

## **Bananas, Airplanes and the WTO: Prohibited Export Subsidies**

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Few topics in international law have created as much controversy as the problems of export subsidies. There is a shared sense among the international community that subsidies can divert resources away from their most efficient or valued use.<sup>1</sup> Disputes involving export subsidies and unfair trade practices are premised on the notion that each party agrees in principle that those types of practices are wrong, but there is disagreement that the practice it engages in involves an unfair trade practice or an export subsidy. Part I is an overview and history behind the creation of the WTO. The role that diplomacy plays and why it was necessary to create the WTO to resolve disputes involving trade and subsidies are also explored. Part II addresses the EU Banana Regime and the current solutions to end the controversy. Part III discusses the EU's subsidies to Airbus Industrie and why the U.S. argues that it violates the GATT and various agreements. Part IV focuses on the controversy involving State tax practices that have the effect of being subsidies. The final section briefly addresses the economic effects of airplane noise restriction and agricultural subsidies and the impact on world trade.

### **I. The History Behind the Creation of the WTO**

Prior to the 1995 World Trade Organization ("WTO") reform of the General Agreement on Tariffs and Trade ("GATT") the U.S. policy on settling disputes involving aspects of trade was the unilateral application of §301.<sup>2</sup> Under §301 of the United States Trade Act of 1974, the American Executive is authorized to take retaliatory action against any foreign country that unreasonably, unfairly or illegally has denied access to American goods or services.<sup>3</sup> In many situations such unilateral action by the U.S. probably violated international law and even the provisions under GATT.<sup>4</sup>

Under GATT, the U.S. was required "to engage the foreign government in formal consultations looking toward settlement of the

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<sup>1</sup> ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 668 (Lexis Publishing 2<sup>nd</sup> ed. 1999) [hereinafter Swan & Murphy].

<sup>2</sup> Alan C. Swan, Unilateralism and the Evolution of International Economic Law The Saga of §301 (2001) (unpublished manuscript, on file with the University of Miami International and Comparative Law Review) [hereinafter Swan].

<sup>3</sup> Pub. L. No. 93-618, Title III §301 *et. seq.* January 3, 1975, 88 Stat. 2041; 19 U.S.C. § 2411 *et. seq.*

<sup>4</sup> Swan, *supra* note 2, at 4.

dispute.”<sup>5</sup> The problem of such unilateral action was that it caused much resentment and anger among the U.S.’s trading partners and consequently had the ability to create animosity with various foreign governments.<sup>6</sup> There were numerous problems with GATT but the most significant problem was the requirement of a consensus rule for approval of panel decisions. A party could block the adoption of a ruling through a veto, which effectively meant that the harmed party could not adopt remedial measures without being in violation of GATT.<sup>7</sup> The creation of the WTO as part of the 1994 GATT changed all of that by creating a new dispute settlement understanding (DSU) and established the dispute settlement body (DSB). The WTO functions include implementing, administering and operating the covered agreements as well as providing the forum for trade negotiations among its members.<sup>8</sup> The DSB is authorized to administer the rules and procedures under the Dispute Settlement Understanding (the “Understanding”). The Understanding provided for some key fundamental changes in the rules and procedures of dispute settlement under GATT. Among the many changes, the Understanding provided for automatic establishment of panels, appellate review, and limits on unilateral action.<sup>9</sup>

One of the most significant changes under the DSU is the creation of a “negative consensus” rule whereby the panel or appellate body reports were deemed adopted unless rejected by a consensus decision.<sup>10</sup> Since the creation of the WTO the U.S. has not unilaterally taken any action under §301 and has submitted its disputes through the DSU process. Diplomacy still plays a significant role in settling trade disputes. As will be seen in the following sections, it is only after negotiations between the parties fail to resolve the problem does the complaining party invoke the mechanisms of the WTO. The WTO is no substitute for diplomatic attempts at resolutions, but given the past history, the advent of the WTO has proved to be a significant system for the neutral resolution of trade conflicts.

