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DELAYED FIGHT: THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT MECHANISM, NEGOTIATION, AND THE TRANSATLANTIC CONFLICT OVER COMMERCIAL AIRCRAFT

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Abstract: For over thirty years, the United States and the European Union have waged a bitter and seemingly eternal political battle over the manufacture and trade of large commercial aircraft. In 2005, they brought this dispute to the World Trade Organization by litigating through its Dispute Settlement Mechanism. With the arrival of decisions from the WTO Dispute Settlement Body, this long-running conflict enters a new phase. This Note proposes that DSM litigation will result in a negotiated settlement between the two parties. Starting with the histories of both the DSM and the LCA industry, it delineates how the WTO has created a system that continually encourages states to settle through the DSM's textual provisions and extrinsic effects. The Note analyzes why and how a negotiated settlement will come about, building upon the settlement-oriented nature of the DSM and the industry's history.

INTRODUCTION

Halfway through its second decade, the World Trade Organization (WTO) is experiencing growing pains.¹ Its current trade liberalization negotiations, the Doha Round, continue to stagnate² as its goal of encouraging free trade has suffered in the wake of the global recession and protectionism by some states.³ Also, one of its key accomplishments, the quasi-judicial Dispute Settlement Mechanism (DSM), has come un-

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¹ See Daniel Pruzin, *WTO Members Give Up on Deliverables Pact, to Push for Work Program to Advance Doha*, 28 INT'L TRADE REP. (BNA) 1228 (July 28, 2011).

² *Id.*

³ *Defying Gravity and History*, ECONOMIST, Aug. 7, 2010, at 72.

der increasing criticism.⁴ Even those who praise its efficacy concede that the DSM needs reform and has fallen short of resolving large, complex, and contentious international trade disputes.⁵

The transatlantic dispute over commercial aircraft is a prime example of such a complex and contentious case.⁶ Over the last three decades, firms in the United States and the European Union (EU) (and its predecessor, the European Economic Community (EEC)) have engaged in a high-stakes commercial competition to manufacture and sell commercial planes with over 100 seats, known as large commercial aircraft (LCA).⁷ This industry is especially lucrative: the combination of high-technology characteristics generating beneficial “spillover” effects and annual sales averaging over \$100 billion lead governments to take an active interest in the success of their domestic aircraft firms.⁸ Additionally, the market dynamics of commercial aircraft production have created a duopoly: the world’s sole two producers of LCA are the United States’ Boeing and the EU’s Airbus.⁹

This competition is fierce, and the two sides do not perceive it as fair.¹⁰ Both firms receive financial support from their governments—Boeing through indirect subsidization in the form of U.S. military contracts and tax incentives, and Airbus through direct EU subsidies.¹¹ Such behavior has led to allegations by both sides that the other is gain-

⁴ See, e.g., Webb McArthur, *Reforming Fairness: The Need for Legal Pragmatism in the WTO Dispute Settlement Process*, 9 RICH. J. GLOBAL L. & BUS. 229, 232 (2010).

⁵ See, e.g., *id.*

⁶ See Nils Meier-Kaienburg, *The WTO’s “Toughest” Case: An Examination of the Effectiveness of the WTO Dispute Resolution Procedure in the Airbus-Boeing Dispute over Aircraft Subsidies*, 71 J. AIR L. & COM. 191, 193–94 (2006).

⁷ See JOHN NEWHOUSE, *BOEING VERSUS AIRBUS: THE INSIDE STORY OF THE GREATEST INTERNATIONAL COMPETITION IN BUSINESS*, at ix–xi (2007).

⁸ Terrence R. Guay, *Boeing, Airbus, and the Transatlantic Aerospace Industry 10* (Mar. 22–25, 2005) (unpublished manuscript) (on file with author).

⁹ Robert J. Carbaugh & John Olienyk, *Boeing-Airbus Subsidy Dispute: A Sequel*, GLOBAL ECON. J., 2004, at 1, 1–2.

¹⁰ Each party frequently aims to portray the facts to its advantage; for example, in January 2011, Boeing and Airbus issued diametrically opposed press releases in response to the same WTO decision. Compare Press Release, Boeing Co., Boeing Response to Public Reports Regarding the WTO’s Final Ruling in DS 353 (Jan. 31, 2011), available at <http://boeing.mediaroom.com/index.php?s=43&item=1603> (“[T]he WTO’s decisions confirm that European launch aid stands alone as a massive illegal subsidy only available to Airbus . . .”), with Press Release, Airbus, WTO Ruling: Billions in Boeing Subsidies Distort Competition (Jan. 31, 2011), available at <http://www.airbus.com/presscentre/pressreleases/press-release-detail/detail/wto-ruling-billions-in-boeing-subsidies-distort-competition/> (“Boeing has received massive and illegal government subsidies for many decades . . .”).

¹¹ Nina Pavcnik, *Trade Disputes in the Commercial Aircraft Industry*, 25 WORLD ECON. 733, 738–39 (2002).

ing an unfair advantage, and each has attempted to alter the other's policy.¹² These attempts have at times resulted in interstate agreements, both bilateral and through the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT).¹³ Yet the dispute has also resulted in public condemnation and confrontation through litigation and trade restrictions.¹⁴

In June 2005, the United States filed a DSM claim, alleging illegal EU subsidization of Airbus;¹⁵ the EU immediately launched a counter-suit against the United States and Boeing.¹⁶ The case is the largest and one of the most complex ever submitted to the DSM,¹⁷ taking five years for the Dispute Settlement Body (DSB) panel to issue its decision in the U.S. case.¹⁸ An average DSM case takes approximately twelve months from filing to decision adoption.¹⁹

Per WTO procedure, the decision in the U.S. case remained confidential until the final public report was issued in June 2010.²⁰ The report contains the Panel's ruling that some of the EU's "launch aid" of loans and other financial support constitutes a violation of WTO agreements, as well as enforcement mechanisms to terminate such subsidization.²¹ A separate panel released its decision in the EU suit in March 2011, labeling various U.S. policies as illegal.²²

¹² See John G. Francis & Alex F. Pevzner, *Airbus and Boeing: Strengths and Limitations of Strong States*, 121 POL. SCI. Q. 629, 646–50 (2006).

