

2002

"Super Jumbo" Problem: Boeing, Airbus, and the Battle for the Geopolitical Future

Daniel L. Fisher

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Air and Space Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Daniel L. Fisher, "Super Jumbo" Problem: Boeing, Airbus, and the Battle for the Geopolitical Future, 35 *Vanderbilt Law Review* 865 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol35/iss3/5>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

“Super Jumbo” Problem: Boeing, Airbus, and the Battle for the Geopolitical Future

ABSTRACT

The commercial aircraft industry is important to the United States for both economic and political reasons. Economically, commercial aviation has been the linchpin of the military-industrial complex and a positive actor on many other segments of U.S. industry. Politically, Boeing has ensured the lead of the United States in the aviation industry and aviation exports, which have a beneficial effect on the ability of the United States to export geopolitical power.

Cognizant of this salutary effect of a successful aviation industry on the United States, Europe created and financed Airbus as a direct competitor to Boeing, hoping it would play the same role for the European Union that Boeing has played for the United States. Recent events, especially the proposed A380 super-jumbo jet and the advancing development of the European Army, place Airbus at the crossroads of European technological advance and military integration, and make Airbus' success vital to that of the “European Project.”

Though global trade agreements such as GATT and the WTO have attempted to deal with this sensitive political and economic issue, they have been unable to do so successfully. This has happened for a number of reasons, ranging from the weakness of the dispute resolution structures embedded in the trade agreements to the intransigence of the principles involved. However, in dealing with Airbus' attempt to steal Boeing's market share and serve as a cohesive force for European integration, U.S. policy makers should not, as in the past, throw up their hands at the collective inaction of trade bodies and accept the status quo. Rather, they should seek heterodoxical

solutions, especially in the diplomatic sphere, to deal with this pressing and potentially paradigm-shifting issue.

TABLE OF CONTENTS

I.	INTRODUCTION.....	866
II.	THE REGULATION OF AIRCRAFT SUBSIDIES.....	870
	A. <i>The Original GATT</i>	871
	B. <i>The Creation Of Airbus</i>	871
	C. <i>The GATT Tokyo Round</i>	872
	D. <i>The 1992 Bilateral Agreement And The Uruguay Round</i>	874
III.	THE A380.....	877
	A. <i>The Need For A Super-Jumbo</i>	877
	B. <i>Further Development Of The A380 By Airbus</i>	878
IV.	CONVENTIONAL DISPUTE RESOLUTION PROCEDURES.....	879
	A. <i>The GATT Dispute Resolution Procedures</i>	881
	B. <i>The World Trade Organization Dispute Resolution Procedures</i>	886
V.	CONCLUSION.....	889

I. INTRODUCTION

Civil aviation is the largest export industry in the United States, and the Boeing Corporation, which controls nearly one hundred percent of the U.S. civil aviation manufacturing industry, is the largest exporting manufacturer in the United States and the world.¹ Boeing's impact on the U.S. economy, while possibly limited in purely macroeconomic terms by its status as one large multinational corporation among many, is immense. It is also disproportionate when considered in industrial, strategic, and geopolitical terms.² In a

1. OFFICE OF TECHNOLOGY ASSESSMENT, 102ND CONGRESS, *COMPETING ECONOMICS: AMERICA, EUROPE AND THE PACIFIC RIM* 345 (1991); see also David Cantor, *Aircraft Production and the United States Economy*, in STAFF OF HOUSE SUBCOMMITTEE ON TECHNOLOGY AND TRADE, 102ND CONG., *AIRBUS INDUSTRY: AN ECONOMIC AND TRADE PERSPECTIVE* 45 (1992).

2. Perhaps Boeing's importance in macroeconomic terms is not insignificant; it has been estimated that among manufacturing, supplies, subcontractors, and other assorted by-products of civil aircraft production, almost 80% of the United States economy is in some way affected by the civil aircraft sector. See generally UNITED STATES INTERNATIONAL TRADE COMMISSION, *GLOBAL COMPETITIVENESS OF UNITED*

time of increasing globalization, and the concomitant dilution and diminution of national symbols, Boeing is one of the world's most recognizable and valuable brands.³ In a time of increasing economic fragmentation, Boeing's presence as a dominant force in the U.S. industrial market enables various other actors in the U.S. economy.⁴ In a time of consolidation of military contractors,⁵ Boeing has emerged as one of perhaps three or four military-industrial market participants capable of meeting the needs of the United States military across a variety of product lines.⁶

Airbus occupies a similar economic and geopolitical space in the European economy.⁷ Unlike Boeing, however, which came to its market prominence and industrial influence through the winnowing influences of U.S.-style capitalism,⁸ Airbus was designed by European governments to play such a dominant role. As the Office of Technology Assessment has acknowledged:

European planners value aircraft manufacture explicitly for the employment it creates. An Airbus official explained that the main reason the collaboration works is that by creating jobs in an export industry, Airbus enables the member countries to capture jobs from other parts of the world. . . . With government commitment to full employment, policymakers view the thousands of jobs Airbus creates in [European Union-member countries] as well worth the costs of the supports provided.⁹

Whether looked at through the lens of hard power, soft power, or economic power,¹⁰ the success and maintenance of Boeing's

STATES ADVANCED TECHNOLOGY MANUFACTURING INDUSTRIES: LARGE CIVIL AIRCRAFT 1-1 (1993).

3. *American Brands in a Global World*, at http://www.wdwb.com/English_html/4ep_pub_01.html (citing Boeing as one of the most valuable brands in exporting the image and values of the United States).

4. *Boeing Sales Help Reduce Trade Deficit*, SEATTLE TIMES, Apr. 18, 1990, at B1.

5. Emma Kelly, *The Third Element*, FLIGHT INT'L, Mar. 5, 2002.

6. John Holusha, *International Flights, Indeed*, N.Y. TIMES, Jan. 1, 1992, § 1, at 49.

7. Pierre Sparaco, *Europe Faces Tense Social Disputes*, AVIATION WK. & SPACE TECH., Nov. 20, 1995, at 67, available at 1995 WL 10193320.

8. Thomas Boeder, *The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry*, ANTITRUST BULL., Mar. 22, 2000, at 119.

9. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 1, at 378-48.

10. The terms "hard power" and "soft power," first popularized by Harvard political scientist Joseph Nye in his book, *Bound to Lead*, have been distorted over time, and often tend to serve as a shibboleth for whatever point a particular author wishes to make about mistakes in U.S. foreign policy. Nye's original definitions are as follows: "hard power" is the ability of the United States to conduct foreign policy and achieve its wishes on the world stage through means of force, force projection, threats, and implied threats. "Soft power" is the ability of the United States to achieve these same goals by powers of persuasion or envy or other emotions felt by those countries that are the target of U.S. policy. JOSEPH NYE, JR., BOUND TO LEAD 1-20, 220-36

manufacturing capabilities and market success is of vital interest to U.S. national security, just as Europe has recognized the importance of Airbus in protecting the security of Europe. The corollary is also true: those outside forces that threaten Boeing, especially by utilizing extra-market methods of protection with which Boeing cannot legally or practically compete,¹¹ pose a danger to U.S. national security.¹²

Past subsidies offered to Airbus Industrie by various EU Member States, and especially the subsidies currently being contemplated to assist in the development of the A380 super-jumbo jet, are an example of such dangerous forces. These European actions require that the United States attempt to halt the subsidies through the various international dispute resolution systems available. If the available mechanisms seem unable to handle a dispute of this potential magnitude, extra-judicial measures, such as diplomacy, must be used.

Airbus' actions seem likely to necessitate a complete reformulation of U.S. national security with respect to its industrial base and relations with the European Union. This is especially true in light of other developments, such as the creation of the European Army and increasingly divergent foreign policy goals of the European Union and United States in the post-Cold War world. Some political figures and economists argue that the economies of the United States and Europe are so intertwined that substantial policy shifts might have potentially destabilizing second-order effects.¹³ Nevertheless, the recent policy of Airbus and the European Union has been to rely more on European suppliers and sub-contractors and to use Airbus to build the European aircraft industry, and to further aid the integration of Europe.¹⁴ This seems likely to continue as Europe asserts its emerging power and independence.¹⁵

(1955). Economic power is much more than a certain contribution to a nation's GDP; economic power can serve to facilitate the growth of hard and particularly soft power as well.

11. The type of direct subsidies and guarantees that Airbus receives are extremely rare in U.S. economic policy, seen in the New Deal, World War II, the Chrysler bailout, and the area of project finance, but rarely elsewhere. Other types of U.S. assistance to Boeing, mainly in the form of military contracts, are discussed *infra* note 61 and accompanying text.

12. John Tierney, *Pursuit of Purpose in Foreign Policy*, WASH. TIMES, Aug. 24, 2000, at A16.

13. A leading EU official has argued that the economies of the United States and Europe are so intertwined that to separate them would be to destroy them. Leon Brittan, *Europe and America: Staying Together* (Nov. 21, 1997), at <http://www.eurunion.org/news/speeches/1997/971120lb.htm>.