## II. Bananas

One of the most prominent disputes over the last few years has been the Banana controversy. The dispute began in 1993 with the creation of the European Union’s single market. Prior to 1993 several

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<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 14.

<sup>8</sup> Zsolt K. Bessko, *Going Bananas Over EEC Preferences? A Look at The Banana Trade War and The WTO’s Understanding On Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT’L L. 265, 287 (1996).

<sup>9</sup> *See id.*

<sup>10</sup> Swan, *supra* note 2, at 17.

European nations had been providing the ex-colonies of Africa, the Caribbean and the Pacific (ACP) with preferential access to EU banana exports, which effectively discriminated against banana imports from Latin and Central America. "Other European countries allowed unrestricted trade or instituted other import regimes, resulting in a patchwork of national policies."<sup>11</sup> The EU felt it needed to adopt a single banana regime in order to eliminate internal barriers between the EU member countries. The new regime set up a tariff quota system to imports from countries other than the ex-colonies, and established import licenses on preferential terms to former colonies.<sup>12</sup> The EC consumes about four million tons of bananas annually and is the second largest importer of bananas after the United States. Domestic EC producers only supply between 645,000 and 750,000 tons of the four million tons consumed yearly with the remaining 2.8 million tons coming from a combination of the ACP and Latin American States.<sup>13</sup> Effectively, once the European Union Banana Regime was adopted, companies such as Chiquita suffered declines in profits once the new tariffs and quotas were put in place.<sup>14</sup>

Initially, the U.S. along with several Central American producers complained to the GATT regarding the preferential treatment but initial consultations failed between the EEC and the U.S. The GATT panel initially held the import restrictions violated certain provisions of the GATT but the EEC was able to block the adoption of the panel report.<sup>15</sup> With the creation of the WTO, Chiquita and the Hawaii Banana Industry Association submitted a §301 petition to the U.S. Trade Representative in 1995, which allowed the U.S. to seek formal resolution by the WTO.<sup>16</sup> The U.S. charged that the preferential trading regime violate the Most Favored Nations (MFN) principle of GATT Article I:1,<sup>17</sup> its tariff rate

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<sup>11</sup> Benjamin L. Brimeyer, *Note Bananas, Beef and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133,147-48 (2001) [hereinafter Brimeyer].

<sup>12</sup> *Id.* at 148.

<sup>13</sup> Raj Bhala, *The Bananas War*, 45 MCGEORGE L. REV. 839, 849 (2000) [hereinafter Bhala].

<sup>14</sup> Office of the United States Trade Representative, *The U.S.-EU Banana Agreement*, available at <http://www.ustr.gov/releases/2001/04/faq.pdf> (last visited Mar. 6, 2002).

<sup>15</sup> Bhala, *supra* note 13, at 849.

<sup>16</sup> Bhala, *supra* note 13, at 873.

<sup>17</sup> General Agreement on Tariffs and Trade (1994), World Trade Organization Legal Texts, available at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm) (last visited July 20, 2002).

GATT Article I:1 states:

quotas violated GATT article XIII<sup>18</sup> and the import licensing regime violated the MFN principle of GATT Article I:1 and the national treatment principle of GATT Article III:4.<sup>19 20</sup>

Ultimately, under the new dispute resolution mechanism the Europeans were unable to block the WTO panel report finding that the EU's "banana import regime and its licensing procedures for the importation of bananas were inconsistent with various obligations of the GATT 1994 and related WTO agreements."<sup>21</sup> At first the EC refused to accept the WTO's initial decision and announced their decision to appeal. The Appellate Body issued and adopted a report upholding the panel's decision.<sup>22</sup> By 1999 the European Union had amended the banana import regime; however, the WTO ruled that it failed to conform to the previous WTO ruling. In retaliation, the WTO authorized the U.S. to

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With Respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

<sup>18</sup> *Id.* GATT Article XIII:1 states in part:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

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

GATT Article III: 4(4) states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

<sup>20</sup> Bhala, *supra* note 13, at 873.