¹³ KEITH HAYWARD, TRADE DISPUTES IN THE COMMERCIAL AIRCRAFT INDUSTRY: A BACKGROUND NOTE 5–6 (Apr. 2005), available at http://www.raes.org.uk/raes/pdfs/Trade_war_Full.pdf.

¹⁴ See *id.* at 6.

¹⁵ Request for the Establishment of a Panel by the United States, *European Communities—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/2 (June 3, 2005) [hereinafter U.S. DSM Filing].

¹⁶ Request for the Establishment of a Panel by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/2 (June 3, 2005) [hereinafter EU DSM Filing].

¹⁷ See Meier-Kaieburg, *supra* note 6, at 242–43 (2006); see also Daniel Pruzin, *WTO Signals Long Delay in Issuing Ruling on EU's Appeal Against Airbus Decision*, 27 INT'L TRADE REP. (BNA) 1482 (Sept. 30, 2010).

¹⁸ Daniel Pruzin & Gary G. Yerkey, *WTO Panel Issues Preliminary Ruling in U.S. Complaint Against Airbus Subsidies*, 26 INT'L TRADE REP. (BNA) 1188 (Sept. 10, 2009).

¹⁹ See John H. Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, 1 BROOKINGS TRADE F. 179, 210 (2000).

²⁰ See Daniel Pruzin, *WTO Panel Ruling Slams Illegal Subsidies for Europe's Airbus in Case Brought by U.S.*, 27 INT'L TRADE REP. (BNA) 1029 (July 8, 2010).

²¹ See Panel Report, *European Communities—Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 8.1–8, WT/DS316/R (June 30, 2010) [hereinafter DS316 Panel Report].

²² See Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶¶ 8.1–10, WT/DS353/R (Mar. 31, 2011) [hereinafter DS353 Panel Report].

With these decisions, this long-running dispute enters a new phase.²³ Both parties have appealed both decisions, making it likely that the conflict will continue to play out for some time.²⁴ Nevertheless, this Note argues that the United States and the EU will likely renew negotiations in an effort to resolve their differences rather than pursue DSB-mandated measures.²⁵ Under the right circumstances, as found in the history of this case, the DSM pushes states to negotiate and settle their disputes, even in the midst of litigation.²⁶ This settlement effect should be considered one of the DSM's successes.²⁷

Part I of this Note reviews the histories of the DSM and the LCA industry, examining the nature and mechanisms of dispute settlement under the GATT and the WTO, as well as the economic and political aspects of LCA production. Part II discusses how the DSM, both through intrinsic structural provisions and extrinsic effects on state behavior, serves as a mechanism to bring states to the bargaining table. Part III puts forth this Note's main argument—that the DSB generates settlement, and that it will do so in this case—through a comparison and analysis of two eras in the history of the dispute. In the mid-1980s, a similar process of public discord and utilization of GATT dispute settlement ultimately led to a negotiated outcome, found in the 1992 U.S.-EEC Bilateral Treaty on Civil Aircraft. This section thus highlights similarities and common trends between the pre-1992 era and the contemporary era to predict that the most recent cases will result in a negotiated settlement. The Note concludes by considering the DSM's practical effects and the future of the LCA dispute in light of its main argument.

I. BACKGROUND

A. *The Evolution of Dispute Settlement Under the GATT and WTO*

As the Allies pushed through the final year of World War II, they sought to ensure that the economic and political failures that had cata-

²³ See Daniel Pruzin, *U.S. Says EU Case Against WTO Ruling on Illegal Subsidies to Airbus Falls Short*, 27 INT'L TRADE REP. (BNA) 1806 (Nov. 25, 2010).

²⁴ See *id.*

²⁵ See discussion *infra* Part III.

²⁶ See *infra* text accompanying notes 160–165, 256–274.

²⁷ See, e.g., Alexandra R. Harrington, *They Fought for Trade but Did Trade Win? An Analysis of the Trends Among Trade Disputes Brought by WTO Member States Before the WTO Dispute Resolution Body*, 16 MICH. ST. J. INT'L L. 315, 339, 341 (2007) (“[The DSM] acts as a deterrent in many cases. . . . [It also] creat[es] a legal forum through which trade fights can be waged civilly and without major incursions into [state sovereignty].”).

lyzed the Great Depression, and in turn, the War, would not reoccur.²⁸ At a series of meetings in Bretton Woods, New Hampshire, delegates from forty-four countries created three institutions to accomplish this goal: the International Monetary Fund; the International Bank for Reconstruction and Development; and the General Agreement on Tariffs and Trade (GATT).²⁹

Although the parties built the first two to their final form, the GATT was a placeholder, to be succeeded by a more comprehensive International Trade Organization.³⁰ Negotiations to create the International Trade Organization took place in Havana in 1948, but the U.S. Congress refused to ratify the resulting Havana Charter.³¹ As such, the GATT's formative treaty, known as "GATT 1947," became a *de facto* international institution, smaller and less developed than its contemporaries.³²

Over the next five decades, the GATT developed through a series of negotiation "rounds" through which its contracting parties sought mutual reductions in trade barriers through international bargaining.³³ The eighth such round, the Uruguay Round (1986–1994), replaced the GATT with the WTO and sought to strengthen the former's mandate and institutional presence through additional, more extensive treaties and a larger bureaucratic apparatus.³⁴

²⁸ See John W. Pehle, *The Bretton Woods Institutions*, 55 YALE L.J. 1127, 1128 (1946).

