
How WTO Sanctions Are Hurting Aircraft Exports

Does the imposition of trade sanctions for non-compliance remedy the granting and maintenance of illegal export subsidies to aircraft manufacturers?

ABSTRACT

This paper broadly analyses the implications of non-compliance with the rulings of the Dispute Settlement Body (the “DSB”) of the World Trade Organization (the “WTO”) and the remedies provided by WTO law. Non-compliance opens the gateway to the imposition of remedies, affects free trade and hinders the objectives of the system. This problem is strongly evidenced in important markets such as those of aircraft manufacture and export. This paper aims at establishing the justification for finding alternative answers to the imposition of trade barriers, advocating for the exclusion of the defaulted Member of the WTO (the “Member(s)”), until compliance with the DSB’s rulings.

TABLE OF CONTENTS

1. Introduction	4
2. Subsidies, Non-compliance and Countervailing Measures	5
2.1. Subsidies are not illegal per se	5
2.2. The “ <i>Enough reasons to believe</i> ” clause substantiates non-compliance claims	7
2.3. Countermeasures need to be ‘appropriate’	8
3. The Impact of Retaliatory Action on Aircraft Exports	10
4. Some Concluding Remarks	13
Bibliography	15

1. INTRODUCTION

Subsidies are governmental interventions that artificially stimulate certain industries and enterprises, affecting international free trade.¹ Subsidies have been present in the aviation industry from its inception, most likely because this young industry required fostering and developing, because aviation was a matter of national defence and because airlines were conceived as a national pride.² In the United States, for example, the Civil Aeronautics Act of 1938 allowed subsidies in favour of the operation of international air services³ – later proscribed through the *Airline Deregulation Act* of 1978.⁴ The situation was not too different in Europe: originally, the European Commission linked subsidies to the concept of ‘governmental measures’ and conceived the concept of ‘permissible State aid’⁵ in spite of the fact that the aviation industry was far from underdeveloped.⁶

In the current context of the WTO, subsidies are dealt with under Article XVI of the General Agreement on Tariffs and Trade (the “GATT 1994”),⁷ and developed by the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”).⁸ Air transport services are contained in Annex 1B of the General Agreement on Tariffs in Services (the “GATS”);⁹ however, most of these services are carved out of the WTO regime.¹⁰ This exemption could be explained by the fact that international air transport services remain heavily linked to the prevailing regime of bilateral Air Services Agreements, containing ownership and control requirements, which States seem unwilling to eliminate. Otherwise, the provision of these services would be subjected to the multilateral *free* trading regime and its rules, diminishing States’ bilateral negotiation leverage.¹¹

Despite the fact that the majority of air transport services are not subject to the jurisdiction of the WTO, 32 Members entered into the plurilateral Agreement on Trade in Civil Aircraft, in force from 1 January 1980 (the “ATCA”).¹² The ATCA, however, does not improve the panorama on subsidies, as it is a plurilateral, instead of a multilateral agreement – making it difficult to test the effectiveness of its rules in the larger sense of international trade of civil aircraft; and its references to the GATT

¹ Gössling, Fichert, and Forsyth (2017), p. 2.

² Berge (1951), pp. 1-11.

³ Barnes, (1956), pp. 311-322.

⁴ Eaton (1996), pp. 147-132. *See also*: Havel (2009), p. 98.

⁵ Eaton (1996), p. 149.

⁶ Gössling, Fichert, and Forsyth (2017), p. 4.

⁷ GATT 1994.

⁸ SCM Agreement.

⁹ GATS 1994.

¹⁰ Under Article 2 of the AATS 1998, the provisions of the GATS 1994 are not applicable to (a) traffic rights, however granted and (b) services directly related to the exercise of traffic rights.

¹¹ Havel (2009), p. 98 footnote No. 2 and pp. 98-99.

¹² *Agreement on Trade in Civil Aircraft*. This Agreement has 32 signatories, eliminates import duties on aircraft – except for military aircraft – and on civil aircraft engines, their parts and components, sub-assemblies of civil aircraft and flight simulators.

subsidies provisions, fail to proscribe export credit restrictions.¹³ Therefore, the ATCA does not achieve – even for the signing Members – a more uniform (*free*) regime for the trade of aircraft manufacturers.¹⁴

The lack of uniformity of trade provisions for all stakeholders of the aviation industry, ultimately allows for certain portions of the aviation value chain to fall within the multilateral trade regime of the WTO. This circumstance plays an important vertical and horizontal role in relation to competition in all levels of this value chain.

One of its biggest stakeholders are aircraft manufacturers; the fact that this industry is indeed subject to the WTO regime, heavily impacts the aviation industry and the economy of a country as a whole. In the United States, for example, civil aviation – particularly, aircraft manufacturing – is the nation's top net export.¹⁵ Its importance derives from the fact that the product is high-tech, high-valued, fast-developing and provides qualified jobs, fostering the national economy. These characteristics encourage governments to support their national aircraft manufacturers; in this case, through subsidization.