14. *Airbus Industrie Paints Upbeat Picture for European Suppliers*, M2 PRESSWIRE, June 3, 1999, available at 1999 WL 19095846.

15. William Lipinski, *Renew The Spirit Of The Clippers*, at <http://www.house.gov/lipinski/aviation.htm> (outlining a protectionist stance against Airbus that does not touch on the nuances of international relations).

When combined with the growing popularity of the proposed European Army,¹⁶ the potential gains in European technological capabilities, especially in the aerospace sector, pose a potential threat to U.S. national security on several levels. An increase in European technological power could lead to a Europe whose security goals differ from those of the United States, with the ability to implement its goals through its new technological and military power. Points of dispute would not merely be specific instances such as intervention in the Balkans, but rather conflicting worldviews between the two blocs, with major flash points coming in such places as formerly Soviet-controlled space and the Middle East.¹⁷ In the post-World War II world, nearly all conflicts between European and U.S. foreign policy ideas have been resolved in favor of the United States.¹⁸ Europe would have less incentive to subordinate its goals to those of the United States in a world in which European and U.S. power was close to parity and in which Europe had achieved a significant degree of technological and military independence.

In economic terms, the United States and Europe are close to parity already. The gross domestic product (GDP) of the European Union was approximately \$7.8 trillion in 2000, as compared to \$10 trillion in the United States.¹⁹ The population of the European Union has already outpaced that of the United States.²⁰ The proposed accession to the European Union of emerging Central and Eastern European countries, such as Poland and the Czech Republic, will further close the gap.²¹

16. Greta Hopkins, *Leaders Endorse European Peacekeeping Initiative*, INTER PRESS SERVICE, Dec. 8, 2000, available at 2000 WL 28920078. There is considerable uncertainty about how such a force would work within the NATO structure. *Uncertainty Regarding European Union Force in NATO*, GUARDIAN (London), Dec. 12, 2000, at A5.

17. The tragic events of September 11, 2001, and their chaotic aftermath, would seem to render disputes between Europe and the United States less pressing, as both ally to combat terrorism. However, if the fight against terror is successful, world geo-politics will return to a pre-September 11 state fairly quickly, as both blocs strive to influence events and places of significant economic and political impact.

18. Examples of such conflicts that have been resolved in favor of the United States are the Suez crisis, when the United Kingdom and France acceded to U.S. wishes, and the debate over the introduction of Pershing intermediate-range nuclear missiles in Europe.

19. *More Facts and Figures on the European Union and the United States*, available at <http://www.eurunion.org/profile/eusstats.htm>.

20. *Fact Sheet on the European Union*, US NEWSWIRE, May 31, 2000, available at 2000 WL 21166870.

21. *Id.* (showing that the economies of the United States and Europe are of similar size and, with the potential additions of more central and eastern Europe countries to the European Union, Europe's economy could out-pace that of the United States). The admittance of Poland to the European Union and the Euro would deprive the United States of arguably its most reliable European ally. BBC Monitoring Int'l Rep., *Foreign Minister Says USA Remains Poland's Main Partner*, Mar. 14, 2002. Poland is perhaps the country which best remembers, from the perspective of the

The possibility of confrontation between Europe and the United States, two powerful blocs with different sources of strength and geopolitical goals, is a classic precursor to global conflict on an economic and systemic, if not a military, level.²² The potential danger inherent in such a conflict mandates that extreme care be given to develop a solution, and existing trade remedy processes heretofore used may be insufficient.

Part II of this Note focuses on the history of civil aircraft subsidies under both the General Agreement on Tariffs and Trade (GATT) and EU-U.S. bilateral agreements, with particular emphasis on the 1992 Civil Aircraft Agreement. Part III considers the creation of the A380 super-jumbo jet, and discusses U.S. grievances regarding its development under the current GATT and bilateral agreement structure. Part IV discusses both traditional and non-traditional dispute settlement mechanisms in international trade disputes, and traces the origin of these processes both in the GATT and its successor, the World Trade Organization (WTO). It addresses the problems inherent in both approaches, as well as reforms that have improved the effectiveness of these settlement mechanisms.

Finally, Part V argues that the dispute over the A380 may have severe and long lasting ramifications. Current dispute resolution mechanisms may be incapable, both by design and practice, of solving the A380 dispute in light of its gravity. An extra-procedural process is needed; the possible conflict is too serious to be handled through normal trade-legal channels, and the problem should be addressed through diplomatic means.

II. THE REGULATION OF AIRCRAFT SUBSIDIES

Several agreements govern aircraft subsidies currently used by the European Union. This section examines the original GATT, and then traces its development in the area of aircraft subsidies in the Tokyo and Uruguay Rounds in order to provide the background for examining the development of the A380.

United States, the lessons of the Cold War. Eric Black, *The Pros and Cons of Expansion*, MINNEAPOLIS STAR TRIB., Apr. 29, 1998, at 12A. Furthermore, it arguably contains vast reserves of good feelings towards the United States, unmatched anywhere else on the continent. *Europe Faces Existential Crisis*, UPI, Jan. 8, 2000.

22. The two main types of relationships with states with which the United States has normal relations are strategic partners and strategic competitors. Donald Lambro, *Warning On Policy Labeling*, WASH. TIMES, Feb. 19, 2001, at A15. Systemic confrontation is where two competing systems seek to persuade neutral or unaligned countries to join one side or the other. Yoshi Tsurumi, *Gross misrepresentation of Japanese industrial policy must be stopped*, JAPAN ECON. J., Apr. 12, 1983, at 24. The Cold War (Soviet system v. Western system) is an example of a systemic conflict that did not become a military conflict.

A. *The Original GATT*

The original GATT was created in 1947,²³ in an attempt to establish a workable framework for international trade and to avoid the spiraling tariffs widely thought to have contributed to the Great Depression.²⁴ The 1947 GATT did not include any limits on subsidies;²⁵ it merely mandated that subsidies be reported, and acknowledged their role in contributing to inefficiencies in international trade.²⁶ Subsequent rounds of the GATT, while addressing general subsidies in various forms, failed to specifically address civil aircraft subsidies.²⁷ By the start of the Tokyo Round of the GATT in the mid-1970s, however, Airbus Industrie had been created and the issue of civil aircraft subsidies had become contentious.

B. *The Creation Of Airbus*

The success of Airbus, with its business model of heavy government subsidization without recoupment of costs, posed a particular threat to U.S. airplane manufacturers. Moreover, it created a general threat to a U.S. economy then in the midst of stagflation and recession.²⁸

Airbus, founded in 1969 by state-run aerospace companies in France, Germany, and the United Kingdom, was heavily funded by those governments.²⁹ Among its advantages was a harmonious aviation industry established by the United Kingdom and France while creating Concorde.³⁰ Though its initial market share was small,³¹ Airbus quickly grew with the help of heavy development subsidization. In addition, with center-left governments in power in

23. Jennifer Hunter, *Rattled in Seattle*, MACLEAN'S, Dec. 13, 1999, at 22, available at 1999 WL 100238071.

24. Lewis J. Walker, *The Bubble Machine*, ON WALL ST., Mar. 1, 2000, available at 2000 WL 8694871.

25. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, art. XV [hereinafter GATT].

26. *Id.* art. XVI. For a comprehensive single volume history of the GATT development, see RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW* (1998). For a more concise volume, see BRIAN McDONALD, *THE WORLD TRADING SYSTEM* (1998).

27. Shane Spradlin, *The Aircraft Subsidies Dispute in the GATT's Uruguay Round*, 60 J. AIR L. & COM. 1191, 1194 (1995).

28. Christopher Westley, *The Smartest Fuel Price Policy?*, J. COM., Mar. 1, 2000, at 6.

29. See generally IAN MCINTYRE, *DOGFIGHT: THE TRANSATLANTIC BATTLE OVER AIRBUS* (1992).

30. MATTHEW LYNN, *BIRDS OF PREY* 120-34 (1998).

31. Thomas C. Hayes, *The Make or Break Sale for Boeing*, N.Y. TIMES, June 6, 1982, § 3, at 1; Laurence Zuckerman, *Boeing Plays an Aerial Wild Card*, N.Y. TIMES, June 6, 1982, § 3, at 1.