²⁹ See Richard N. Gardner, *The Bretton Woods-GATT System After Sixty-Five Years: A Balance Sheet of Success and Failure*, 47 COLUM. J. TRANSNAT'L L. 31, 32 (2008).

³⁰ See *id.* at 36, 55; Steven Nathaniel Zane, Note, *Leveling the Playing Field: The International Legality of Carbon Tariffs in the EU*, 34 B.C. INT'L & COMP. L. REV. 199, 206 (2011).

³¹ DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 20, 25 (2008); Jeffrey Clay Clark, *The United States Proposal for a General Agreement on Trade in Services and Its Preemption of Inconsistent State Law*, 15 B.C. INT'L & COMP. L. REV. 75, 78 (1992).

³² CHOW & SCHOENBAUM, *supra* note 31, at 20, 25. The IMF and International Bank for Reconstruction and Development together received \$15 million and two-member Boards of Governors supported by a dozen Executive Directors each; the GATT received \$1.5 million for its first two years and a Secretariat of ten senior staff, two of whom were on loan from the United Nations. See *Establishment of Bretton Woods Institutions*, 32 FED. RES. BULL. 361, 361–62, 372 (1946); U.N. Secretary-General, *Costs of the Conference of Trade and Employment and Its Preparatory Committee*, U.N. Doc. E/CONF.2/38 (Feb. 7, 1948); Press Release, European Office, United Nations ITO Interim Commission Established at Geneva, U.N. Press Release No. 420 (Aug. 11, 1948).

³³ See Gardner, *supra* note 29, at 56. Such bargaining also generated corollary agreements to the GATT 1947. See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 20 (2005).

³⁴ See Pauwelyn, *supra* note 33, at 24–25.

From the outset, key GATT provisions addressed dispute settlement,³⁵ but entailed weak enforcement and great deference to state autonomy.³⁶ As a result, one of the Uruguay Round's notable contributions reformed GATT dispute settlement through a new treaty, the Dispute Settlement Understanding (DSU).³⁷ GATT and WTO dispute settlement has played a central role in the LCA dispute.³⁸

1. GATT Dispute Settlement, 1947–1995

GATT dispute settlement emphasized negotiation and amicable resolution of trade disputes, rather than rules or quasi-judicial institutions.³⁹ This approach sought the withdrawal of measures considered illicit under the GATT without imposing too legalistic a framework that would offend sovereignty and thus reduce state participation.⁴⁰

Two Articles, XXII and XXIII, are the central elements of GATT 1947 that address the settlement of trade disputes, though they later led to additional clarifying policy statements and were eventually supplemented by the DSU.⁴¹ Article XXII requires parties to “accord sympathetic consideration to [one another] with respect to . . . all matters affecting the operation of this Agreement.”⁴² In the case that two or more contracting parties fail to find a “satisfactory adjustment,” they may consult in order to do so.⁴³ In other words, if a GATT signatory believed that another signatory pursued trade practices that violated the treaty, the other signatory would have to consider the allegations in good faith, and the two could negotiate an opportunity to bring the policy into accordance with the GATT.⁴⁴

³⁵ See *id.* at 10. In light of pre-GATT protectionism, states sought to monitor each other's commitment to free trade and challenge digressions from this commitment. See *id.*

³⁶ See *id.* at 13. Such deference relates to states' desire to maintain control over their economies and the anarchic nature of international relations. See *id.* This concern led states and policymakers to see GATT as an institution where political flexibility and sovereignty trumped adherence to developing legal standards. See *id.*

³⁷ CHOW & SCHOENBAUM, *supra* note 31, at 52.

³⁸ See *infra* text accompanying notes 102–159.

³⁹ Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996: An Introduction*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 3, 30 (Ernst-Ulrich Petersmann ed., 1997).

⁴⁰ See Gardner, *supra* note 29, at 55–56.

⁴¹ See General Agreement on Tariffs and Trade arts. XXII, XXIII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]; Jackson, *supra* note 19, at 184–85.

⁴² GATT 1947, *supra* note 41, art. XXII.

⁴³ *Id.* art. XXIII.

⁴⁴ See *id.* This provision is a “broad general authorization for consultation among parties,” which thus encourages a possible mutually agreed-upon solution as the first step in

The second key provision, Article XXIII, highlights three potential interstate disagreements concerning trade policy: violation, whereby a GATT state fails to “carry out its obligations;” non-violation, whereby a GATT state can contest another’s policy, even if the policy does not violate treaty obligations; and “any other situation.”⁴⁵ The disputing parties would refer the issue to the GATT Council, a general body open to all members which would meet once a month.⁴⁶ The Council would appoint a panel, which would review the parties’ arguments.⁴⁷ The panel would determine whether the measure in question “nullified or impaired” any “benefit” that a contracting party expected under the GATT, or if it impeded any other treaty objectives.⁴⁸

Once the panel reached a conclusion, it issued a report; if it found nullification or impairment, it could recommend (but not mandate) “in order of preference:” removal of the measure, compensation of the injured party, or retaliation.⁴⁹ To take effect, the report must have been adopted unanimously by the GATT Council.⁵⁰ This led member states to contend that the institution was unable to enforce panel decisions.⁵¹ Additional GATT treaties, such as the Subsidies Code and the Agreement on Trade in Civil Aircraft, contained similar mechanisms and references to Articles XXII and XXIII.⁵²

the GATT dispute settlement process. John H. Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 61 AM. SOC’Y INT’L L. PROC. 144, 149 (1967).