2. SUBSIDIES, NON-COMPLIANCE AND COUNTERVAILING MEASURES

The WTO regime does not in itself prohibit the granting and maintenance of all subsidies; however, when such an act entails a breach of the obligations under the SCM Agreement – as determined by the DSB – the Member is required to bring its internal measures to compliance with the system, aiming to restore international trade.

The problem arises when the breaching Member fails or refuses to comply with the recommendations issued by the DSB, leaving the complaining party with a WTO ruling in paper, no compensation and artificially altered trade in the relevant industry. This is where countervailing measures and remedies become applicable.

2.1. Subsidies are not illegal *per se*

Article XVI of the GATT does not *de iure* prohibit all subsidies but regulates them with the objective of preventing artificial altering of trade between Members. This provision is to be read in conjunction with Article XXIII of the GATT, that introduces the concept of ‘nullification and impairment’, which allows for the imposition of retaliatory measures to the same extent as that of the benefits affected.¹⁶

The SCM Agreement develops the regime by prohibiting Members from granting and/or maintaining subsidies that are targeted to a specific industry, sector or enterprise.¹⁷ The SCM Agreement requires that such governmental action, *directly* or *indirectly*, artificially increases – or encourages – imports or exports in and out of the Member's territory.¹⁸ The regime recognizes that

¹³ Kleiner (2002), p. 135. Levick (1993), pp.450-451.

¹⁴ O' Cunningham, (1999), p. 4.

¹⁵ FAA Report (2014) p. 3.

¹⁶ Article 22:6 of the DSU. Articles 1, 4.2 and 7.10 of the SCM Agreement

¹⁷ Article 2 of the SCM Agreement.

¹⁸ Article 1 of the SCM Agreement.

the granting of subsidies harms the economy in a larger scale, as it causes unjustified disturbances of international commercial interests, trumping with the object and purpose of WTO law.¹⁹

Article 1 of the SCM Agreement establishes two elements for the existence of a subsidy: (i) a financial contribution or an income or price support provided by a government agency, and (ii) a – consequential – benefit, provided that the measure is ‘specific’ in the terms of Article 2. Particularly, in relation to the export industry Article 3 of the SCM Agreement states:

“Article 3: Prohibition.

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(...)

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.” (Emphasis added)

Annex I of the SCM Agreement provides an illustrative list of prohibited subsidies, including “*the provision by governments of direct subsidies to a firm or an industry contingent upon export performance”, “*currency retention schemes or any similar practices which involve a bonus on exports”, “*the full or partial exemption remission, or deferral specifically related to exports or direct taxes”, “*the allowance of special deductions directly related to exports or export performance”, etc.*²⁰***

Export subsidies, particularly those provided in the aircraft manufacture sector, are difficult to determine due to the fact that, aside from the obvious requirement of market specificity, the DSB will have to determine their actual impact in the industry. Aircraft manufacture involves the manufacture of separate parts and portions of the aircraft – just as any other high-tech industry – which can make the determination and assessment of the impact of a given subsidy in the market of another Member, a bit more difficult. Ultimately, this creates a challenge in the quantification of the ‘appropriate’ countermeasure available to the complainant, in the terms of Article 4 of the SCM Agreement.

In this sense, whenever a Member “*has reason to believe*”²¹ that another Member is granting or maintaining a prohibited subsidy – in this case, a *prohibited export* subsidy – it has the option to

¹⁹ In this sense see: Brazil – Export Financing Programme for Aircraft – Panel Report, ¶7.26: “*The object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade*”. In the same sense see: Canada – Measures affecting the Export of Civilian Aircraft – Panel Report, ¶9.119: “*The object and purpose of the SCM Agreement could more appropriately be summarized as the establishment of multilateral disciplines ‘on the premise that some forms of government intervention distort international trade [or] have the potential to distort [international trade]’*”.

²⁰ Annex I, SCM Agreement (emphases added).

²¹ Article 4.1 of the SCM Agreement.

request consultations with regard to the existence and nature of the challenged measure,²² to arrive at a mutually agreed solution.²³ Should direct negotiations fail, the complainant may refer the matter to a Panel constituted by the DSB.²⁴ If the Panel determines that the challenged measure constitutes a prohibited export subsidy, it issues a recommendation to the subsidizing Member to withdraw the challenged measure without delay, on a reasonable period of time. The respondent Member can appeal the Panel Report before the WTO Appellate Body, who will issue its own Report; as soon as the DSB adopts it, it shall be “*unconditionally accepted by the parties to the dispute*”.²⁵

2.2. The “*Enough reasons to believe*” clause substantiates non-compliance claims

Ideally, the defeated Member will adopt the final ruling of the DSB and bring its challenged measures to compliance with its international trade obligations. However, the WTO regime foresees the possibility of non-compliance, creating two different consequences for the Members: On one hand, it creates the obligation for the defeated Member to bring its measures to compliance.²⁶ As established by the Arbitrators in *Brazil – Export Financing Programme for Aircraft*, the rationale of this obligation is the same as that of the Articles of State Responsibility for Internationally Wrongful Acts.²⁷

On the other hand, it subjects the Members to the dispute settlement system, further from the mere issuance of a ruling, into the enforcement of the ruling itself. The WTO dispute settlement regime is the cornerstone of the multilateral trading system.²⁸ However, several problems have been identified in relation to the enforceability of the system itself, including a lack of incentives for prompt compliance, a lack of effective alternatives to trade sanctions and the lack of assessment of the actual impact of such sanctions over private actors.²⁹ In the context of non-compliance in abstract, Article 19:1 of the DSU states that a breach of the WTO rules entails a ‘recommendation’ of the DSB to the Member to bring the challenged measure to conformity with the relevant agreement. Should the defeated Member not comply with the ruling, Article 22:2 permits the complainant to “*request authorizations from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements*”.³⁰ The DSU goes as far as to state that

²² Article 4.2 of the SCM Agreement.