European countries throughout the 1970s, possible nationalistic implications for Airbus' success could be seen.³² While Boeing was a privately established and financed company, albeit one with significant involvement with United States defense contracts,³³ Europe's aerospace corporations were government creations, and from the beginning of the jet age were entirely government financed and supported.³⁴ When Airbus was created in the late 1960s, the Concorde was still under production by European governments despite staggering costs. Boeing, meanwhile, was nearly bankrupted by its development of the original jumbo, the 747.³⁵ Boeing was forced to lay off thousands of workers and to provide private sector airlines with favorable purchase terms in order both to secure much needed deposits and to establish the order base to spur further development and production.³⁶ Though eventually the U.S. government did provide minimal assistance, mostly in the form of encouraging negotiations between Boeing and major airline customers, it provided essentially nothing in the way of direct financial support for the 747. This is in contrast to Europe's civil aircraft development, which was almost entirely government funded.³⁷

C. *The GATT Tokyo Round*

Civil aviation was the only industry given a separate agreement at the conclusion of the Tokyo Round of the GATT in 1979.³⁸ The agreement was a subject of much controversy, and served as more of a general declaration of principles and a jumping-off point for future

32. Survey, *ECONOMIST*, Aug. 30, 1980, at 5. This time period is generally considered the nadir of the nationalization of the Western European industrial economy. *Id.*

33. See generally EUGENE RODGERS, *FLYING HIGH: THE STORY OF BOEING AND THE RISE OF THE JETLINER INDUSTRY* (1996); see also *infra* note 62 and accompanying text.

34. LYNN, *supra* note 30, at 26-32. The world's first jet aircraft, the De Havilland Comet, was developed and financed by the British government and supported by orders from the British state airline. *Id.* at 29. Similarly, the Concorde, perhaps the first post-World War II effort by Europe to challenge U.S. technological superiority, was entirely created by the British and French governments and kept alive by French civil servants when it was clear that market realities doomed it to be a loss leader at best, and quite likely an expensive failure. *Id.* at 59-77.

35. Matthew Brellis, *Airbus Stakes its Future on a 555 Seat Jumbo Jet*, *BOSTON GLOBE*, Dec. 20, 2000, at C2.

36. *Id.* at 78-99.

37. *Id.* at 92-94.

38. Agreement on Trade in Civil Aircraft, Nov. 6, 1979, GATT B.I.S.D. (34th Supp.) at 162, Annex 4A (1979) [hereinafter *Civil Aircraft Agreement*]. Signatories included Canada, Egypt, the European Union, Japan, Macau, Norway, Romania, Switzerland, and the United States. *Id.*

negotiations than as a specific action document.³⁹ However, the agreement did boast several concrete accomplishments.

Under this Round, export subsidies were essentially forbidden⁴⁰ both under the general GATT subsidies code⁴¹ and the specific Civil Aircraft Agreement, which specified that this portion of the general code was applicable to the civil aircraft industry.⁴² In the main GATT agreement, domestic subsidies were permitted, and it was noted that such subsidies were "widely used as important instruments for the promotion of social and economic policy objectives, [and the agreement does not] intend to restrict the right of signatories to use such subsidies."⁴³

Domestic subsidies, the subsidies most commonly at issue in international trade law today, is where the battle over civil aircraft financing and subsidization has been fought and in which the most contentious negotiations have taken place.⁴⁴ However, both the competitive disadvantage of the U.S. position in negotiations and the pressures on U.S. trade negotiators to arrange a face-saving deal left domestic subsidies unaddressed in the Tokyo Round Civil Aircraft Agreement.⁴⁵ Some practices, such as government-supported marketing, were limited by the Agreement,⁴⁶ and signatories were encouraged to price their airplanes in a manner designed to recoup normal development costs and end the practice of development subsidization followed by below-cost pricing. The subsidy practices that had given Airbus an advantage, however, were not addressed

39. MCDONALD, *supra* note 26, at 148.

40. Export subsidies, which are paid to domestic industries to subsidize only those particular products that are exported, while leaving products intended for domestic consumption to sell at a market price, are a potentially valuable subsidy in the civil aircraft field. JOHN H. JACKSON, *INTERNATIONAL ECONOMIC RELATIONS* 757-58 (1995). However, the removal of export subsidies from the available tools with which European nations could assist Airbus still left intact the possibility of domestic subsidies, which are subsidies paid to a company to develop and sell products regardless of their intended market. *Id.* at 758.

41. Agreement in Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Nov. 6, 1979, GATT B.I.S.D. (26th Supp.) art. 9 (1979) [hereinafter Subsidies Code] (noting an exception for farm products).

42. Civil Aircraft Agreement, *supra* note 38, arts. 4-6.

43. Subsidies Code, *supra* note 41, art. 11(1).

44. KEITH HAYWARD, *INTERNATIONAL COLLABORATION IN CIVIL AEROSPACE* 176 (1986).

45. *Id.* at 170-97. The main reason for the U.S. disadvantage in the negotiations was the simple fact that they were trying to change the status quo, which permitted subsidies of the kind that were permitting Airbus to flourish; any deal the United States could come away with was by definition better than the current situation. *Id.*

46. An example of government-supported marketing is the situation of pressuring allies to buy the national plane in exchange for strategic support. *Air Pacific says it gave Airbus fair chance*, AGENCE FRANCE-PRESSE, Jan. 1, 1997, available at 1997 WL 2033237.

substantively.⁴⁷ Instead, the issue of domestic subsidies was left to fester throughout the 1980s, and was only addressed in an agreement signed more than ten years later in the midst of even more political pressure than the Tokyo Round accord.⁴⁸

D. *The 1992 Bilateral Agreement And The Uruguay Round*

The political pressures on the U.S. government to limit subsidies increased from the late 1970s to the 1990s.⁴⁹ Airbus' penetration of the United States and key foreign markets, as well as the deficit in the U.S. balance of payments, were both at their peak; both were significantly higher than they had been even in the Carter years.⁵⁰ Mindful of these economic and political factors, in 1992 the Bush Administration entered into negotiations seeking to limit production and development subsidies.⁵¹ These negotiations initially yielded limited results.

On April 1, 1992 the United States and Europe agreed on substantive subsidy limits,⁵² only to see the agreement come under criticism from leaders in the United States who viewed it as insufficiently tough on Airbus' practices.⁵³ The negotiators, who thought that they had concluded an agreement, then reopened the

47. U.S. DEPARTMENT OF COMMERCE, A COMPETITIVE ANALYSIS OF THE UNITED STATES CIVIL AIRCRAFT INDUSTRY 70-80 (1986).

48. Richard W. Stevenson & David E. Sanger, *U.S. Braces for Wider Trade Gaps and New Confrontations*, N.Y. TIMES, Dec. 20, 1997, at D1.

49. Michael J. Levick, *The Production of Civil Aircraft: A Compromise of Two World Giants*, 21 TRANSP. L.J. 433, 460-61 (1993).

50. *Id.*

51. *President's 1992 Trade Policy Agenda*, 9 Int'l Trade Rep. (BNA) No. 10, at 422 (Mar. 4, 1992). There were significant pressures on President Bush from many different sides in the subsidy negotiations. As a sitting President in the middle of what would ultimately be an unsuccessful re-election campaign, it would have been politically unwise to enter into negotiations with the Europeans only to see the European Union adopt a hard line, and the talks fail. Martin Fletcher, *Rough Diamond Clinton Cuts Tough Deals on Trade*, TIMES (London), Feb. 15, 1994. On the other hand, the insurgent primary campaign of Patrick Buchanan and the nascent Ross Perot campaign showed that there was a fertile vein of protectionism still alive in the United States, and there was considerable anger regarding European subsidies. Peter Wilson, *Perot Enlists Protectionists*, AUSTRALIAN, Sept. 12, 1996, at 6. In addition, John Danforth, the powerful Republican Senator from Missouri, the home to McDonnell Douglas (which would eventually be forced to merge with Boeing after being demolished by Airbus), was applying great pressure on the White House to enter into negotiations. Charlotte Gimes, *Congress Warns Against Airbus Subsidies*, ST. LOUIS POST-DISPATCH, Feb. 20, 1992, at 1B. Danforth stated that the United States should take enforcement action if the negotiations were not successful, and then decried the eventual agreement as too weak. *Id.*; see also Stuart Auerbach, *Opposition Emerges to Airbus Subsidies Accord*, WASH. POST, Apr. 9, 1992, at A16.

52. Roger Cohen, *United States and Europe Agree on Limits To Subsidies for Aircraft Makers*, N.Y. TIMES, Apr. 2, 1992, at A1.

53. See Auerbach, *supra* note 51.

talks over several key points.⁵⁴ The amount of an aircraft's development costs allowed to be financed by government was the key issue precluding a final agreement.⁵⁵ A deal was finally reached, and the resulting 1992 EU-U.S. Civil Aviation Agreement included several structural changes to world trade law that limited or capped the use of subsidies.⁵⁶ The Agreement covered aircraft of one hundred seats or more,⁵⁷ and its core limitation was that government funding for new aircraft development could not exceed thirty-three percent of a new plane's total development costs. Furthermore, the manufacturer must be able to repay the full amount of the subsidy within seventeen years.⁵⁸ The Agreement standardized the interest rate at which Airbus had to repay government or government-sponsored loans,⁵⁹ and banned all production subsidies.⁶⁰ The Agreement also limited "identifiable benefits from indirect support" of government funding to three percent of industry-wide turnover, and four percent of any one company's turnover.⁶¹ The Europeans, who felt that Boeing and U.S. industry received major indirect benefits from the U.S. military, insisted on this clause.⁶²

54. Keith Bradsher, *Trade Talks Reopened Secretly Over Key Issue*, N.Y. TIMES, Apr. 8, 1992, at D2.

55. *Id.*

56. Specifically, the capped subsidies included those given by state entities to private manufacturers to develop civil aircraft. See Agreement Concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Aircraft, art. 35, 1992 O.J. (L 301) 32.