<sup>21</sup> Brimeyer, *supra* note 11, at 149.

<sup>22</sup> EC- Regime for Importation, Sales and Distribution of Bananas Report of the Appellate Body WT/DS27/AB/R (September 9, 1997).

impose 100% duties on selected EU products up to \$191.4 million in trade sanctions as retaliation.<sup>23</sup>

The EU and the U.S. have recently reached an agreement to settle the dispute.<sup>24</sup> Under the proposed agreement, the EU banana regime will move to a tariff only system by 2006. During the transition period bananas will be imported into the EU through import licenses which will be distributed based on past trade.<sup>25</sup> Under the new system the EC will make adjustments to the quantities in the various quotas in order to expand access for Latin American Bananas while ensuring a secure marketplace for specific quantities of ACP bananas.<sup>26</sup> On July 1, 2001, the US announced that it was lifting regulatory duties on \$191 million worth of EU products resulting from the steps taken by the EU to increase market access for U.S. banana distributors.<sup>27</sup> The plan still has to be approved by the WTO before it is considered GATT compliant.

### III. Airplane Subsidies: The Airbus Industry Controversy

Another area that has caused controversy is the EU subsidies of the Airbus Industry. "Aircraft represents the largest exporting industry in the U.S. and Aircraft production affects nearly 80% of the U.S. Economy."<sup>28</sup> Airbus is a consortium of four European companies that collectively produce the Airbus aircraft. The governments of France, Germany, United Kingdom and Spain have, since its inception in 1967, been providing massive subsidies to their respective member companies to aid in the development, production and marketing of Airbus civil aircrafts according to the U.S. Trade Representative.<sup>29</sup> As a result of these subsidies, Airbus has been able to claim a 55% market share and recently surpassed Boeing in sales.<sup>30</sup> In recent years, Airbus' A320 and

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<sup>23</sup> Brimeyer, *supra* note 11, at 152.

<sup>24</sup> *U.S. Government and European Commission Reach Agreement To Resolve Long Standing Banana Dispute*, available at <http://www.ustr.gov/releases/2001/04/01-23.pdf> (last visited Mar. 6, 2002).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Richard Mills, *U.S. Trade Representative Announces the Lifting of Sanctions on European Products as EU Opens Market to U.S. Banana Distributors*, available at <http://www.ustr.gov/releases/2001/07/01-50.pdf> (last visited Feb. 17, 2002).

<sup>28</sup> Michael J. Levick, *The Production of Civil Aircraft: A Compromise of Two World Giants*, 21 *TRANSP. L.J.* 434 (1993) [hereinafter Levick].

<sup>29</sup> Staff of the United States Trade Representative, 2001 Report European Union Section, available at [http://www.ustr.gov/html/2001\\_eu.pdf](http://www.ustr.gov/html/2001_eu.pdf) (last visited February 17, 2002) [hereinafter Trade Report].

<sup>30</sup> Scott Hamilton, *The Real Boeing Story; Mortgaging the Future*, *SEATTLE TIMES* (Mar.28,2001),

A330 models have been outselling Boeing's 737 and 767 models.<sup>31</sup> U.S. Officials estimate that Airbus has received over \$30 Billion in subsidies since its inception, and most recently the European governments have agreed to provide \$4 billion in loans to help cover the cost of developing the A380 super jumbo jet to compete with Boeings' 747's.<sup>32</sup>

There are a number of agreements that have to be examined to understand the nature of the dispute between the US and EU and their interpretations as to whether aircraft subsidies are permissible. The GATT itself, the GATT Subsidies Code, The U.S.-EU Bilateral Agreement on Large Civil Aircraft and the Multilateral Agreement on Large Civil Aircraft.