²³ Article 4.3 of the SCM Agreement.

²⁴ Article 4.4 of the SCM Agreement. The Panel may request the assistance of the Permanent Group of Experts of to determine the existence of a breach of any of the obligations of WTO law.

²⁵ Article 4.9 of the SCM Agreement.

²⁶ *Regarding the Member’s obligation to comply with WTO rulings see: Japan –Alcoholic Beverages – Appellate Body Report*, p. 13.

²⁷ *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil*, ¶¶ 3.44 - 3.45.

²⁸ See: Horlick (2004), p. 171. Article 3(2) of the DSU.

²⁹ Horlick (2004), p. 172.

³⁰ Article 22:2 of the DSU (emphasis added).

“[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members”³¹
(emphasis added).

2.3. Countermeasures need to be ‘appropriate’

In line with this mandate, the SCM Agreement allows the complainant to request authorisation by the DSB to “*take appropriate countermeasures*” in case of non-compliance.³² Countermeasures can usually involve the lifting of trade barriers by the respondent Member and those will be determined by the complainant, or by the appointed arbitrators under the DSU.³³ Under Article 22:3 of the DSU, however, countermeasures are intended to be imposed after the mandatory escalation procedure, and subject to the parties’ inability or unwillingness to reach a compensation agreement.³⁴ Notably, the general principle under WTO law is that countermeasures are to be imposed in the same sector.³⁵ To determine the ‘reasonable time’ of compliance and the extent and nature of the ‘appropriate’ measures of compensation and/or retaliation³⁶ the system allows recourse to arbitration, provided that the “[authorized level of suspension be] *equivalent to the level of nullification or impairment*” vis-à-vis the impairment of trade with the defending Member.³⁷

Article 4 of the SCM Agreement is structured in the same way, highlighting that countermeasures cannot be disproportionate simply on the grounds of the finding that a given subsidy was in fact a *prohibited* subsidy.³⁸

Paradoxically, the possibility of authorizing trade sanctions gives leverage to the winning Member to force the respondent to comply with the DSB’s ruling (*i.e.* to regain the freedom of trade that the Member has nullified and impaired); but at the same time, the imposition of such sanctions hinders free trade “*and provokes ‘sanction envy’*”.³⁹ The paradox increases, because the imposition of the trade sanction under WTO law does not, in principle, allow for punitive damages, reducing the leverage of the winning Member especially when the economies are dissimilar in size and power.⁴⁰

³¹ Article 21:1 of the DSU.

³² Article 4.10 of the SCM Agreement (emphasis added). This possibility is derived from the general provision of Article 22:6 of the DSU.

³³ As established by Article 22:6 of the DSU.

³⁴ Notably, compensation lacks real effect because it does not effectively lower trade barriers. This leads to the imposition of retaliatory measures that will inevitably cause additional harm to both the complainant, the respondent and the international trading system, as it affects additional markets and products. *In this sense see:* Horlick (2004), p. 177.

³⁵ Article 22:3 of the DSU.

³⁶ Article 22:6 of the DSU. Article 7.10 of the SCM Agreement

³⁷ Article 2:4 of the DSU.

³⁸ Article 4:10, footnote 9 of the DSU.

³⁹ Charnovitz (2001), p. 792.

⁴⁰ Ali (2003), p. 4.

Ultimately, this paradox becomes an incentive of non-compliance at least until countermeasures are imposed, if any.⁴¹

EC-Bananas and *EC-Hormones* are the perfect examples of non-compliance and of the effectiveness – or lack thereof – of countermeasures which ultimately aggravated the violations of WTO law:

In *EC-Bananas*, Ecuador, México, Guatemala and the United States challenged the European discriminatory restrictions imposed on the import of bananas.⁴² The Panel Report established the violations derived from the EU's measures,⁴³ which ideally entailed their obligation to comply with WTO law.⁴⁴ However, the EU failed to bring its breaching measures to compliance, allowing the complainants to request authorization to suspend tariff concessions. Considering its size and leverage on the market, the United States imposed 100 tariffs on specific products originating from several European countries.⁴⁵ Ecuador, however, in spite of being authorized to impose restrictions equivalent to USD\$202 million,⁴⁶ did not impose them precisely because of its lack of leverage.