57. This left out the small jet market. LAURA TYSON, WHO'S BASHING WHOM 206 (1993). The market for small jets is a potentially lucrative one and the only area of civil aircraft development in which non-European or U.S. companies have been able to challenge the Boeing-Airbus duopoly; Bombardier of Canada and Embraer of Brazil are leaders in the small jet space. *Super-Jumbo trade war ahead*, ECONOMIST, May 6, 2000, at 20.

58. TYSON, *supra* note 57, at 208-09.

59. In early 1991 a GATT panel had found that Germany had violated the treaty by providing exchange-rate guarantees to Airbus' German partner, a highly embarrassing setback for Europe's efforts to portray Airbus' operations as well within the boundaries of free trade capitalism as defined by international trade agreements. *Airbus Loses GATT Ruling*, N.Y. TIMES, Jan. 16, 1992, at D7. The United States vehemently disagreed with the guarantees; U.S. Trade Representative Carla Hills called the German guarantees "the most reprehensible type of subsidy . . . much worse than the usual production subsidies. Once you subsidize currency fluctuations you're destroying the balance wheel that makes the trade mechanism work." TYSON, *supra* note 57, at 206.

60. TYSON, *supra* note 57, at 208.

61. *Id.*

62. For example, if Boeing won a military contract to develop a new airplane navigation system, it could put the benefits of its government-sponsored navigation research to work when constructing a navigation system for a new civilian aircraft. There have also been similar European allegations that U.S. manufacturers profit from military funding in the field of engine design and production. *U.S. Rejects European EU-Backed Proposal for GATT Civil Aircraft Agreement*, Int'l Trade Daily (BNA), May 20, 1994 [hereinafter *U.S. Rejects Proposal*]. European aerospace leaders have also

The Uruguay Round of the GATT, which began in 1986 and concluded in 1994,⁶³ hoped to address such contentious subjects as commercial aircraft subsidies in its efforts to forge a broad international trade consensus in the post-Cold War world.⁶⁴ A comprehensive Uruguay Round agreement was not reached, however, primarily due to the differences between the two main disputants, the United States and the European Union.⁶⁵

By 1994, a final Uruguay Round agreement was in sight, but fierce divisions remained over the issue of civil aircraft subsidies.⁶⁶ The French Airbus partner, Aerospatiale, called for an agreement.⁶⁷ Aerospatiale feared that to conclude the Uruguay Round without an additional civil aircraft agreement would result in the application of the GATT subsidies code to all aspects of commercial aviation not specifically covered by the 1992 bilateral agreement.⁶⁸ Aerospatiale also felt that this was "inapplicable and inadequate,"⁶⁹ and could lead to a trade war.⁷⁰

As negotiations continued, however, it became apparent that no agreement could be reached that would satisfy important political constituencies in both the European Union and the United States.⁷¹ The United States rejected several European proposals for a weak subsidies code,⁷² and the final GATT treaty was signed and ratified without explicitly dealing with civil aircraft production.⁷³ As a result, the 1992 Bilateral Agreement remained in force, as supplemented by the 1979 Tokyo Round agreement.⁷⁴ Where the Uruguay Round

made explicit appeals for Airbus to follow what it claims is the U.S. model of indirect subsidies by having the four member countries of Airbus divide the Airbus' Research and Development costs. *Europe Should Follow U.S. Example in Financing Aircraft Development*, Int'l Trade Daily (BNA), Jan. 31, 1994.

63. For a good history of general GATT and WTO proceedings, see BHALA & KENNEDY, *supra* note 26.

64. *Id.* at 1311.

65. Canada and Brazil are the third and fourth biggest aircraft producers, a distant third and fourth. Kevin Done, Survey, *Aerospace 2000*, FIN. TIMES, July 24, 2000, at 9. See also *supra* note 57 and accompanying text.

66. U.S., *European Trade Negotiators Locked in All-night Talks*, AGENCE FRANCE-PRESSE, Dec. 14, 1993, available at 1993 WL 11131200.

67. *European Companies Seek Advantage When Aviation Subsidy Talks Resume*, AVIATION EUR., Dec. 16, 1993.

68. *Airbus Partners Seek Separate GATT Agreement for Aircraft*, BLOOMBERG NEWS, Sept. 28, 1993.

69. *French Partner in Airbus Sees Future Dispute*, Int'l Trade Daily (BNA), Jan. 6, 1994.

70. *Id.*

71. *U.S. Agrees to GATT Panel on Steel to Probe EU Charges of Unfair Duties*, Int'l Trade Daily (BNA), Apr. 29, 1994; see also *supra* note 46 and accompanying text.

72. See *U.S. Rejects Proposal*, *supra* note 62.

73. *Clinton Signs GATT Legislation*, Int'l Trade Daily (BNA), Dec. 9, 1994.

74. BHALA & KENNEDY, *supra* note 26, at 1311.

GATT subsidy code and the previous bilateral agreements came into conflict, the earlier, industry-specific agreements would control.⁷⁵

Since the failed conclusion of the Uruguay Round, conflict between the European Union and United States in the civil aircraft field has been confined to two central areas: debate over European approval of the Boeing-McDonnell Douglas merger⁷⁶ and the subsidization by European governments of Airbus' proposed super-jumbo jet. The development of the super-jumbo jet is where the conflict between the European and U.S. aviation industries has been most fierce. It is also the area with the most potential for impact on future EU-U.S. relations.⁷⁷

III. THE A380

This section considers the need for a super-jumbo aircraft and traces the actions of Airbus to develop such an aircraft. This is done in order to provide a framework for considering possible U.S. grievances.

A. *The Need For A Super-Jumbo*

The Boeing 747, the world's only jumbo jet, has been the premier jet for long-haul international travel since its introduction in the late 1960s.⁷⁸ Updated models of the 747 are still in production, and it remains a backbone of Boeing's line.⁷⁹ While Airbus has introduced several jets designed to compete with smaller Boeing products, it has not attempted to directly compete with the 747—the world's largest, most expensive, and most profitable commercial aircraft.⁸⁰

At the Paris Air Show in 1991, riding high after driving Boeing's market share below fifty percent, Airbus announced that it would begin preliminary development of a passenger plane with a capacity

75. World Trade Organization, Committee on Trade in Civil Aircraft, W/T/L/193 (1996), available at http://docsonline.wto.org/gen_search.asp.

76. See generally Sondra Roberto, Note, *The Boeing/McDonnell Douglas Merger Review: A Serious Stretch of European Competition Powers*, 24 BROOK. J. INT'L L. 593 (1998). The Boeing-McDonnell Douglas merger is outside the scope of this Note.

77. *European Union Threatens to Pull Out of Pact on Aircraft Subsidy Limitations*, Int'l Trade Rep. (BNA), June 11, 1997 (summing up the intersection between the two issues).

78. Stuart F. Brown, *How to Build a Really, Really, Really Big Plane*, FORTUNE, Mar. 5, 2001, at 144.

79. RODGERS, *supra* note 33, at 296. This is a useful book dealing with the development of Boeing as a cornerstone of the U.S. economy.

80. Francis Kan, *Fight the Friendly Skies*, BUS. TIMES (Singapore), Feb. 21, 2000, available at 2000 WL 4653594. The Airbus A340-600 carries only slightly fewer passengers than an early-model 747, but Airbus has not attempted to sell the A340-600 as a 747 replacement. *Id.*

of up to 700—the largest in history.⁸¹ Despite this announcement, after the signing of the 1992 Bilateral Agreement, Airbus announced that it would abandon its solo effort and entered into discussions with Boeing for joint development of the super-jumbo.⁸² With potential development costs estimated at up to \$15 billion, a joint project was believed to be the only way Airbus could develop a new plane and stay within the boundaries of the subsidy agreement.⁸³ Boeing and Airbus agreed to a one-year feasibility study of the project, which took place in 1993.⁸⁴

Though the initial cooperation went beyond the feasibility study,⁸⁵ the companies eventually decided not to proceed with the joint project.⁸⁶ Even during periods of putative cooperation, the two companies pursued different tracks, perhaps in preparation for the eventual need to proceed on their own.⁸⁷ The cooperation ended in 1995, with each side claiming that the market would not bear the introduction of such a large airplane.⁸⁸ Airbus then proceeded to develop just such a plane independently.