⁴⁵ GATT 1947, *supra* note 41, art. XXIII.

⁴⁶ See Petersmann, *supra* note 39, at 34–35. While the treaty itself defined basic guidelines and violations, it left the finer points of dispute settlement process and remedies open to interpretation and clarification, which later occurred through procedures, policy statements, and customary developments by and within the institution itself. See GATT 1947, *supra* note 41, arts. XXII–XXIII; Petersmann, *supra* note 39, at 35–36.

⁴⁷ See Petersmann, *supra* note 39, at 34–35.

⁴⁸ GATT 1947, *supra* note 41, art. XXIII.

⁴⁹ William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT’L L.J. 51, 59–60 (1987).

⁵⁰ *Id.* at 94 (“[I]f the losing party prevents formation of a consensus, the report is not adopted and has no effect.”). Though GATT 1947 did not prescribe unanimous adoption, weak enforcement and customary development led to “consensus [as] the traditional method of resolving disputes.” General Agreement on Tariffs and Trade, Ministerial Declaration of 29 November 1982, L/5424, GATT B.I.S.D. (29th Supp.) at 16 (1983).

⁵¹ See Davey, *supra* note 49, at 85–88. Given unanimous adoption and panels’ limited recommendation abilities, a losing party could effectively block unfavorable findings. See *id.* at 85.

⁵² See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade art. 18, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 77 [hereinafter Subsidies Code]; Agreement on Trade in Civil Aircraft art. 8.8, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 167–68 [hereinafter Civil Aircraft Agreement].

Member states thus criticized GATT dispute settlement as weak and ineffective.⁵³ Even after developments in the 1970s and 1980s that commentators deemed the “legalization” of the process,⁵⁴ dispute settlement was still hampered by noncompliance, politicization, and “forum-shopping” among the various GATT corollary agreements.⁵⁵ Thus, when policymakers set out to transform the GATT into the WTO, they sought to further the growing sense of “legalization” in dispute settlement.⁵⁶

2. The WTO Dispute Settlement Mechanism, 1995–Present

Dispute settlement under the WTO is much more rigorous, time-sensitive, and rules oriented.⁵⁷ In response to decades of criticism, GATT member states set out to address the system’s flaws through a new treaty exclusively committed to dispute settlement.⁵⁸ Known as the DSU, this part of the Uruguay Round codified the DSM.⁵⁹

Under the DSU, dispute initiation is similar to GATT: Article 4 requires the contesting party to seek consultations with the offending party to discuss the measure in question.⁶⁰ These consultations can last

⁵³ See Davey, *supra* note 49, at 61–62.

⁵⁴ Petersmann, *supra* note 39, at 48. States began to view panels as a “right” under the GATT, and panels themselves (increasingly comprised of legal professionals) began to utilize (1) previous decisions as non-binding precedent, and (2) customary methods of treaty interpretation, among other institutional developments initiated by the GATT Council. *Id.*

⁵⁵ *Id.* at 53–54.

⁵⁶ See Pauwelyn, *supra* note 33, at 18–20. As the GATT developed between 1947 and the Uruguay Round’s conclusion in 1994, member states gained comfort with conceding autonomy in order to promote trade liberalization. See *id.* at 18–24 (describing the GATT’s “quiet mutation” toward “harder law” and highlighting “a mounting belief in the rule of law amongst GATT parties . . .”). The focus of GATT’s development thus shifted from avoiding the creation of legal standards to encouraging and adhering to them. See *id.* at 18.

⁵⁷ See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. Despite adherence to “the principles” of Articles XXII and XXIII, WTO members emphasize “prompt settlement . . . in accordance with [states’ DSU] rights and obligations,” implying that the DSM is more time sensitive and stricter than GATT dispute settlement. *Id.* arts. 3.1, 3.3, 3.4.

⁵⁸ See *id.* art. 1.

⁵⁹ Taunya McLarty, *GATT 1994 Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System?*, 9 FLA. J. INT’L L. 241, 264 (1994). At the time, the DSU was seen as a landmark step; analysts noted that the DSM “reflect[s] a legal system more so than ever in the history of GATT.” *Id.* at 268.

⁶⁰ DSU, *supra* note 57, art. 4.3.

up to sixty days, during which the complaining party can ask the WTO Council, acting as the DSB, to form a panel.⁶¹

Article 8 outlines the creation of panels, noting that they shall contain three panelists who are “well-qualified governmental and/or non-governmental individuals.”⁶² If there are multiple related complaints, Article 9 enables the formation of a single panel to address all of them.⁶³ Per Article 12, the panel has six months (three if the matter is deemed urgent) from the date of composition to hear arguments and evaluate the case.⁶⁴ If this is not possible, Article 12 sets a strict deadline of nine months.⁶⁵ All panel proceedings are confidential.⁶⁶

Following the above steps, the panel issues its findings to the contesting parties through an interim report and provides them an opportunity to review the report before it is fully circulated to the DSB;⁶⁷ the panel sets the time period during which parties may raise concerns or objections.⁶⁸ After interim review, the panel submits the report to the DSB, which adopts it after a maximum of sixty days unless it refuses, by consensus, to do so.⁶⁹

Unlike GATT, the WTO DSM process need not end with the panel. Instead, Article 17 allows a party to appeal a panel decision; three members of the Appellate Body (AB), a rotating group comprised of seven individuals serving four-year terms, hear the appeal.⁷⁰ The AB’s jurisdiction is limited to issues of law raised and concluded by the panel, and it cannot remand cases to panels.⁷¹ It has sixty, and never more than ninety, days to execute its proceedings, after which the DSB adopts its findings within thirty days of the decision.⁷² The entire process is designed to take nine to twelve months, depending on whether or not a party appeals the panel decision.⁷³

⁶¹ *Id.* art. 4.7.

