and threatening to lose its share of certain export markets. Even where it was able to sell aircraft, it had to do so at reduced prices because of the presence of the subsidized 787 on the market.

9. The Appellate Body has also confirmed that the Washington Tax subsidies, Foreign Sales Corporation subsidies and the Wichita subsidies enabled Boeing to beat Airbus in winning orders in the 'single aisle' 100-200 seat market (Boeing 737 vs A320)
10. Boeing's illegal subsidies adversely affect sales, market share and prices of Airbus' A320, A320 neo, A330, A350xWB and the A380 families of Large Civil Aircraft (LCA).

Proceedings in the Boeing case

Following the final report of the Appellate Body in the DS 353 case adopted by the Dispute Settlement Body on 23 March 2012, the US compliance period ended on 23 September 2012. On 24 September 2012, the US submitted a compliance report.

After EU review of the US compliance claims, on 25 September 2012 the EU submitted a request for consultations on US compliance under Article 21.5 of the Dispute Settlement Understanding and on 27 September 2012 a request for the authorisation of countermeasures under Article 22.2 of the DSU.

After compliance consultations where the US failed to provide detailed evidence to the EU to support its compliance claims, on 11 October 2012, the EU requested the establishment of a WTO compliance panel to address the failure of the US to remove WTO-inconsistent subsidies. On 23 October 2012, a compliance panel was set up; litigation is ongoing.

US challenge of EU support to Airbus (Dispute Settlement Case No. 316)

The European Commission welcomed the WTO Appellate Body report on the Airbus case. The Appellate Body overturned several key findings made by the Panel in favor of the EU. Most importantly, the Appellate Body found that support provided by Germany, Spain and the UK for the launch of Airbus' A380 aircraft is not a prohibited export subsidy under WTO Law. It also rejected the US appeal that other instances of Repayable Launch Investment (RLI) were export subsidies.

Essential facts about the Airbus case

The Appellate Body report contains a number of clear findings - vindicating many of the EU's long held positions, including:

1. Repayable Launch Investment (RLI) for the A380 granted by France, Germany, Spain and the UK is not a prohibited export subsidy;
2. All research and development programmes in the EU (European, national and regional) are fully compatible with WTO rules, especially relevant when compared to the findings on NASA and US Department of Defense support in the Boeing case;
3. Treatment of infrastructure: the US challenge on Aéroconstellation in France was fully rejected and the finding on the Mühlenger Loch facility in Hamburg much improved;
4. The French government's transfer of its interest in Dassault Aviation to Aerospatiale in 1998 was not a subsidy;
5. The Appellate Body reduced the element of subsidy that can be given under RLI, giving greater weight to the EU's proposed benchmark. It also substantially reduced the impact of adverse effects findings made by the Panel, reflecting the limited damage to Boeing from Airbus subsidies.
6. The EU has fully complied with its WTO obligations thanks to the comprehensive set of actions presented in December 2011.

Certain 'actionable subsidy' findings do remain, even though the economic impact of these support measures in the Large Civil Aircraft (LCA) market has been found to be very limited. RLI may contain an element of subsidy but nowhere near the alleged US\$ 15-20 billion. Certain old equity infusions and restructuring measures by France and Germany, infrastructure measures in Germany and certain regional grants by Spain and Germany also remain.

Proceedings the Airbus case

Following the final report of the Appellate Body in the DS 316 case adopted by the Dispute Settlement Body on 1 June 2011, the EU presented a comprehensive set of actions in December 2011 bringing its measures in conformity with its WTO obligations.

On 9 December 2011, the US requested consultations on EU compliance under Article Article 21.5 of the Dispute Settlement Understanding. On 30 March 2012, the US requested the establishment of a compliance panel. This was set up on 17 April 2012. Litigation is ongoing.