The relevant GATT provision on the subject of subsidies is Article XVI. While Article XVI by itself does not outlaw subsidies, it must be read in conjunction with Articles XXIII, which states that "remedies are available whenever "benefits" accruing to one party under the GATT are being "nullified or impaired" by the action of another party."<sup>33</sup> In addition, Articles XVI, VI:3, and 6 must be considered. Overall, while not strictly prohibited, subsidies under the GATT are available even when those actions would not be considered illegal under the GATT.<sup>34</sup> For the most part, the GATT provisions are fairly sparse and poorly define subsidies and what is considered an illegal subsidy.

Acknowledging the deficiencies of the GATT's treatment of subsidies, one of the important aspects that came out of the Uruguay Round was the WTO Multilateral Agreement on Trade in Goods Agreement on Subsidies and Countervailing Measure (Subsidies Code).<sup>35</sup> Under article I of the Subsidies Code, a subsidy exists if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities(e.g.loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

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available at <http://www.archives.seattletimes.nwsourc.com/cgi-bin/texis/web/vortex> (last visited July 20, 2002).

<sup>31</sup> *Id.*

<sup>32</sup> Les Blumenthal, *U.S. Issues Warning Over Airbus*, NEWS TRIB., (May 1, 2001) [hereinafter Blumenthal].

<sup>33</sup> SWAN & MURPHY, *supra* note 1, at 671.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 672.

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;or[;]

(a)(2) there is any form of income or price support in the sense of ArticleXVI of GATT 1994; and (b) a benefit is thereby conferred.”<sup>36</sup>

The GATT Civil Aircraft Agreement (CAA) signed in 1986 was designed to address particular issues to trade in civil aircraft; however, the agreement only incorporates by reference the subsidies provisions of the GATT. The new aircraft code created new rules regarding marketing, but fails to provide any restrictions on the use of government export credits.<sup>37</sup> Ultimately the CAA did little to improve upon the Subsidies code.<sup>38</sup>

In 1987, the U.S. challenged a German program that insulated Deutsche Airbus against adverse exchange rate fluctuations. “[The] GATT dispute panel ruled that the German program was in breach of the subsidies code because it was an export subsidy covered by the Annex to the 1979 Subsidies Code, subsection ‘j’, which prohibits certain exchange rate insurance programs.”<sup>39</sup> The EC exercised their right under the 1947 GATT to block the ruling, which prevented the U.S. from taking any remedial measures in this case. Realizing the deficiencies of the GATT and the subsidies code, the U.S. and the EC attempted to negotiate a bilateral treaty that would reduce the role of government support of the airline industry.<sup>40</sup>

In 1992, after years of negotiation, the EU and U.S. entered into Bilateral Agreement on Trade in Large Civil Aircraft. After the German Exchange Rate case, the EC realized that the Airbus subsidies programs violated international law and in the future they would be in the uncomfortable position of having to block future actions under the Subsidies code.<sup>41</sup> In an effort to thwart the U.S. from pursuing its claim

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<sup>36</sup> Multilateral Agreement on Trade in Goods Agreement On Subsidies and Countervailing Measures, April 15, 1994 Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (on file with the author).

<sup>37</sup> Levick, *supra* note 28, at 450-51.

<sup>38</sup> Richard O Cunningham, *Subsidies to Large Civil Aircraft Production: New WTO Subsidy Rules and Dispute Settlement Mechanism Alter Dynamics of U.S.-E.U. Dispute*, 14 FALL AIR & SPACE LAW. 4 (1999) [hereinafter Cunningham].

<sup>39</sup> Shane Spradlin, *The Aircraft Subsidies Dispute in the GATT's Uruguay Round*, 60 J. AIR L. & COM. 1191, 1206 (1995) [hereinafter Spradlin].

<sup>40</sup> *Id.* at 1208.