⁶² *Id.* arts. 8.1, 8.5.

⁶³ *Id.* art. 9.1.

⁶⁴ *Id.* art. 12.8.

⁶⁵ *Id.* art. 12.9.

⁶⁶ DSU, *supra* note 57, art. 14.1.

⁶⁷ *Id.* art. 15.2.

⁶⁸ *Id.*

⁶⁹ *Id.* art. 16.4.

⁷⁰ *Id.* arts. 17.1, 17.2.

⁷¹ *Id.* art. 17.6; John Lockhart & Tania Voon, *Reviewing Appellate Review in the WTO Dispute Settlement System*, 6 MELB. J. INT’L L. 474, 483 (2005).

⁷² DSU, *supra* note 57, arts. 17.5, 17.14.

⁷³ *Id.* art. 20. This provision responds to states’ criticism of the GATT’s delays in panel processes and decisions. *See* Davey, *supra* note 49, at 83–85.

After the final report, the DSB meets, requiring the “losing” party to implement the panel or AB’s recommendations.⁷⁴ The party can propose, and the DSB must approve, a “reasonable period of time” for implementation.⁷⁵ If the party does not implement the recommendations, the parties must then negotiate compensation.⁷⁶ If they fail to do so within twenty days, the DSB allows the “winning” party to enact retaliatory measures aimed at countering the policy in question, starting with the relevant sector and potentially expanding into others.⁷⁷

The development of the DSM was a direct reaction to states’ disappointment with and concerns over circumvention under⁷⁸ the weak enforcement and lax standards of GATT dispute settlement. The DSM, in addition to addressing this disappointment, demonstrates the amount of sovereignty that states are willing to concede in the area of international trade to ensure cooperation.⁷⁹ In order to comprehend current prospects for settlement, however, an understanding of the economic dynamics and political history of LCA is also necessary.

B. *An Economic and Political History of the Transatlantic LCA Dispute*

In order to understand why the DSM will generate a negotiated resolution in this case, it is important to comprehend the history of the LCA dispute. Specifically, an explanation of the economic and business foundations of aircraft production and the surrounding international political developments is crucial.

1. The Commercial Aircraft Industry: An Economic and Business Background

a. *Economic Dynamics and Their Political Effects*

According to economists, commercial aircraft manufacturing entails factors that make market entry and success uniquely difficult.⁸⁰

⁷⁴ DSU, *supra* note 57, art. 21.3.

⁷⁵ *Id.*

⁷⁶ *Id.* art. 22.1.

⁷⁷ *Id.* arts. 22.2–3.

⁷⁸ See Davey, *supra* note 49, at 85–88.

⁷⁹ See Pauwelyn, *supra* note 33, at 3.

⁸⁰ See NEWHOUSE, *supra* note 7, at 67–68 (noting that long life cycles of aircraft and erratic demand by airlines forces producers to invest in both current and future products); Keith Hartley, *Aerospace: The Political Economy of an Industry*, in THE STRUCTURE OF EUROPEAN INDUSTRY 307, 316, 325 (H.W. de Jong ed., 1993) (explaining how high research and development (R&D) costs require firms to spend billions of dollars before they can manu-

Many conclude that, because of these factors, the market naturally consolidates over time⁸¹—resulting in the Boeing-Airbus duopoly⁸²—and requiring subsidization in order to exist and flourish.⁸³

In the United States, subsidization occurs through the military-industrial complex.⁸⁴ Private aerospace firms amass funds and technical knowledge through military contracts, which effectively subsidize their commercial programs.⁸⁵ This generates further ties between the civilian government and these firms, which are already strong because policy-makers believe that the industry is economically important.⁸⁶

In Europe, governments subsidize commercial aircraft manufacturing through more direct means.⁸⁷ Since its founding in the mid-1960s, Airbus has received various forms of direct subsidies from multiple European governments, including France, Germany, the United Kingdom, and Spain.⁸⁸ As with the United States, commentators note

facture and sell enough aircraft in order to profit, and that these firms operate under economies of scale, in which product price decreases as production increases).

⁸¹ See Vicki L. Golich, *From Competition to Cooperation: The Challenge of Commercial-Class Aircraft Manufacturing*, 46 INT'L ORG. 899, 903–04 (1992).

⁸² Pavcnik, *supra* note 11, at 739.

⁸³ See generally Richard Baldwin & Paul Krugman, *Industrial Policy and International Competition in Wide-Bodied Jet Aircraft*, in TRADE POLICY ISSUES AND EMPIRICAL ANALYSIS 45 (Robert E. Baldwin ed., 1988) (explaining the political and economic rationale for subsidization).