B. Further Development Of The A380 By Airbus

Airbus continued to proceed with its plans and development, albeit in a low profile manner,⁸⁹ despite the breakdown of cooperation with Boeing and negative reports by aviation analysts.⁹⁰ From 1997 to 2000, the company continued to talk to potential partners and customers about the need for a super-jumbo,⁹¹ and became convinced that its future depended on having its own top of the line super-jumbo.⁹² It appears that Airbus' decision to develop the super-jumbo

81. Steven Greenhouse, *There's No Stopping Europe's Airbus Now*, N.Y. TIMES, June 23, 1991, § 3, at 1.

82. Roger Cohen, *Confusion on Plans for a Giant Plane*, N.Y. TIMES, Jan. 7, 1993, at D4.

83. *Id.*

84. *Boeing and Airbus Move Ahead With Plans for Jet*, N.Y. TIMES, Oct. 6, 1993, at D4.

85. *Boeing Talks with Airbus*, N.Y. TIMES, Mar. 4, 1994, at D6.

86. John Holusha, *Jumbo-jet Plan is Scrapped by Boeing and Europeans*, N.Y. TIMES, July 11, 1995, at D2.

87. Michael Meham, *Airbus to Seek Feedback on Super-jumbo Concept*, AVIATION WK. & SPACE TECH., Sept. 5, 1994, at 49, available at 1994 WL 2603442.

88. See Holusha, *supra* note 86.

89. John Tagliabue, *Airbus Wins 2 Big Orders for 4-Engine Rival to 747*, N.Y. TIMES, Aug. 2, 1997, at 32. The A3XX was at this point merely a part of Airbus' possible future product offering, and not a centerpiece. *Id.*

90. Adam Bryant, *The \$1 Trillion Dogfight*, N.Y. TIMES, Mar. 23, 1997, § 3, at 1.

91. Matthew Wald, *The Airline Industry May Get a Little Smaller So It Can Get Bigger*, N.Y. TIMES, Dec. 20, 1999, at C19.

92. Laurence Zuckerman, *The Jet Wars of the Future: Airbus Prepares to Take on 'the Boeing that Will Be'*, N.Y. TIMES, July 9, 1999, at C1.

was not strictly a business decision, but was also motivated, at least in part, by strategic considerations.⁹³ Airbus announced tentative plans to proceed with the A380 in mid-2000, contingent upon receiving forty to fifty orders from airline customers.⁹⁴ The orders were received,⁹⁵ and in December 2000 Airbus officially announced the launch of the 500 to 900 seat A380, to be delivered sometime around 2006.⁹⁶

The reaction of Boeing and the U.S. government was swift and predictable. Both parties claimed that, despite the conversion of Airbus from a French holding company to a joint stock company in mid-2000,⁹⁷ the program was unfairly and perhaps illegally subsidized by European governments, and that Airbus' actions could start a trade war.⁹⁸ Boeing claimed that it had not proceeded with its plans for a super-jumbo because of the potentially prohibitive cost, and that for Airbus to develop such a plane with the backing of European governments would be a violation of world trade conventions.⁹⁹ Airbus responded that everything it was doing was within the letter of the agreements signed by the European Union and United States, and that it would proceed as planned.¹⁰⁰

IV. CONVENTIONAL DISPUTE RESOLUTION PROCEDURES

Under international law, there are several conventional mechanisms through which a potential EU-U.S. dispute over European funding of the A380 could be resolved, including GATT, the Dispute Settlement Understanding (DSU) of the WTO, and NAFTA.¹⁰¹

The dispute settlement procedures of the original GATT Agreement, which were in force from 1947 until the conclusion of the

93. *Id.*

94. Wayne Arnold, *Airbus Wins \$8 Billion Deal For Its New Jet*, N.Y. TIMES, Sept. 30, 2000, at C1.

95. Suzanne Kapner, *Debt Payment is Skipped in Britain*, N.Y. TIMES, Dec. 16, 2000, at C2.

96. John Tagliabue, *Airbus Clears Plans to Build Long-Range Jumbo Jet*, N.Y. TIMES, Dec. 20, 2000, at W1.

97. *European Aircraft Maker Prices Its Shares*, N.Y. TIMES, July 10, 2000, at C2. Airbus was converted from a French holding company to an 80% subsidiary of EADS, a publicly traded French and German company, which underwent an I.P.O. in 2000. William Wright, *Turkey of the Quarter*, FIN. NEWS, Oct. 9, 2000, available at 2000 WL 9075985.

98. *How Will the New Airbus Be Paid For?*, N.Y. TIMES, June 28, 2000, at C4.

99. Blair Pethal, *Trade Group Has Jumbo Concerns*, SEATTLE TIMES, Jan. 11, 2001, at E6.

100. *EU Challenges US Funding For Boeing*, XINHUA GEN. NEWS SERVICE, Jan. 12, 2001; see also *supra* note 57 and accompanying text.

101. BHALA & KENNEDY, *supra* note 26, §§ 2.3-2.5, at 171; § 1.6, at 115.

Uruguay Round in 1994,¹⁰² were largely unstructured and depended on general cooperation and a desire on the part of participating nations to avoid a general trade conflagration. It did not contain enforcement mechanisms adequate to coerce cooperation.¹⁰³ In 1994 the DSU of the WTO replaced GATT as the mechanism through which participating organizations would regulate and develop global trade policies.¹⁰⁴ Under the DSU, the world trading system developed a more substantial enforcement mechanism that provides for the possibility of significant reprisals for non-compliance with DSU decisions.¹⁰⁵ In addition, there are other commonly accepted methods of both settling trade disputes and reaching new trade understanding, such as the one used in NAFTA.¹⁰⁶

A review of both past and present enforcement mechanisms gives a useful roadmap to guide settlement of the current dispute over the A380. However, the formal framework of the world trading system has never been confronted with a case of this potential magnitude.¹⁰⁷ The structures involved have not yet proven their ability to sustain the massive pressures stemming from a case with the potential to affect the standing political order for much of the developed world. In such a case, in which EU-U.S. relations could be permanently realigned, it seems unlikely that current structures would be adequate.

There is substantial uncertainty over which dispute resolution system would govern the 1992 Bilateral Agreement.¹⁰⁸ If the parties involved are unable to agree even on a forum to hear their differences, it seems unlikely that the losing party would accept a resolution reached by that forum. Thus, it seems likely that in order to affect a more long-lasting and permanent solution to the A380 crisis and similar crises likely to arise in the era of globalization, consideration must be given to settling the dispute in extra-judicial proceedings such as political negotiations. With this cautionary note in mind, it is useful to examine existing dispute resolution procedures for their explicative value as a framework for future political negotiations.

102. DAVID PALMETER & PETROS MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 7-13 (1999).

103. *Id.* at 7-11.

104. *Id.* at 16-18.

105. *Id.*

106. BHALA & KENNEDY, *supra* note 26, at 240.

107. See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993).

108. PALMETER & MAVROIDIS, *supra* note 102, at 131-32; see also *infra* notes 177-82 and accompanying text.

A. *The GATT Dispute Resolution Procedures*

The original GATT dispute resolution procedures had their roots in the conditions surrounding the creation of the GATT, which in turn was based on the Bretton Woods organizations founded in the waning days of World War II.¹⁰⁹ Cognizant of the need to formalize the post-war economic order,¹¹⁰ the leading industrial countries sought to create a mechanism to avoid devastating trade spirals such as Smoot-Hawley, which many believed to have precipitated World War II.¹¹¹ At the same time, the participants were leery of any mechanism that would seriously compromise sovereignty and could enforce cooperation.¹¹² The notions of trust and non-zero-sumness¹¹³ that manifest themselves significantly in today's international economic order were not present in the days immediately following World War II. Nations were eager to protect both their economic interests and their future ability to act on changes in the world order without being hampered by restrictive international agreements.¹¹⁴ Against this backdrop, the comparatively weak enforcement scheme of the original GATT is understandable.

Furthermore, the original dispute resolution system created by the 1947 GATT was merely intended as a stop-gap measure.¹¹⁵ The participating nations anticipated the imminent enactment of the International Trade Organization (ITO), whose design included a significantly strengthened dispute resolution procedure.¹¹⁶ The U.S.

109. *Id.* at 1-2.

110. In a similar manner, the post-war political order was formalized through such actions as the establishment of the United Nations. *Id.*

111. *Id.*

112. *Id.* at 3-4.

113. Robert Wright, one of the leading modern thinkers in the field of evolutionary psychology and a pioneer in applying game theory to modern geo-political contexts, has offered this definition of non-zero-sum games and non-zero-sumness as they apply to political actors:

If self-interested entities are to realize mutual profit in a non-zero-sum situation, two problems typically must be solved: communication and trust. . . . A non-zero-sum relationship is . . . a relationship in which, if cooperation did take place, it would benefit both parties. . . . Non-zero-sumness is a kind of potential . . . it can be tapped or not tapped, depending on how people behave . . . To realize non-zero-sumness—to turn the potential into positive sums—often creates even more potential, more non-zero-sumness.

ROBERT WRIGHT, *NON-ZERO: THE LOGIC OF HUMAN DESTINY* 337-39 (2000).