<sup>41</sup> *Id.*

in the GATT, the EC hastened to enter into a bilateral agreement with the U.S. to resolve their dispute.<sup>42</sup>

Under the agreement, Europeans committed to four important points. First, they agreed to reduce support levels. Secondly, they agreed to provide no support other than new aircraft program development supports. Thirdly, they agreed to limit such development subsidies to 33% of a program's total development cost and to provide development supports only to programs justified by a critical project appraisal. Lastly, indirect government aid was to be limited to 3% of the annual industry wide turnover and 4% of the turnover for each individual manufacturer.<sup>43</sup> The agreement does not preclude either party from taking subsidy issues to WTO dispute resolutions if either party violates the terms of the agreement.<sup>44</sup>

From the outset, the U.S. position has been that Europe's subsidies to Airbus are improper. The U.S. has long argued that the direct government contracts for commercial airlines, loan and loan guarantees that cover both the development and production costs, guarantees against losses due to exchange rate fluctuations, tax breaks, debt forgiveness and bailouts are all violations of the GATT and SCM agreements to which the EU and U.S. are parties to.<sup>45</sup>

The European response to the U.S. Claims is that subsidies of the Airbus Industry is legal under the bilateral agreement because the support for Airbus falls below 33% as provided for in that agreement.<sup>46</sup> In addition, the EC claims that the U.S. has long been supporting Boeing and the U.S. Aircraft industry through government support in research, development and large military contracts that has allowed the U.S. companies to take more risk than they could otherwise assume on their own.<sup>47</sup> The EU asserts that the indirect support of the U.S. civil aircraft industry through military spending and NASA research grants provides the same type of government assistance as the Europeans in a more indirect manner.<sup>48</sup>

Currently, this issue is at a stalemate. The U.S. maintains that EU subsidies of the Airbus Industry must be considered not only under the bilateral agreement but also under the WTO agreement and its chapter on subsidies.<sup>49</sup> EU takes a much more narrow stance that the

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<sup>42</sup> Cunningham, *supra* note 38.

<sup>43</sup> Levick, *supra* note 28, at 452.

<sup>44</sup> Spradlin, *supra* note 39, at 6.

<sup>45</sup> Levick, *supra* note 28, at 436.

<sup>46</sup> *U.S. Doubts EU assertion Airbus Loans Follow Rules*, SEATTLE TIMES, Apr. 24, 2001, at C3 [hereinafter Loans].

<sup>47</sup> Levick, *supra* note 28, at 437.

<sup>48</sup> Levick, *supra* note 28, at 437.

<sup>49</sup> *Loans*, *supra* note 46.

bilateral agreement is controlling.<sup>50</sup> Whether the parties can reach an understanding is questionable. The most recent Super 301 report places this issue on a very closely monitored watch list<sup>51</sup> and unless an agreement is reached the U.S. will likely pursue its cause in the WTO.

#### IV. Foreign Sales Corporations and the EU Dispute

*But in this world nothing is certain but death and taxes.*

—Benjamin Franklin

*The hardest thing in the world to understand is income tax!*

—Albert Einstein

The role of taxes and their relation to subsidies have always been a source of contention in international trade. Included in the definition of a subsidy in the Subsidies Code are tax credits.<sup>52</sup> Every country has different tax laws and the tax treatment on exports has spurred numerous debates. The U.S. taxes its citizens, including U.S. corporations on both domestic and foreign sources of income, but reduces international double taxation by allowing for a foreign tax credit paid on foreign source income.<sup>53</sup> Many European countries allow for exemptions from the value added tax (VAT) for exported goods, which created a tremendous advantage for European exporters.

In an attempt to address the disadvantage U.S. companies were faced with, the Nixon administration introduced the Domestic International Sales Corporation (“DISC”) legislation, in an effort to promote U.S. exports.<sup>54</sup> DISC’s are U.S. corporations whose income is derived from exports. Under the program, the profits of a DISC were not taxed to the DISC, but were taxed to the shareholders of the DISC when distributed or deemed distributed to them. The shareholder could defer the taxes until the distribution was actually made.<sup>55</sup> The EC objected to

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<sup>50</sup> *EU Commission Tells U.S. the Airbus A380 Subsidies Within Agreed Limits* AFX NEWS, Apr. 23, 2001, available at <http://www.afx.com> (last visited July 20, 2002).