⁸⁴ See Walter Adams & William James Adams, *The Military-Industrial Complex: A Market Structure Analysis*, 62 AM. ECON. R. 279, 279–80 (1972) (summarizing the military-industrial complex as the close relationship between the U.S. defense establishment and private industry).

⁸⁵ See Francis & Pevzner, *supra* note 12, at 635. Military programs generate commercially beneficial technological “spillover” effects and benefits such as access to military infrastructure and testing equipment. See *id.*; see also EU DSM Filing, *supra* note 16, at 7–8 (listing specific R&D subsidies provided by the U.S. Department of Defense (DOD)).

⁸⁶ See, e.g., IAN MCINTYRE, DOGFIGHT: THE TRANSATLANTIC BATTLE OVER AIRBUS 82 (1992) (discussing aircraft executives’ assistance in developing policy during congressional enactment of the 1974 Trade Act); Sheryl Gay Stolberg & Vikas Bajaj, *In India, Obama Courts Corporate America*, N.Y. TIMES, Nov. 7, 2010, at A8 (noting Boeing CEO Jim McNerney’s role as head of President Barack Obama’s Export Council). The U.S. aerospace industry has the country’s highest positive trade balance of all manufacturing industries, valued at \$47.2 billion in 2009. INT’L TRADE ADMIN., DEP’T OF COMMERCE, FLIGHT PLAN 2010: ANALYSIS OF THE U.S. AEROSPACE INDUSTRY 2 (2010).

⁸⁷ See U.S. DSM Filing, *supra* note 15, at 1–4. Even before Airbus, national aircraft firms were state-owned or subsidized, leading some to argue that divergent attitudes toward subsidization in the United States and the EU are based on fundamentally different philosophies of political economy, culture, and governance. See Meier-Kaienburg, *supra* note 6, at 195–97.

⁸⁸ See U.S. DSM Filing, *supra* note 15, at 1–4. Such subsidization, commonly known as “launch aid,” has included attractively rated loans, direct R&D funding, and equity infu-

the overlap between European leaders' policy goals and Airbus executives' business aims.⁸⁹ Beyond subsidization itself, the development of the industry provides additional insight into this dispute.

b. *The Transatlantic Duopoly and Specter of Future Competitors*

In the late 1940s, U.S. aircraft firms, buoyed by World War II, transitioned to commercial aerospace as a way to ensure future success, but continued to rely primarily on existing propeller technology.⁹⁰ French and British competitors, possessing less market share and industrial capacity, sought to generate demand through a new, faster product: the jet airliner.⁹¹ Due to a combination of circumstances, they failed in this venture, enabling American firms to continue their domination of the industry.⁹² Boeing capitalized on these circumstances and its military connections to develop the 707 jetliner.⁹³ Thereafter, from the mid-1950s through the late 1970s, Boeing led a small number of American firms that dominated the global market for commercial aircraft.⁹⁴

sions. *See id.*; *see also* GELLMAN RESEARCH ASSOCS., AN ECONOMIC AND FINANCIAL REVIEW OF AIRBUS INDUSTRIE, at 2–5, B6–B17 (1990) [hereinafter GELLMAN REPORT].

⁸⁹ *See* DAVID WELDON THORNTON, AIRBUS INDUSTRIE: THE POLITICS OF AN INTERNATIONAL INDUSTRIAL COLLABORATION 118 (1995). Airbus's history contains many instances of European leaders placing Airbus at the top of their agendas, including financing, advocating, and even lobbying for its aircraft on diplomatic trips. *See id.*; *see also* NEWHOUSE, *supra* note 7, at 131, 186, 191.

⁹⁰ *See* BILL YENNE, THE STORY OF THE BOEING COMPANY 144, 150 (updated ed. 2010).

⁹¹ *See* HARRY LAWRENCE, AVIATION AND THE ROLE OF GOVERNMENT 147, 157 (2004).

⁹² *See id.* at 148, 313–14. The British deHavilland Comet failed due to structural issues that led the British government to deem it inherently unsafe. *See id.* at 148. Other planes, such as the French Sud Caravelle, faced a lack of market access and low interest from airlines. *See id.* at 314.

⁹³ *See id.* at 149. Some of the 707's design came from Boeing's highly successful B-47 and B-52 bombers. *Id.* The aircraft would also serve multiple military roles, including as mid-air refueling tankers and intelligence aircraft. *See* THE COMPLETE ENCYCLOPEDIA OF WORLD AIRCRAFT 164–67 (David Donald ed., 1999) [hereinafter AIRCRAFT ENCYCLOPEDIA].

⁹⁴ *See* LAWRENCE, *supra* note 91, at 321–22. The 707 enabled Boeing to introduce three new aircraft in the 1960s: the medium-range 727; the short-range 737; and the iconic 747 “jumbo jet,” the first widebody (dual aisle) aircraft. *See* AIRCRAFT ENCYCLOPEDIA, *supra* note 93, at 168–72; Marc C.S. Mathis, *Uncivil Aviation: How the Ongoing Trade Dispute Stalemate Between Boeing and Airbus Has Undermined GATT and May Continue to Usher In an Era of International Agreement Obsolescence Under the World Trade Organization*, 13 TULSA J. COMP. & INT'L L. 177, 183 (2005). The late 1970s saw Boeing introduce the medium-range 757 and the medium-/long-range 767, a response to the Airbus A300 and A310. THORNTON, *supra* note 89, at 110; *cf.* Baldwin & Krugman, *supra* note 83 at 47–51 (discussing the similarities between the 767 and A300 and noting the latter's entry into service eight years prior to the former). In the 1990s, Boeing introduced the 777 “minijumbo,” followed by the largely composite and more energy-efficient 787 in the 2000s. NEWHOUSE, *supra* note 7, at 8; *see*