114. The U.N. Charter has been seen by some analysts as being similarly flexible. Symposium, *The Prospective Role of the United Nations in Dealing with the International Use of Force in the Post-Cold War Period: An Analysis in Light of the Persian Gulf Crisis*, 22 GA. J. INT'L & COMP. L. 9, 63 (1992).

115. HUDEC, *supra* note 107, at 4-8.

116. *Id.* at 23-37.

Congress refused to ratify the ITO,¹¹⁷ however, leaving it to wither on the vine.¹¹⁸ Thus, the primitive dispute resolution measures found in the original GATT had to suffice for world trading disputes until 1994. Until then, the only formal changes were minor modifications without significant effect.¹¹⁹

The structures and procedures of dispute resolution under GATT are largely diplomatic in tone.¹²⁰ Such a focus is understandable considering that in the early days of the Bretton Woods world system¹²¹ there was a greater emphasis on mutual comity and acceptance of this original "new world order" than for the creation of a system of enforcement procedures. Such procedures would have served to trap nations into making concessions ordered by the new international system before the system was able to achieve a patina of legitimacy with either the nations or their citizens.¹²²

Early GATT procedures were not adequately developed to create a complex code of legal agreements.¹²³ The initial phase of any GATT question required "sympathetic consideration" of the complaint by the offending party,¹²⁴ and consultation by all parties involved in the dispute in an attempt to fashion a non-judicial remedy.¹²⁵ If the attempt at a non-judicial remedy failed, the party bringing the dispute could seek to involve other GATT parties, known as "contracting parties."¹²⁶ During the 1950s, what came to be known as "panel procedures" were developed.¹²⁷ These procedures involved a neutral board comprised of delegates from "contracting parties" who had no stake in the dispute at hand. These parties were responsible for deciding the merits of the individual disputes and deciding how treaty obligations applied to the facts of the case.¹²⁸ The panel would

117. *Id.* at 69.

118. The abandonment of the ITO and its subsequent failure recalls similar treatment by the U.S. Senate of the League of Nations, following World War I. PALMETER & MAVROIDIS, *supra* note 102, at 2. Of course, rejection of the ITO did not have the same grave consequences that the rejection of the League of Nations did.

119. HUDEC, *supra* note 107, at 68-73.

120. Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 393-95 (1995).

121. For background on the Bretton Woods system as a whole, see John Ciorciari, *A Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations*, 22 FORDHAM INT'L L.J. 292 (1998).

122. PALMETER & MAVROIDIS, *supra* note 102, at 1-3; *see also supra* notes 112-13 and accompanying text.

123. For an excellent general critique of the early GATT procedures, see Jeffery L. Dunoff, *Institutional Misfits: The GATT, the ICJ, and Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1063-66 (1994).

124. GATT, *supra* note 25, art. XII.

125. *Id.*; *see also id.* art. XIII.

126. *Id.* art. XII.

127. Young, *supra* note 120, at 398.

128. Martin Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 61 AM. SOC'Y INT'L L. PROC. 144, 148 (1967).

then make recommendations for a solution to the entire GATT group.¹²⁹ Recommended measures could range from suspension of GATT rights to imposition of new duties upon the goods in question.

The GATT was not an organization per se but rather a group of nations, all considered contracting parties.¹³⁰ By both GATT and international law conventions, any report recommending punishment had to be approved by a unanimous vote of all the contracting parties, including the offending party against whom the action was being contemplated.¹³¹ In fact, any one party, involved or not, could block the creation and utilization of the panel procedure.¹³² Despite this potential for stagnation, however, there was substantial diplomatic pressure upon GATT Members to cooperate.¹³³ Even without a binding legal enforcement mechanism, thirty of the forty complaints filed between 1952 and 1958 were resolved in favor of the complaining party, with the complained-of measures being eliminated.¹³⁴

Though the original GATT dispute resolution procedure lacked rigid structure, the Tokyo Round negotiations, concluded in 1979, formalized the process in an attempt to streamline procedures.¹³⁵ The Understanding of 1979 sought to codify GATT procedures as they had developed since 1947.¹³⁶ The Understanding put strict timelines on panel actions¹³⁷ and called for mandatory consideration of reports that were adopted by a particular panel.¹³⁸ Though these reports could still be rejected by even one party,¹³⁹ forcing the contracting parties to consider the report served to force states to act openly and visibly. By placing a premium on openness and transparency, the Understanding served to encourage mutual cooperation.¹⁴⁰

129. GATT, *supra* note 25, arts. XII, XIV.

130. PALMETER & MAVROIDIS, *supra* note 102, at 8.

131. *Id.* at 9-10. As Palmeter and Mavroidis note, the Vienna Convention on the Law of Treaties mandates a need for unanimity unless otherwise provided. *Id.*

132. *Id.*

133. See *supra* notes 115-16 and accompanying text.

134. Robert E. Huden, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 151 n.10 (1980).

135. For a good overview of the Tokyo Round proceedings, see Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 562-80 (1996).

136. *Id.* at 565; see also Young, *supra* note 120; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 6, 1979, GATT B.I.S.D. (26th Supp.) at 210, 215 (1979) [hereinafter 1979 Understanding].

137. 1979 Understanding, *supra* note 136, at 11. This was done in an attempt to prevent countries from stalling panel consideration by engaging in political tactics. See *U.S. Stalling GATT Panel "Gas Guzzler" Ruling*, *Sources Say*, Int'l Trade Daily (BNA), June 29, 1994.

138. 1979 Understanding, *supra* note 136, at 21.

139. *Id.* at 14-21.

140. For a general discussion of this, see Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016 (1985). As Young points out, the annex

Though it was a fairly substantial revision of GATT dispute resolution procedures, the 1979 Understanding did not push procedures away from its negotiated, diplomatic base.¹⁴¹ Mediation was still the dominant characteristic of GATT dispute resolution¹⁴² and the Understanding did little if anything to give enforcement any teeth.¹⁴³ The codified mechanisms did serve as a spur for dispute settlement, however. Though settlement rates had stagnated by the 1970s, the 1980s saw GATT settlement develop into quite a powerful legal instrument.¹⁴⁴

The GATT dispute resolution system, even as formalized by the 1979 Understanding, was hampered from the start due to its lack of enforcement mechanisms and its potential for obstruction from one contracting party. One reason for its limited success was the political will of the participating governments. This political will was present for several reasons. First, the original GATT was comprised of relatively few, homogeneous nations, each of whom was trying to rebuild its economy from either the ravages of World War II, in the case of the first European members, or from an economy which had been placed on war footing more suitable to producing tanks than cars, in the case of the U.S. economy.¹⁴⁵ In fact, with the exception of a few small Eastern European states and post-colonial nations, all the participants in the original GATT were in some way under the Western umbrella.¹⁴⁶ The knowledge that there were additional significant ties binding them tended to make the contracting parties more aware of the need for harmony and the possible dangers inherent in any serious sectional split.

Secondly, the presence of political will can be explained to some extent by game theory. Theoretically, the nations involved all realized that they were engaged in a non-zero-sum game, in which positive behavior would be rewarded in the future, and harmful behavior would be punished.¹⁴⁷ Such a non-zero-sum game creates a powerful incentive for countries to go along with the system, at least to the same extent as their fellow members. Thus, diplomacy, negotiations, and transparency can be powerful weapons leading to

to the Understanding calls for "mutually acceptable" solutions. Young, *supra* note 120, at 404 n.30.

141. *Review of the Effectiveness of Trade Dispute Settlement Under the GATT and Tokyo Round Agreements*, in UNITED STATES INTERNATIONAL TRADE COMMISSION 3-7 (1985).

142. *See generally* Young, *supra* note 120.

143. After all, if the 1979 Understanding merely codified what already existed, no new enforcement mechanisms could have been added.

144. HUDEC, *supra* note 107, at 14.

145. *Id.* at 3.

146. *Id.*

147. *See supra* notes 112-13 and accompanying text.

trade harmonization even in the absence of available punitive measures.

This is not to say that the GATT system did not have serious problems.¹⁴⁸ The knowledge that any dispute resolution could be rejected by any contracting party, especially the complained-of party, served to influence which actions were brought.¹⁴⁹ In addition, certain cases tended to drag on for years as the objections of one contracting party blocked adoption of a resolution.¹⁵⁰ The absence of time limits for panel action also resulted in significant delay, with the eventual actions often being moot by the time they were actually decided.¹⁵¹ Overall, disputes that were deemed "un-resolvable" by the complaining party were never brought, for fear of wasting time and resources.¹⁵² Although an excellent example of non-zero-sumness within an international system, the dispute resolution mechanism also involved trade unfairness and created inefficiencies that enabled structural deficiencies to pool within the GATT system. The GATT system also lacked appropriate staff resources for investigating and resolving disputes.¹⁵³

These problems, combined with the advent of section 301 trade actions brought by the United States,¹⁵⁴ convinced the world trade community that a more concrete dispute resolution system was needed. This feeling was further heightened by the end of the Cold War, which heralded the eventual entry into the world trading system of many new countries not previously aligned with the Western bloc.¹⁵⁵ The end of bi-polar hegemony brought a new

148. See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990).

149. Terence P. Stewart & Mara M. Burr, *The WTO's First Two and a Half Years of Dispute Resolution*, 23 N.C. J. INT'L L. & COM. REG. 481, 484 (1998).