This behaviour evidences the power struggle between a *smaller* complainant and a *bigger* respondent in relation to enforceability. Effectively, the imposition of countermeasures affects the smaller 'winning' Member's economy twice: Prior to the ruling of the DSB, it suffers the direct negative effects of the illegal measure. After the decision of the DSB and its corresponding retaliation for non-compliance of the respondent, it inevitably suffers additional injuries, be it in the relevant industry of the dispute, or in another sector as authorized by the Arbitrators of the case. While countermeasures are designed to be temporary, the fact that imposition does not guarantee that the breaching Member will modify its behaviour, renders the measures ineffective in practice.⁴⁷

In *EC-Hormones*, the United States and Canada activated the WTO's dispute settlement mechanism against the EU, challenging its restrictive measures on the import of meat produced with the aid of growth hormones.⁴⁸ The Panel found that the measure breached the Agreement on the Application

⁴¹ Ali (2003), pp. 6 and 9: "Robert Hudec's study of the implementation of panel reports in the GATT era shows that the complaining party received full satisfaction in 60% of the cases and partial satisfaction in 29% out of the 139 complaints launched until 1989". See also: Robert Hudec's study of the implementation of panel reports in the GATT era shows that the complaining party received full satisfaction in 60% of the cases and partial satisfaction in 29% out of the 139 complaints launched until 1989". See also: Charnovitz (2001), p. 794.

⁴² Bahla (2000), p. 839.

⁴³ *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Appellate Body Report*.

⁴⁴ The Panel of Arbitrators established to determine the period of time allotted for compliance established that the EU was to comply within 15 months: *EC – Bananas – Recourse to Arbitration by the EC*.

⁴⁵ The Guardian (5 March 1999). Charnovitz (2001), p. 795, footnote 22: "Actually, the U.S. government jumped the gun by acting on March 3, 1999, to impose a contingent liability for duties on imports. Office of the U.S. Trade Representative [USTR], Press Release 99-17 United States Takes Customs Action on European Imports (Mar. 3, 1999)."

⁴⁶ *EC – Bananas – Recourse to Arbitration by the EC*.

⁴⁷ Lawrence (2003) p. 4. See also: Meltzer (2001). Ali (2003), p. 15.

⁴⁸ Wirth (1998).

of Sanitary and Phytosanitary Measures⁴⁹ and allotted the EU with a period of 15 months to adjust its measures with its WTO obligations.⁵⁰ The EU did not comply with the ruling, leading the United States and Canada to impose 100% of duties on certain European products.⁵¹ In the words of one commentator:

“The problem is that retaliation is most useful in its threat stage (...) once you actually have to implement retaliation, it may not be so useful anymore. If you actually retaliate, and the other side decides it can live with the retaliation, then there may be no resolution of the dispute (...) given that retaliation makes both sides worse off because retaliation hurts importers and other people in a country’s economy, it seems that it would be desirable to have some other mechanism for promoting enforcement. [Non-compliance] presents a serious problem. Implementation of retaliation has served as a pressure relieve valve – at the moment, tensions have been tamped down a bit. But long-term, non-compliance with rulings will undermine the system. Particularly, it is likely to cause other members, less powerful members, to wonder why they should accept adverse decisions if the major players do not accept adverse decisions when they do not want to”⁵² (emphasis added).

3. THE IMPACT OF RETALIATORY ACTION ON AIRCRAFT EXPORTS

In relation to air transport services within the WTO regime, two cases have dealt with the granting and maintenance of prohibited export subsidies in the terms of the SCM Agreement. Both cases have reached the stage of imposition of retaliatory measures as allowed by the WTO and both cases have evidenced the structural issues related to the enforceability of the DSB’s ruling once the ‘winner’ imposes these measures.

From 1996 to 2001, Canada and Brazil entered a three-case dispute concerning the Brazilian export-financing programs for regional aircraft. Initially, Canada challenged Brazil’s payments to Brazilian regional aircraft manufacturers. The payments performed under the “*Programa de Financiamento as Exportações*” of 1991– PROEX – included an interest rate equalization component⁵³ that amounted to a *prohibited export subsidy*.⁵⁴ On this basis, the Panel recommended Brazil to bring

⁴⁹ *EC – Hormones* – Arbitration Report.

⁵⁰ *EC – Hormones* – Arbitration (Complaint of the USA). *EC – Hormones* – Arbitration (Complaint of Canada). *In the same sense see*: Charnovitz (2001), p. 796, footnote 29, citing: The Washington Post (20 July 1999).

⁵¹ The United States was authorized to impose restrictions amounting to USD\$116 million, while Canada’s restrictions were authorized for a total of USD\$11 million.

⁵² Davey (2001), p. 1199

⁵³ *Brazil – Export Financing Programme for Aircraft* – Panel Report, ¶2.1.

⁵⁴ *Brazil – Export Financing Programme for Aircraft* – Panel Report, ¶¶8.1-8.4: The Panel determined, amongst others, that (a) the PROEX interest rate equalization payments on exports of Brazilian regional aircraft **are subsidies** in the meaning of Article 1 of the SCM Agreement; (b) PROEX measures **are not a permitted export subsidy** in the terms of item (k) of the Illustrative List; (c) Brazil’s conduct **amounts to a prohibited export subsidy** in the terms of Article 3 of the SCM Agreement; and that (d) this behaviour **nullifies and impairs benefits accruing to Canada** under the Agreement.

its measures to compliance with WTO law in a maximum period of 90 days.⁵⁵ Upon Brazil's failure to comply with the Panel's recommendations, Canada gained authorization to suspend tariff concessions for an amount equivalent to CAD\$344 million;⁵⁶ however, the complainant decided not to exercise this option.