Across the Atlantic, industrial and political leaders continued their effort to challenge U.S. dominance by utilizing the trend of European integration to promote collaboration in aerospace.⁹⁵ By the late 1960s, France, Great Britain, and West Germany had established the Airbus consortium, pooling national firms' resources and capabilities to produce the groundbreaking A300,⁹⁶ followed by a series of other planes that would challenge U.S. products.⁹⁷ At the dawn of the twenty-first century, Airbus eclipsed Boeing, its sole competitor, in market share.⁹⁸ Though the two have since traded places, the market remains split between them, pitting the two companies in a tit-for-tat development and sales cycle.⁹⁹

The duopoly's days are likely numbered: firms in Brazil, Canada, China, and Russia are developing commercial aircraft due to enter service in the next decade, which will directly challenge Boeing and Airbus's market share.¹⁰⁰ Nevertheless, the duopoly's rise and surrounding controversy over subsidies catalyzed international political and legal action over the last three decades, pitting the United States against the EU.¹⁰¹

Roger Renstrom, *Boeing's Big Gamble: Half-Plastic Dreamliner*, PLASTICS NEWS, July 2, 2007, at 4.

⁹⁵ See MCINTYRE, *supra* note 86, at 9–11. Following World War II, European leaders merged production and planning in crucial sectors such as coal and steel so as to avoid war; this process set off further economic and political cooperation, eventually leading to the current EU system. See Jonathan A.C. Wise, Note, *Variable Geometry and the European Central Bank: How the ECB Can Assert Itself Against Attacks from Member States with Derogations*, 20 B.C. INT'L & COMP. L. REV. 407, 407 (1997). Leaders cited aerospace as a sector that would benefit from such integration. See MCINTYRE, *supra* note 86, at 9–11.

⁹⁶ LAWRENCE, *supra* note 91, at 318–19. The A300, for which ninety percent of costs were paid by subsidies, was the first widebody, twin-engined aircraft. See GELLMAN REPORT, *supra* note 88, at 2–5; LAWRENCE, *supra* note 91, at 162.

⁹⁷ See LAWRENCE, *supra* note 91, at 319, 322–25. Airbus developed a “family” of aircraft that share design traits, which reduced costs and increased competitiveness. See *id.* at 323–24. They include the A310, a shortened A300; the A320, a short-/medium-range narrowbody that competes with the 737; the A330/340, a twin- and/or quad-engined aircraft that competes with the 767 and 777; the double-decker A380, which surpassed the 747 as the world's largest passenger aircraft; and the A350, a reaction to the 787. *Id.*; THORNTON, *supra* note 89, at 108; Francis & Pevzner, *supra* note 12, at 643, 651; see NEWHOUSE, *supra* note 7, at 7–8.

⁹⁸ *Boeing Gets Back on Track*, ECONOMIST, June 4, 2005, at 59–60. By this time, Airbus had become a largely private entity. See NEWHOUSE, *supra* note 7, at 10–11.

⁹⁹ See Francis & Pevzner, *supra* note 12, at 651 (noting how Airbus answered Boeing's 787 with its A350, akin to the A330 but with a composite body and cleaner engines).

¹⁰⁰ See Robert Wall, *After the Battle*, AVIATION WEEK & SPACE TECH., July 4, 2011, at 49. Canadian Bombardier's C-Series, one such aircraft meant to compete with the A320 and 737 (along with the Chinese COMAC C919 and Russian Irkut MS-21), has spurred Airbus and Boeing to offer updated versions of these venerable aircraft. See *id.*

¹⁰¹ See *infra* text accompanying notes 102–159.

2. Surrounding International Political and Legal Developments

a. *A Developing Rivalry, the GATT Subsidies Code, and the 1979 Agreement on Trade in Civil Aircraft*

The U.S. government first raised concerns over Europe's subsidization of Airbus in the mid-1970s.¹⁰² The Europeans concurrently blocked trade in aircraft and alleged U.S. subsidization through military funding and other financial instruments.¹⁰³ Following this discord, the United States raised the aircraft dispute at the 1978 G7 summit, where leaders committed to "maximum freedom of trade possible in commercial aircraft."¹⁰⁴ The leaders maintained that the GATT's Tokyo Round was the best mechanism through which such freedom of trade could be accomplished.¹⁰⁵

Upon its conclusion in 1979, policymakers praised the Tokyo Round for being the first of its kind to address, *inter alia*, non-tariff barriers to trade as well as specific sectors and industries.¹⁰⁶ It heralded two important treaties with regard to the aircraft dispute: (1) the Subsidies

¹⁰² See *American and Foreign Practices in the Financing of Large Commercial Aircraft Sales: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways & Means* 95th Cong. 84–85 (1978) (statement of Paul T. O'Day, Deputy Director, Bureau of Domestic Bus. Dev., Dep't of Commerce). American objections to, threats against, and investigation of European subsidization increased following Airbus's first sale to a U.S. airline in 1977. See *id.* at 82; see also *Trade Panel Probes Eastern Airbus Lease*, CHI. TRIB., June 24, 1977, at C9; Richard Witkin, *U.S. Checking Airbus Accord*, N.Y. TIMES, June 24, 1977, at D7.