<sup>51</sup> Blumenthal, *supra* note 32.

<sup>52</sup> World Trade Agreement (1994) Article I:I.1 states that a subsidy is deemed to exist if:

“(ii) government revenue that is otherwise foregone or not collected (e.g. fiscal incentives such as tax credits),” available at <http://www.jus.uio.no/lm/wta.1994/jia1a13.html> (last visited Feb. 15, 2002).

<sup>53</sup> See Alvin C. Warren, Jr., *Income Tax Discrimination Against International Commerce*, 54 TAX L. REV. 131 (2001) [hereinafter Warren].

<sup>54</sup> United States—Tax Treatment for Foreign Sales Corporations, Report of the Panel, WT/DS108/R (October 8, 1999) [hereinafter Report] (on file with the author).

<sup>55</sup> *Id.*

the introduction of the DISC, and upon their objection the U.S. responded by requesting that if the DISC was a subsidy, than the income tax laws of Belgium, France and the Netherlands also resulted in subsidy as well.<sup>56</sup> The panel found that the European and American practices were an illegal export subsidy under GATT 1947 Article XVI:4.<sup>57</sup>

At the time the U.S. signed the WTO Subsidies Agreement the U.S. was committed to bringing their laws into conformity with the Agreement and thus created the Foreign Sales Corporation (FSC) to replace the DISC.<sup>58</sup> FSC's are foreign corporations, generally a shell company of a U.S. corporation that has been established for the purpose of serving as a vehicle for U.S. exports and reducing the tax implications by as much as 30%.<sup>59</sup> Under U.S. Law, the foreign source income of a foreign corporation engaged in trade or business in the United States is taxable only to the extent that it is "effectively connected with the conduct of a trade or business within the United States."

In designing the FSC, Congress was attempting to devise a program that would exempt a portion of the income from foreign economic processes in export transactions.<sup>60</sup> U.S. exporters were able to price their goods more cheaply and market them more aggressively as a result of the FSC scheme.<sup>61</sup> By 1999, there were over 6000 FSC's with a net exempt income of over four billion dollars with manufacturing products accounting for the vast majority of generated exports.<sup>62</sup> Once again, the EC alleged that the FSC scheme violated U.S. obligations under GATT and the Subsidies Agreement.<sup>63</sup> The panel agreed with the EC and found that FSC violated Article 3.1(a) of the subsidies agreement.<sup>64</sup> The U.S. unsuccessfully appealed the decision of the panel in 2000, but the panel made clear that their ruling was not intended to require a member to choose one kind of tax system to be consistent with their WTO obligations.<sup>65</sup>

The current status of tax incentive programs is problematic. In May 2000, the U.S. presented a replacement regime for the FSC to bring U.S. legislation in line with its WTO obligations. However, the EU felt that the new regime would not be enough to comply with the DSB

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> SWAN & MURPHY *supra* note 1, at 673.

<sup>59</sup> Mark Clough QC, *Essay: The WTO Dispute Settlement System - A Practitioner Perspective*, 24 *FORDHAM INT'L L. J.* 252, 266 (2000) [hereinafter Clough].

<sup>60</sup> Report, *supra* note 54.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Warren, *supra* note 53, at 157.

<sup>64</sup> Clough, *supra* note 59, at 265.

<sup>65</sup> *Id.*

ruling.<sup>66</sup> At the same time, the U.S. instituted its own dispute settlement consultations against France, Netherlands, Greece, Ireland, Belgium, and Spain as being inconsistent with the WTO subsidy rules.<sup>67</sup> If the revised version of the FSC is found to be incompatible with U.S. obligations under WTO rules, the EU has asked the WTO to authorize retaliatory sanctions.<sup>68</sup> If the WTO does authorize sanctions, it could be as high as four billion dollars in retaliatory measures, which could be disastrous for the U.S.