150. Terence P. Stewart, *Dispute Settlement Mechanisms*, in 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992) 2669-70 (Terrence P. Stewart ed., 1993).

151. *Id.*

152. Stewart, *supra* note 150, at 484-85.

153. See *id.* The complaining party realized that the only result of bringing an action would be provocation of other parties without any possible favorable solutions, so such actions were not brought. *Id.*

154. Richard O. Cunningham & Clint N. Smith, *Section 301 and Dispute Settlement in the World Trade Organization*, in *THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION* 581 (Terrence P. Stewart ed., 1996). Section 301 "permits the United States Trade Representative (USTR) to investigate foreign practices and sanction countries whose trade practices are deemed unfair. . . . The USTR has discretion under law to investigate foreign trade practices and impose sanctions under its own initiative or on behalf of domestic industries that lodged a petition if the USTR determines: (1) unfair foreign trade practices are harming the United States' commerce, and (2) action by the United States is appropriate." *Laws Affecting Exporters*, available at <http://www.itds.treas.gov/LawsAffectingExporters.html>.

155. *Beyond the WTO: Alternatives to Economic Globalization* (Nov. 26, 1999), available at <http://www.ifg.org/beyondwto.html>, is an interesting look at WTO expansion from a protectionist perspective.

impetus for trade dispute resolution measures that could be enforced against parties not previously involved in the world system. In addition, parties were cautious about bringing controversial disputes in light of the prospective Uruguay Round of negotiations, since the new agreement would no doubt revamp dispute settlement procedures in ways that could be beneficial to one of the involved parties.¹⁵⁶ This feeling was manifested in provisional agreements mid-way through the Uruguay Round,¹⁵⁷ and codified through the elimination of the GATT and the creation of the World Trade Organization at the conclusion of the Uruguay Round of negotiations in 1994.

B. *The World Trade Organization Dispute Resolution Procedures*

The Uruguay Round of GATT saw the end of the loose GATT structure as a world trade paradigm and the rise of the World Trade Organization as the vehicle through which the world trading scheme would be governed.¹⁵⁸ Along with this new vehicle came a new and strengthened dispute settlement procedure, the DSU.¹⁵⁹ The DSU sought to address what had become the focal flaw of GATT procedures—at least in the eyes of academic and legal theoreticians—the ability under GATT for one party to delay or even derail the process.¹⁶⁰

The DSU created a new set of structures with unilateral powers to act regardless of the wishes of the complaining party. While the new structure was clearly a more enforceable and predictable one, it also raised the specter of decisions being forced on Members against their will, and the corresponding loss of confidence in the WTO.¹⁶¹

156. Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1200 (1998).

157. PALMETER & MAVROIDIS, *supra* note 102, at 10-11 (regarding the Montreal Rules).

158. The GATT was not a formal organization, but rather a group of contracting parties who joined the web of both bilateral and multilateral treaties that made up the GATT. The World Trade Organization was a formal organization that tracked and facilitated all such treaties. See BHALA & KENNEDY, *supra* note 26.

159. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 404, 405 (1994), 33 I.L.M. 1144, 1226 (1994) [hereinafter DSU].

160. Stewart, *supra* note 150, at 484-86.

161. For example, the assumption by the European Central Bank (ECB) of interest rate-setting power at the same time that the ECB has failed to introduce reforms meant to promote transparency has weakened citizen confidence in the European Union as a whole. John Schmid, *The Euro in Crisis, and Words Fail Its Guardian; He May Talk Too Much, ECB President Admits*, INT'L HERALD TRIB., Oct. 30, 2000, at 1.

Under the DSU, the panel procedure remained in place, but panel infrastructure was strengthened in both resources and capabilities.¹⁶² The panels were made anonymous¹⁶³ and confidential.¹⁶⁴ Qualifications were laid down for individual panel members,¹⁶⁵ each of whom were designated to serve in an individual, supranational capacity, rather than as a representative of a particular country.¹⁶⁶ The main improvement from the previous dispute resolution procedures is that the panel report was considered to be automatically adopted unless a consensus decision of the panel decided otherwise.¹⁶⁷

In recognition of the streamlining of the panel procedure, a new Appellate Body (AB) was created.¹⁶⁸ The AB, composed of members from several different governments,¹⁶⁹ reviews the panel's decision within a specified time frame,¹⁷⁰ and recommends measures for compliance if violations are found.¹⁷¹ Failure to comply with an AB ruling leads first to mandated negotiations,¹⁷² and then to a subsequent stage of the DSU—unless consensus decides otherwise¹⁷³—allowing the suspension of trade concessions previously held by the Member found in offense.¹⁷⁴

Overall, the DSU procedures are highly legalistic and formalistic.¹⁷⁵ They are designed to succeed in an atmosphere of distrust. They introduce uncertainty into the process by removing elements of party-to-party negotiations, which are controllable by the parties, and introducing legal decisions, which are not. Third parties can bring complaints, which means that even if the two participating parties wish to resolve their differences via diplomatic or other means, the parties could still be forced into participating in the DSU process by other parties with wide and varied motivations.¹⁷⁶

162. DSU, *supra* note 159, art. 1.

163. *Id.* art. 14.

164. *Id.* app. 3.

165. *Id.* art. 8.

166. *Id.*

167. *Id.* art. 2.4.

168. Reitz, *supra* note 135, at 582-85.

169. DSU, *supra* note 159, art. 17.3. The AB currently consists of 7 people: an American, a New Zealander, a German, a Filipino, a Japanese, a Uruguayan, and an Egyptian.

170. Lichtenbaum, *supra* note 156, at 1201-02.

171. DSU, *supra* note 159, art. 17.13.

172. *Id.* art. 4.

173. *Id.* art. 22.6.

174. PALMETER & MAVROIDIS, *supra* note 102, at 16-17.

175. See Reitz, *supra* note 135, at 580-82.

176. There are limited issues of personal jurisdiction; see Giorgio Saceroti, *Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in INTERNATIONAL TRADE LAW AND THE GATT/WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT SYSTEM 247-74 (Ernst-Ulrich Detersmann ed., 1997).

Therefore, despite the good intentions of the dispute resolution reforms put in place by the WTO, the actual effect is a system that discourages cooperation in favor of a procedure with guarantees. This, in turn, results in an international order that permits third party complaints when the involved parties would rather develop a joint, private solution; the overall resulting structure could be a world trading system that might not be up to the task of resolving fundamental complaints and issues inappropriate for a legal dispute resolution process.

Both the 1979 and 1992 Agreements on Civil Aircraft¹⁷⁷ have had an uneasy relationship with the enforcement provisions of the GATT and WTO dispute resolution procedures. The 1979 agreement included the 1979 Understanding as its basis for dispute settlement.¹⁷⁸ Appendix 1 of the 1992 agreement states that it is covered by the DSU; it is not listed in Appendix 2 of the DSU as an agreement that uses its own dispute settlement terms in place of those of the DSU.¹⁷⁹ However, the Committee on Trade in Civil Aircraft has not officially notified the DSU, as it must, as to the manner in which the DSU multilateral based procedures will be applied.¹⁸⁰ There is corresponding uncertainty over the legal mechanisms and even legal status of dispute resolution under the Agreement on Trade in Civil Aircraft. As the report of the Committee said in 1997:¹⁸¹ "At the meeting of 16 June, the Chairman recalled that significant legal uncertainty surrounded the relationship between the Agreement and other World Trade Organization agreements as a result of the continuing failure to adapt the Agreement to the World Trade Organization structure."¹⁸²

No doubt due at least partially to the political sensitivity of the underlying Agreement and potential disputes, there have been no real efforts to reform the Agreement on Trade in Civil Aircraft with respect to its dispute resolution, or to bring it more in line with WTO standards. Thus, the uncertainties involving the issue of civil aircraft dispute resolution hangs like the sword of Damocles over the European Union and the United States, implicitly invoked every time one side or the other threatens formal action, but unlikely to fall so long as both sides recognize the benefits of non-zero-sumness.

177. The 1992 agreement also established a permanent Committee on Civil Aviation under the World Trade Organization.

178. Civil Aircraft Agreement, *supra* note 38, art. 8.8; *see also* 1979 Understanding, *supra* note 136.

179. PALMETER & MAVROIDIS, *supra* note 102, at 131-32.

180. *Id.*

181. *Id.*

182. *See Report of the Committee On Trade in Civil Aircraft, in 1996 REPORT OF THE COMMITTEE ON TRADE IN CIVIL AIRCRAFT (1997).*

V. CONCLUSION

The introduction of the A380 could have potentially destabilizing effects not just on the civil aircraft field but also on EU-U.S. relations in general. It is therefore vital that any solution to a EU-U.S. conflict over the A380 be created with this in mind.