Subsequently, Brazil complained against Canada for the granting of prohibited export credits and loan guarantees in favour of the Canadian aircraft manufacturers.⁵⁷ In 2002, the Panel found in favour of Brazil, requiring Canada to withdraw its measures in accordance with the SCM Agreement. Canada failed to comply with the ruling, allowing Brazil to request authorization to take the necessary – and appropriate – countermeasures, which the Panel allowed.⁵⁸

Notably – perhaps recognizing the negative impact of retaliatory action in the market – the Arbitrator highlighted the desirability of a mutually agreed solution as established by Article 22:8 of the DSU.⁵⁹ The Arbitrators in the Brazil decision of 2000, stated that this desirability, is derived from the broader obligation of States to refrain from committing internationally wrongful acts against other States.⁶⁰ The Panel went as far as to determine that countermeasures are not necessarily tied to the level of nullification and impairment of the complainant,⁶¹ as their aim is to rebalance the circumstances of the parties of the dispute.⁶² Considering that the DSU does not seem to leave room for punitive damages, this decision would have to be framed under a broader definition of “sanctions”, that permits the breaching party to bring its practices to conformity.⁶³

On a more recent development, from 2004⁶⁴ onwards the United States and the European Communities have been engaged in a long-standing battle before the WTO, derived from the prohibited subsidies granted and maintained by each Member in favour of their respective aircraft

⁵⁵ *Brazil – Export Financing Programme for Aircraft* – Panel Report, ¶8.5.

⁵⁶ *Brazil – Export Financing Programme for Aircraft* – Recourse to Arbitration by Brazil (2000), ¶4.1.

⁵⁷ *Canada – Export Credits and Loan Guarantees for Regional Aircraft* – Panel Report, ¶2.2.

⁵⁸ Brazil had requested authorization to impose restrictions amounting to USD\$344 million but in 2003, the Arbitrators allowed them for a total amount of USD\$248 million.

⁵⁹ *Canada – Export Credits and Loan Guarantees for Regional Aircraft* – Recourse to Arbitration by Canada, ¶¶4.3-4.4.

⁶⁰ *Brazil – Export Financing Programme for Aircraft* – Recourse to Arbitration by Brazil, ¶¶3.44 - 3.45.

⁶¹ *Brazil – Export Financing Programme for Aircraft* – Recourse to Arbitration by Brazil, ¶¶3.48, 3.54, 3.57, 3.59.

⁶² Charnovitz (2001), p. 804.

⁶³ *Brazil – Export Financing Programme for Aircraft* – Recourse to Arbitration by Brazil, ¶3.55.

⁶⁴ Wittig (2011), p. 149: “*The United States and the European Union have been fighting over aircraft subsidies since 2004. The USA had requested the initiation of WTO dispute settlement proceedings against the EU at the time when Airbus launched the A380 and A350 projects, and when Boeing was about to lose its position as market leader. The EU immediately countersued the USA, resulting in two parallel subsidies cases of a dimension never seen at the WTO. The EU claimed in its filing that Boeing had received over US \$19.1 billion in illegal subsidies from state, local and federal sources. The consultations and panel proceedings took more than six years whereas average WTO cases are resolved within approximately 22 months. After the decision on Airbus in June 2010, the WTO Panel now ruled that Boeing had received subsidies of at least US \$5.3 billion. The views on the WTO ruling diverge on both sides of the Atlantic: the USA and the EU both claimed victory*”

manufacturers, Boeing and Airbus.⁶⁵ The United States complained against the European Airbus Programme, claiming that the measures provided by the respondent constituted “*actionable subsidies*”, that caused “*adverse effects*” to the complainant.⁶⁶ On its part, the European Communities counter-claimed against several actions taken by the United States in favour of Boeing.⁶⁷

In 2010, the WTO Panel ruled that the A380 contracts of the European Communities – particularly of France, Germany, the United Kingdom and Spain – amounted to prohibited export subsidies under the SCM Agreement, including low-interest government loans, equity infusions; infrastructure provisions; rights to use infrastructure; and regional government grants, valued at USD\$18 billion.⁶⁸ These conducts had effectively (i) displaced Boeing’s imports into the European market; (ii) displaced Boeing’s exports into third-country markets; and (iii) caused loss of sales.⁶⁹ The Panel recommended that the subsidies were removed in 90 days.⁷⁰ The parties appealed the Panel Report before the Appellate Body, who confirmed most of the findings.⁷¹

The European Communities’ complaint, on its part stated that the United States was taking – illegal – multibillion-dollar subsidization actions in favour of Boeing through Federal and State Programmes.⁷² Broadly, the Panel found that the United States’ actions constituted prohibited and actionable subsidies in the form of ‘Foreign Sales Corporation Export Subsidies’, ‘Research and Development Subsidies’ (through NASA and the US Department of Defence), and tax and other benefits programmes granted by the States of Washington, Kansas and Illinois.⁷³ The Panel concluded that (i) the measures installed by the aforementioned States constituted specific subsidies with adverse effects to the interests of the European Communities;⁷⁴ (ii) the actions performed by NASA and the Department of Defence constituted indirect subsidies for research and development;⁷⁵ (iii) that ultimately, the challenged measures amounted to prohibited export

⁶⁵ Kienstra (2012), pp 569-606.