Looking forward, while the U.S. is attempting to implement changes that will conform to WTO rules it is unlikely that the U.S. will make fundamental changes in its tax laws. Diplomatic negotiations will have to be the forum for settling this dispute; perhaps a multi-lateral treaty dedicated to tax treatment will need to be considered in order to balance the inequities caused by the variances in the U.S. and European tax laws.

## V. Hushkits and Agricultural Subsidies

Some of the problems associated with subsidies are not as clear as the Banana, Airbus and FSC disputes. It is worth noting a few others that, while not presently before the WTO's dispute mechanism, are nonetheless problematic issues worth addressing.

### Airplane Noise Restrictions and Hushkits

The current controversy over airplane noise restrictions is attributable to the EU's adoption of regulations aimed at precluding certain certified aircraft from serving community airports in an effort to curb airplane noise.<sup>69</sup>

Unlike the U.S. where space is more readily available, many European communities are closely situated to airports. The noise from airplanes, according to the European studies can cause "mental disorders and other detrimental psychological effects on human beings."<sup>70</sup> Many critics feel that this regulation is "industrial protectionism masquerading under the guise of environmentalism."<sup>71</sup> The U.S. takes the position that the regulation adopted was politically motivated and the EU realized that the high cost imposed on EU manufactures and airlines made it impossible for the EU to adhere to the EU Commission's standard as proposed.<sup>72</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> Trade Report, *supra* note 29.

<sup>68</sup> Clough, *supra* note 59, at 265.

<sup>69</sup> Benedicte A. Claes, *Aircraft Noise Regulation in the European Union: The Hushkit Problem*, 65 J. AIR L. & COM. 329 (2000) [hereinafter Claes].

<sup>70</sup> *Id.* at 337.

<sup>71</sup> Troy A. Rolf, *Comment: International Aircraft Noise Certification*, 65 J. AIR L. & COM. 383, 385 (2000).

<sup>72</sup> Trade Report, *supra* note 29.

The EU responded by developing this alternate legislation that has since been adopted that the U.S. argues is incompatible with the Chicago Convention and bilateral air services agreements to which the EU and U.S. are parties.<sup>73</sup> In addition, the U.S. claims that Airbus is getting a boost over Boeing in aircraft sales because under the transfer rule of the Regulation, EU carriers would have to buy second-hand aircraft from other Member States instead of from non-European carriers. Likewise, non-European carriers will refrain from buying older aircraft from U.S. carriers if those aircraft can no longer be operated in the EU.<sup>74</sup> The effect of the regulation has already cost American Business more than \$2.1 billion in spare parts and engine sales and the commercial resale value of over 1600 U.S. aircraft have been reduced.<sup>75</sup>

The U.S. is not opposed to reducing aircraft noise; in fact, the opposite is true. The U.S. supports measures to reduce noise emissions, what it opposes is the EU's unilateral adoption of this regulation. The U.S. has stated it is willing to negotiate a resolution if the EU rescinds the regulation. The future of this issue remains to be seen; as of now the U.S. has filed with the International Civil Aviation Organization (ICAO) to develop a mutually agreeable standard that will reduce aircraft noise level in a time frame that is suitable and practical. Recently the ICAO agreed on a new noise certification standard which the U.S. supports.<sup>76</sup>

### **Subsidies in the Agricultural Industry**

One of the more unique problems in the areas of subsidies is the treatment of the agricultural industry. Agricultural subsidies account for the vast bulk of the world trade in primary products.<sup>77</sup> Part of the problem lies in the fact that agricultural products are expressly excluded from most of the coverage of the WTO Subsidies Agreement.<sup>78</sup> "The exclusion of agriculture was necessitated by the advent of the WTO Agreement on Agriculture that regulates national export subsidies in a fashion unsuited for treatment under the broader Subsidies Agreement."<sup>79</sup>

Under the Agricultural Agreement, domestic agricultural subsidies that conform to that Agreement are automatically treated as "non-actionable" subsidies under the broader Subsidies Agreement.<sup>80</sup> As a result of the WTO Agreement on Agriculture, reform programs are currently being proposed by a number of nations to attempt to strike a

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<sup>73</sup> Claes, *supra* note 69, at 345.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Trade Report, *supra* note 29.