From the U.S. perspective, there are three troubling effects of the A380's development. The first is on Boeing's role as a mainstay of both the U.S. economy and the U.S. military-industrial complex.¹⁸³ Secondly, it will enable Airbus to serve a greater role in meeting Europe's military needs. Most importantly, it will unite Europe both militarily and technologically; when combined with an independent European foreign policy, this could threaten U.S. hegemony.

Success of the A380 could seriously impair both Boeing's economic position and U.S. military industrial capacity. The end of the Cold War has seen a sharp consolidation of the U.S. defense industry from as many as twenty-five prime contractors to five, with Boeing and Lockheed Martin being the only two remaining contractors with aircraft manufacturing capability.¹⁸⁴ If Boeing were to encounter serious difficulties, the United States would be left with one contractor capable of manufacturing military airplanes.¹⁸⁵ Since Boeing derives most of its profits from its larger jets, anything that impacts the future sales of these larger planes is a serious threat to the company.¹⁸⁶ If the A380 succeeds as Airbus hopes, it would not only put a crimp in Boeing's profits, but would also serve to subsidize Airbus' development of other products that would threaten Boeing. Especially troubling would be Airbus development of a direct competitor to the 777, Boeing's newest and most advanced plane.¹⁸⁷ In short, the potential success of the A380 could serve as a catalyst for the competitive success of Airbus and its partners and subcontractors, and severely hurt Boeing's ability both to develop new civil aircraft and to serve as a U.S. defense contractor.

The other damaging effect of A380 success, while perhaps more ephemeral, is also potentially more harmful and destabilizing. Since the end of the Cold War, Europe has taken a foreign and security policy line that differs increasingly from that of the United States, often in connection with the strengthened and expanded European

183. See *supra* notes 1-4 and accompanying text.

184. Kenneth Gilpin, *A Wary Eye on the Future for Military Contractors*, N.Y. TIMES, Feb. 18, 2001, § 3, at 8.

185. See *id.*

186. Stanley Holmes, *Boeing Beats Airbus in Race for Jet Orders—But European Rival is Gaining Strength, Closing Up the Gap*, SEATTLE TIMES, Jan. 8, 1999, at A1.

187. See *id.*

Union.¹⁸⁸ From the Middle East, where European support of Iran and Iraq has effectively undermined the U.S. policy of isolating those two "states of concern,"¹⁸⁹ to the Balkans,¹⁹⁰ to the difference in outrage over the Russian invasion of Chechnya,¹⁹¹ the 1990s have seen the Atlantic Alliance badly fray over defining strategic interests.

This divergence of interests has manifested itself in the recent debate over the proposed European Army.¹⁹² Strongly supported by France and slightly less so by Germany,¹⁹³ this force would have a structure outside that of NATO and would act when NATO was unwilling to do so.¹⁹⁴ Though several smaller countries such as Iceland and Norway are members of NATO but not the European Union,¹⁹⁵ this proposed force would effectively be a way for Europe to act independently of the United States, and to counter U.S. interests in a manner it could not do through NATO. Although recent discussions between Prime Minister Blair and President Bush seem to have developed a consensus that the proposed force would not be a threat to NATO,¹⁹⁶ it should be noted that others, such as France's President Chirac, might well have a different view, and were not a party to those discussions.¹⁹⁷ Regardless, once such a force is created and deployed there is little the United States could do in protest that would not have much graver consequences.

With this backdrop in mind, it seems possible that funding by EU governments and success of the A380 could contribute to a destabilization of the situation. Europe has no military contractors with the across-the-board strengths of Boeing or Lockheed Martin; none are likely to be created by European nations in this age of privatization over nationalization. Thus, Europe has relied on U.S.

188. Jeffrey Gedmin, *The New Europe—Menace; United by Anti-Americanism*, WKLY. STANDARD, Mar. 29, 1999, at 19.

189. Robert Manning, *Noble intent too far?*, WASH. TIMES, June 18, 2000, at B1.

190. Judy Dempsey, *Allies with Big Issues at Stake*, FIN. TIMES, Feb. 28, 2001, at 8.

191. *Itar-Tass military-political news digest of June 6*, ITAR TASS NEWS, June 6, 2000.

192. Suzanne Daley, *European Union to Proceed with Planned Strike Force*, N.Y. TIMES, Dec. 9, 2000, at A8.

193. Craig Whitney, *U.S. and NATO Allies Divided Over Defense Needs*, N.Y. TIMES, Dec. 3, 1999, at A20.

194. Craig Whitney, *Europeans Envisioning Strike Force Without U.S.*, N.Y. TIMES, Nov. 26, 1999, at A17.

195. The countries that belong to NATO but not to the European Union are Norway, Iceland, and Turkey; Austria, Finland, Ireland, and Sweden are in the European Union but not NATO. The United Kingdom, France, the Netherlands, Belgium, Luxembourg, Denmark, Germany, Italy, Spain, Portugal, and Greece belong to both. TOM KENNEDY, UNDERSTANDING EUROPEAN LAW 41 (1997).

196. *Blair, Nato and the Euro army*, DAILY MAIL, Feb. 6, 2001, at 12, available at 2001 WL 14120360.

197. *NATO Chief "In Denial" Over Euro Force*, PRESS ASS'N NEWSFILE, Feb. 27, 2001.

contractors and technology since the end of World War II, and this reliance has helped to keep Europe close to the U.S. worldview on a host of issues. Without independent technological and military capability, it is unlikely that the European Army, even if it were launched, would be more than a shell used to assist NATO in various ways. If the A380 succeeds, however, it could provide Europe with the military industrial capability to be self-sufficient, or at least self-sufficient enough to enable Europe to challenge American hegemony safely. A Europe united in policy,¹⁹⁸ currency, and economy, and backed by independent armed forces, while nominally an ally of the United States, in fact begins to look like something entirely inconsistent with a Fukuyama-esque worldview.¹⁹⁹

The potential conflict between Europe and the United States over the A380 could easily reach critical levels, and become the most clear-cut confrontation between the two sides since the Suez Canal crisis, if not the entire post-World War II period. Success of the A380 would greatly hinder both the economic and strategic positions of the United States. On the economic front, a rejuvenated Airbus that could compete with Boeing across all product lines would threaten the largest U.S. exporter, as well as the vast web of subcontractors that it supports. In addition, significant Airbus success would likely be paralleled by other European advances in industrial technology and exports. Combined with a more integrated European Union, this would deal a substantial blow to many U.S. companies and further increase the U.S. trade and balance of payments deficit. On a strategic level, Airbus' success could lead to greater European military integration.

With this in mind, it is obvious that traditional dispute settlement mechanisms, whether based in GATT, the WTO, or other agreements, are useless for solving the problem. There is substantial uncertainty over which mechanism applies to the 1992 Bilateral Agreement. Additionally, it is unlikely that either side would permit such a potentially paradigm-shifting case to go before the WTO, a body that currently lacks sufficient legitimacy. Finally, it is certainly possible, especially in light of the vagueness with which it was drafted and applied, that the 1992 Bilateral Agreement would not actually cover the A380 situation. A different approach is needed.

In light of both the seriousness of the situation and the absence of any clear remedy or vehicle for solution, the United States should withdraw from the 1992 Bilateral Agreement and inform the European Union of its desire to renegotiate terms of the WTO as it

198. A common foreign and security policy is one of three pillars of the European Union. *Common Foreign and Security Policy: Seeking a Broader Vision for the EU in the World*, EURO. REP., Mar. 3, 2001, available at 2001 WL 26059472.

199. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

applies to civil aircraft. The United States should make the European Union aware of the perceived strategic threat, so that Europe is aware of the potential price in terms of de-linking its capabilities and success with that of the United States, if it decided to go down the path of strategic and military independence. Finally, if the actions and deeds of the European Union suggest such a reclassification is warranted, the United States should be prepared to approach Europe as a strategic competitor rather than a strategic partner. These may seem to be harsh notions at the present time; but then again, in 1939 France's biggest trading partner was Germany.²⁰⁰

*Daniel I. Fisher**

200. Christopher Holton, *Wall Street's Panda-Huggers* (Oct. 10, 2000), available at <http://www.worldtribune.com/worldtribune/Archive-2000/guest-holton-10-10.html>.

* J.D. Candidate, May 2002, Vanderbilt University Law School. I wish to thank the staff of the VANDERBILT JOURNAL OF TRANSNATIONAL LAW, particularly Will Sugden, for invaluable assistance with this Note. I would also like to thank my parents, sister, and grandparents for all the love and support they have shown me. I would particularly like to thank my grandfather, Maurice C. Greenbaum, a gentleman of the old school, for showing me through his daily conduct what it means to be a lawyer. Greenbaum, Wolff & Ernst may be gone, but it is not forgotten.