⁶⁶ *US – Measures Affecting Trade in LCA – Second Complaint*.

⁶⁷ *EC – Measures Affecting Trade in LCA – Panel Report*.

⁶⁸ *EC – Measures Affecting Trade in LCA – Panel Report*. It is important to note that the Panel rejected several challenges made by the United States against different actions undertaken by the European Communities in relation to Airbus; however, for the purposes of this analysis, the relevant findings are exclusively those of prohibited export subsidies and their “adverse effects” in the terms of the SCM Agreement.

⁶⁹ McGivern (2010), p. 306.

⁷⁰ *EC – Measures Affecting Trade in LCA – Panel Report*, ¶8.7, p. 1050.

⁷¹ *EC – Measures Affecting Trade in LCA – Panel Report*, ¶7.942-7.946, pp. 609-610. The Appellate Body Report found that the German, Spanish and UK alleged financial aid, was actually *legal* and did not constitute prohibited export subsidies under the SCM Agreement.

⁷² *US – Measures Affecting Trade in LCA – Second Complaint*, pp. 781-783

⁷³ *US – Measures Affecting Trade in LCA – Second Complaint*, pp. 781-783

⁷⁴ *US – Measures Affecting Trade in LCA – Second Complaint*, pp. 781-783.

⁷⁵ *US – Measures Affecting Trade in LCA – Second Complaint*, pp. 781-783.

subsidies under Articles 3.1(a) and 3.2 of the SCM Agreement.⁷⁶ The Panel recommended the United States to withdraw the illegal measures⁷⁷ and both parties appealed the ruling,⁷⁸ which in the broader sense, upheld the findings of the Panels.

Currently, due to the mutual non-compliance with the recommendations, both Parties are allowed to impose ‘appropriate’ trade restrictions against each other, putting the development and continuance of trade and development into halt, while the corresponding governments make the next move.

4. SOME CONCLUDING REMARKS

There is a clear paradox in the centre of the WTO’s enforcement mechanism, as it attempts to overcome pure power struggles between Members, but at the same time, relies on their *economic* power for the enforcement stage of a dispute.⁷⁹ This objective to exclude power-based relations was structured on a rule-oriented system that created mutual – legitimate – expectations between the Members.⁸⁰ The WTO’s Dispute Settlement System is one of the most effective international mechanisms in the world, but as it remains inter-governmental, the reliance of its Members on the system itself severely depends on their own willingness to comply in good faith with its rulings. This reliance may pose enforceability problems, especially when the relevant private actors are powerful trading subjects in their respective markets.

This circumstance is evidenced precisely in the aircraft export manufacture sector, where the giant manufacturers are so powerful in the market, that the corresponding Members are rendered uselessly engaged in a trade battle with no winners. In this particular context, the retaliatory measures allowed by the WTO system fail to achieve the regime’s enforceability objectives. The situation that surrounded the *EC – Bananas* and *EC – Hormones* cases are evidence of this inefficacy; the same inefficacy that is now occurring in the United States-Europe – and in reality, Boeing-Airbus – everlasting battle.

The fundamental issue in this context is precisely the fact that countermeasures are essentially counterproductive, not only towards the Members involved, but also, *vis-à-vis* the larger international trade system because their core is fundamentally protectionist, mercantilist and power-driven. The retaliatory measures are exclusively designed to impose trade barriers in the form of withdrawals of concession to the respondent’s exports, which ultimately hinders the imposing Member’s economy. As stated by one commentator,

“Retaliatory measures end up being self-defeating as far as the very object and purpose of the WTO is concerned, as they are an example of mercantilist practices.”⁸¹ They are based on the premise that protecting markets is beneficial

⁷⁶ *US – Measures Affecting Trade in LCA* – Second Complaint, pp. 781-783.

⁷⁷ *US – Measures Affecting Trade in LCA* – Second Complaint, pp. 781-783.

⁷⁸ Knorr (2012), p. 599.

⁷⁹ Van der Broek (2004), p. 233.

⁸⁰ Van der Broek (2004), p. 234

⁸¹ Pauwelyn, (2017), p. 335.