<sup>77</sup> SWAN & MURPHY, *supra* note 1, at 672.

<sup>78</sup> *Id.* at 673.

<sup>79</sup> *Id.*

<sup>80</sup> World Trade Agreement (1994), available at

<http://www.jus.uio.no/lm/wta.1994/iia1a13.html> (last visited Feb. 15, 2002).

balance between agricultural trade liberalization and governments' desire to pursue legitimate agricultural policy goals.<sup>81</sup>

The United States has taken the position that in too many countries the production and marketing decisions farmers make are driven by government programs and as a result trade distorting policies have developed skewing world markets.<sup>82</sup> The U.S. is committed to eliminating trade distorting measures but also supports policies that address the non-trade concerns such as food security, resource conservation, rural development and environmental protection.<sup>83</sup> The U.S. proposal that was submitted to the WTO recognizes the legitimate role of government in agriculture but aims to reduce the agricultural export subsidies and trade-distorting domestic subsidies.<sup>84</sup> At the moment, WTO members are committed to reforming the problems associated with agricultural subsidies and 64% of the members have submitted proposals for reforming the system.<sup>85</sup> Negotiations are ongoing and while there is no firm basis for a complaint yet, there is the hope that the negotiations and the proposal submitted would yield an acceptable solution to resolving this aspect of world trade.

## VI. Conclusion

The problem of subsidies is not that they are wrong. Rather, the root of the problem is that measures taken by different countries are designed to enhance their own policies without running afoul of their obligations to other states that are party to the various agreements. The Banana regime, Airbus and FSC's are just some examples of the utilization of the WTO to create bodies of law that attempt to answer the bigger question. What practices are subsidies that run afoul of members' obligations to other members and what practices are permitted?

There are currently more than 200 disputes pending before the WTO, which is a sign that the system is working.<sup>86</sup> The scheme of settling disputes in the WTO encompasses five stages; only if consultations fail does the panel review process begin.<sup>87</sup> Diplomacy still remains a vital element of settling disputes. The Banana dispute dates back to 1993 and it was only as a result of the WTO's decision that the EU agreed to implement an alternative scheme. The Airbus controversy

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<sup>81</sup> Staff at The World Trade Organization, *The Agricultural Negotiations*, available at <http://www.wto.org/english> (last visited Feb. 15, 2002).

<sup>82</sup> Committee on Agriculture, *Proposal for Comprehensive Long Term Agricultural Trade Reform*, Submission by the United States (June 23, 2000) available at <http://www.ustr.gov/sectors/litprop.htm> (last visited Feb. 15, 2002).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *supra*, note 81.

<sup>86</sup> Clough, *supra* note 59, at 252.

<sup>87</sup> Brimeyer, *supra* note 11, at 142-43.

dates back to 1967 and the creation of the consortium. It is unlikely that this dispute will be settled amicably through diplomatic channels and it will be necessary for an impartial WTO panel to resolve this. There are many tradeoffs to thrusting trade disputes into the legal realm but thus far, it appears that the negative impacts have been diminished by the accelerated pace at which the WTO is capable of resolving dispute.

Overall, the adoption of the WTO has had positive effects on world trade. It is through this body that members can dialogue and resolve their disputes. In the worst case, members can request a panel to make a binding ruling that has the potential of sanctioning reciprocity, equal to the amount that the member has been harmed as a means of encouraging compliance with the panel decision. The old system of unilateral decision making by one member when it deemed another member was engaged in unfair practice is over. The new system of engaging dialog and settling matters in legal forums is the prevailing method in which countries need to work with each other to settle their disputes.