*and that it can offset the “nullification and impairment” caused by the WTO-inconsistent measure and thereby force the losing member to comply with the rules. It is a paradox that the premier international organization established to promote free trade makes trade sanctions a basic tool of the system.”*⁸²

However, other alternatives to address the issue of non-compliance have been proposed: The Meltzer Commission suggested that “*instead of retaliation, countries guilty of illegal trade practices should pay an annual fine equal to the value of the damages assessed by the panel or provide equivalent trade liberalization*”.⁸³ Other proposals rely on the concept of compensation, both as permitted under the WTO regime and as allowed by public international law. Currently, compensatory measures are voluntary and not necessarily financial in nature under WTO law; but if made obligatory, its use could allow complaining Members to enforce the reduction of trade barriers by the respondent to the extent of the damage initially caused. Albeit challenging in practice, these possibilities should be discussed in light of the major consequences that default on compliance brings to trade and international commerce.

Lastly, and perhaps most effective to increase the enforceability of the rulings of the DSB, is the option of excluding a defaulting Member to invoke the jurisdiction of the DSU to protect its own commercial interests. As evidenced in the Canada-Brazil and EU-US protracted power-battles, the respondent’s almost instinctive response is to file a counterclaim, accusing the complainant of the same conducts, requiring enforceability of the rulings, when it itself defaults on that very obligation. It simply seems inappropriate that a Member is in a safe-heaven, capable to raise claims before an adjudicative body whose decisions it challenges by not complying with its rules and obligations.

This exclusion presents a just balance, as it provides for an effective, reasonable and appropriate measure, that discourages the Member to disregard the DSB’s findings; yet is not so burdensome as to permanently isolate the Member from the international trade regime.

⁸² Ali (2003), p. 14.

⁸³ Lawrence (2003), p. 4, footnote 12. *See also*: Aldan (2002). It is true that in practice Members have a tendency to be reticent to transfers of capitals between each other as product of the imposition of a fine, especially when the fine could be imposed to small or developing economies threatening to create macroeconomic and political problems

BIBLIOGRAPHY

DOCTRINE

- Aldan, Edward, *US Puts Forward Plan for Fines Instead of Sanctions in Trade Disputes*, The Financial Times London (2002). Aldan (2002)
- Ali, Asim Imdad, *Non-Compliance and Ultimate Remedies Under the WTO Dispute Settlement System*, Journal of Public and International Affairs, Harvard University, Volume 14 (2003). Ali (2003)
- Bahla, Raj, *The Bananas War*, McGeorge Law Review No. 31 (2000). Bahla (2000)
- Barnes, L.O., *Airlines subsidies – Purpose, Cause and Control*, Journal of Air Law and Commerce No. 26 (1956). Barnes (1956)
- Berge, S., *Subsidies and Competition as Factors in Air Transport Policy*, Journal of Air Law and Commerce No. 18 (1951). Berge (1951)
- Charnovitz, Steve, *Rethinking WTO Trade Sanctions*, American Journal of International Law, Volume 95, Cambridge University Press (2001). Charnovitz (2001)
- Davey, William, *International Economic Conflict and Resolution: The World Trade Organization's Dispute Settlement System*, South Texas Law Review No. 42 (2001). Davey (2001)
- Eaton, J., *Flying the Flag for Subsidies – Prospects for Airline Deregulation in Europe*, Intereconomics No. 31 (1996). Eaton (1996)
- Gössling, Stefan, Fichert, Frank and Forsyth, Peter, *Subsidies in Aviation*, Review, Journal of Sustainability No. 9 (2017). Gössling, Fichert and Forsyth (2017)
- Havel, Brian F., *Beyond Open Skies: A New Regime for International Aviation*, Aviation Law and Policy Series, Kluwer Law International (2009). Havel (2009)
- Horlick, Gary N., *Problems with the Compliance Structure of the WTO Dispute Resolution Process*, in WTO Jurisprudence and Policy: Practitioners' Perspectives, Cameron May International Law and Policy (2004). Horlick (2004)

- Kienstra, J.D., *Cleared for Landing: Airbus, Boeing and the WTO Dispute over Subsidies to Large Civil Aircraft*, Northwest Journal of International Law and Business No. 32 (2012). Kienstra (2012)
- Kleiner, Marc, *Bananas, Airplanes and the WTO: Prohibited Export Subsidies*, International Law and Competition Law Review, Volume 10, University of Miami (2002). Kleiner (2002)
- Knorr, Andreas, Bellman, Jörg, Schomaker, Rahel, *Subsidies in Civil Aircraft Manufacturing: The World Trade Organization (WTO) and the Boeing-Airbus Dispute*, European State Aid and Law Quarterly (2012). Knorr, Bellman and Schomaker (2012)
- Lawrence, Robert Z., *Crimes and Punishments? An Analysis of Retaliation under the WTO*, Harvard University, John F. Kennedy School of Government (2003). Lawrence (2003)
- Levick, Michael J., *The Production of Civil Aircraft; A Compromise of Two World Giants*, Transportation Law Journal (1993). Levick (1993)
- McGivern, Brendan, *Aircraft Subsidies and WTO Rules; The Airbus Decision*, Kluwer Law International, Air and Space Law No. 35 (2010). McGivern (2010)
- Meltzer, Allan H. *Report of International Financial Institution Advisory Commission*, (2001). Meltzer (2001)
- O' Cunningham, Richard, *Subsidies to Large Civil Production: New WTO Subsidy Rules and Dispute Settlement Mechanism Alter Dynamics of U.S. – E.U. Dispute*, Fall Air and Space Law No. 14 (1999). O' Cunningham (1999)
- Pauwelyn, Joost, *Enforcement and Countermeasures in the WTO: Rules are Rules – Towards a More Collective Approach*, American Journal of International Law No. 94, (2017). Pauwelyn (2017)
- U.S. Department of Transportation, Federal Aviation Administration, *The Economic Impact of Civil Aviation in the U.S. Economy*, Report (2014). FAA Report (2014)
- Van der Broek, Naboth, *Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports – Interdisciplinary Approaches and New Proposals*, in WTO Jurisprudence and Policy: Practitioners' Van der Broek (2004)

Perspectives, Cameron May International Law and Policy (2004)

Wirth, David A., *Case Report: European Communities – Measures Concerning Meat and Meat Products*, American Journal of International Law No. 92 (1998)

Wittig, *The WTO Panel Report on Boeing Subsidies: A Critical Assessment*, Aircraft Subsidies, University of Hamburg, Germany, Intereconomics (2011). Wittig (2011)

INTERNATIONAL CONVENTIONS

Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869, U.N.T.S. 14. SCM Agreement

Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). DSU

General Agreement on Tariffs and Trade of 1994 (GATT), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). GATT 1994

General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869, U.N.T.S. 183, 33 I.L.M. 1167 (1994). GATS 1994

World Trade Organization, Agreement on Air Transport Services, WTO Doc. No. S/C/W/59, 5 November 1998, Council for Trade in Services AATS 1998

World Trade Organization, Agreement on Trade in Civil Aircraft, available online at: *Agreement on Trade in Civil Aircraft*
https://www.wto.org/english/tratop_e/civair_e/civair_e.htm, last visited on 4 March 2019.

CASE LAW

Brazil – Export Financing Programme for Aircraft – Report – WTO Doc. WT/DS46/R, 14 April 1999	<i>Brazil – Export Financing Programme for Aircraft – Panel Report</i>
Brazil – Export Financing Programme for Aircraft – Panel Report – WTO Doc. WT/DS46/R, 20 August 1999 as modified by the Appellate Body Report, WTO Doc. WT/DS46/AB/R	<i>Brazil – Export Financing Programme for Aircraft – modified by Appellate Body Report.</i>
Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil Under Article 22:6 of the DSU and Article 4.11 of the SCM Agreement, WTO Doc. WT/DS46/ARB, 28 August 2000	<i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil (2000)</i>
Canada – Export Credits and Loan Guarantees for Regional Aircraft – Panel Report – WTO Doc. WT/DS22/R, 28 January 2002.	<i>Canada – Export Credits and Loan Guarantees for Regional Aircraft – Panel Report</i>
Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WTO Doc. WT/DS222/ARB, 17 February 2003.	<i>Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada</i>
Canada – Measures affecting the Export of Civilian Aircraft – Panel Report – WTO Doc. WT/DS/R, 20 August 1999, as modified by the Appellate Body Report, WTO Doc. WT/DS70/AB/R.	<i>Canada – Measures affecting the Export of Civilian Aircraft – modified by Appellate Body Report</i>
European Communities and Certain Member States – Report of the Appellate Body, WTO Doc. WT/DS316/AB/R, 18 May 2011	<i>EC – Measures Affecting Trade in LCA – Panel Report</i>
European Communities – Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AR/R, WT/DS48/AB/R, 16 January 1998.	<i>EC – Hormones – Arbitration Report</i>
European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities Under Article 22:6 of the DSU, WTO Doc. WT/DS48/ARB, 12 July 1999 (Complaint of Canada)	<i>EC – Hormones – Arbitration (Complaint by Canada)</i>

European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities Under Article 22:6 of the DSU, WTO Doc. WT/DS26/ARB, 12 July 1999 (Complaint of the United States)	<i>EC – Hormones – Arbitration (Complaint by the USA)</i>
European Communities – Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WTO Doc. WT/DS27/AB/R, 9 September 1997	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Appellate Body Report</i>
European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22:6 of the DSU, Decision by the Arbitrators, WTO Doc. WT/DS27/ARB, 9 April 1999	<i>EC – Bananas – Recourse to Arbitration by the EC.</i>
Japan – Taxes on Alcoholic Beverages – Appellate Body Report, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/AB/R, 4 October 1996	<i>Japan – Alcoholic Beverages – Appellate Body Report</i>
United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint – Panel Report, WTO Doc. WT/DS353/R, 31 March 2011.	<i>US – Measures Affecting Trade in LCA – Second Complaint</i>

OTHER SOURCES

Barkham, Patrick, <i>The Banana Wars Explained</i> , The Guardian, 5 March 1999, available online at: https://www.theguardian.com/world/1999/mar/05/eu.wto3 , last accessed on 3 March 2019.	The Guardian (5 March 1999)
Blustein, Paul, <i>Europe Hit by Tariffs in Battle over Beef; U.S. Acts After EU Ignores Trade Group</i> , Washington Post, 20 July 1999 at EU	The Washington Post (20 July 1999)