¹⁰³ See Don Cook, *Concorde Issue Stalls Deal: Boeing Fleet Sale in Holding Pattern*, L.A. TIMES, Apr. 12, 1977, at D9; *Suspension of Buying Certain Foreign Planes Announced by France*, WALL ST. J., June 13, 1977, at 12 (highlighting European trade blockages in response to U.S. government action against European aircraft's landing and sales rights). In addition to military contracts, Boeing received favorable treatment from the U.S. Export-Import Bank in financing its international sales. See William M. Carley, *Boeing Waging Rare Attack on Policies of Airbus Industrie in Selling Its A300*, WALL ST. J., Apr. 13, 1978, at 16.

¹⁰⁴ GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 238–39 (1986). In full, states agreed to "the objective of negotiating maximum freedom of world trade in commercial aircraft parts, and related equipment, including elimination of duties and to the fullest extent possible, the reduction or elimination of trade restricting or distorting effects of other measures." *Statement by Several Delegations on Current Status of Tokyo Round Negotiations*, 5, MTN/INF/33 (July 14, 1978) [hereinafter *Tokyo Round Statement*], available at <http://sul-derivatives.stanford.edu/derivative?CSNID=91910050&mediaType=application/pdf> (statement by the GATT on behalf of G7 Member States).

¹⁰⁵ Cf. *Tokyo Round Statement*, *supra* note 104, at 1, 5 (highlighting the aim of the Tokyo Round to generate mutual reductions in trade barriers in numerous sectors, including aircraft).

¹⁰⁶ D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT'L L. 51, 52, 56 (1983).

Code and (2) the Agreement on Trade in Civil Aircraft.¹⁰⁷ By tackling subsidies, the former was the first international agreement to set a standard for what had long been an untouchable area of international trade law.¹⁰⁸ Yet the shortcomings of the Subsidies Code soon became apparent.¹⁰⁹ It conceded that subsidies “promote important objectives of social and economic policy” and asked signatories merely to “avoid causing” adverse effects on partner states.¹¹⁰ In terms of reprieve for states adversely affected by foreign subsidies, it allowed such states either to impose unilateral countervailing duties against the subsidized items (already permitted under the GATT 1947),¹¹¹ or to retaliate by subsidizing industries that export to the offending market, which was strongly discouraged.¹¹² It also lacked an operational definition of the term “subsidy,” which caused further misinterpretation and discord.¹¹³

The Civil Aircraft Agreement, though lauded, also led to disappointment.¹¹⁴ Language on credit and financing merely asked that “firms be provided with access to business opportunities on a competitive basis.”¹¹⁵ Governments agreed to “avoid” sales inducements, not

¹⁰⁷ Richard O. Cunningham & Peter Lichtenbaum, *The Agreement on Trade in Civil Aircraft and Other Issues Relating to Civil Aircraft in the GATT/WTO System*, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1165, 1167 (Patrick F.J. Macrory et al. eds., 2005).

¹⁰⁸ See Stephen D. Krasner, *The Tokyo Round: Particularistic Interests and Prospects for Stability in the Global Trading System*, 23 INT’L STUD. Q. 491, 518 (1979) (“[T]he subsidies code does provide for some international surveillance in an area that had previously been an exclusively national domain.”).

¹⁰⁹ See Andrew L. Stoler, *The Evolution of Subsidies Disciplines in GATT and the WTO*, 44 J. WORLD TRADE 797, 802, 805 (2010) (“Although the improvements . . . appeared fairly robust, . . . [they] were clearly largely cosmetic. . . . The Tokyo Round Subsidies Code was a step forward in disciplining subsidies but its ineffective approach . . . meant that there was more to do [in] the Uruguay Round.”).

¹¹⁰ Subsidies Code, *supra* note 52, arts. 8.1, 8.3.

¹¹¹ *Id.* art. 4.3; see GATT 1947, *supra* note 41, art. II.2(b).

¹¹² See Subsidies Code, *supra* note 52, art. 13.4 (enabling states to resort to countermeasures “in the event the [panel] recommendations are not followed”). Nevertheless, such discouragement did not stave off retaliatory action, which increased following the Tokyo Round. See Howard P. Marvel & Edward John Ray, *Countervailing Duties*, 105 ECON. J. 1576, 1582–84 (1995).

¹¹³ See Marvel & Ray, *supra* note 112, at 1578.

¹¹⁴ See Shane Spradlin, *The Aircraft Subsidies Dispute in the GATT’s Uruguay Round*, 60 J. AIR L. & COM. 1191, 1200–01 (1995). The Civil Aircraft Agreement appeared comprehensive by “eliminating tariffs, prohibiting licensing requirements, and banning discriminatory procurement,” but left much undone through its unclear connection to the Subsidies Code. *Id.* In other words, “the subsidy practices that had given Airbus an advantage were not addressed substantively in the GATT Tokyo Round.” Meier-Kaienburg, *supra* note 6, at 198.

¹¹⁵ Civil Aircraft Agreement, *supra* note 52, art. 4.3.

prohibit them.¹¹⁶ The treaty further stated that “governmental support, of itself, would not be deemed a distortion of trade.”¹¹⁷ Many labeled such language as weak, due to domestic political limits and the time constraints under which the parties negotiated.¹¹⁸ Nevertheless, the treaty and its resultant political circumstances would dictate the conflict for the next decade; by bringing the aircraft dispute into the GATT’s international forum and providing structural mechanisms such as dispute settlement, the Civil Aircraft Agreement effectively broadened a bilateral diplomatic issue.¹¹⁹

b. *The 1992 Bilateral Agreement*

The 1979 Civil Aircraft Agreement integrated the transatlantic dispute into the GATT through the establishment of a Civil Aircraft Committee¹²⁰ and the application of GATT dispute settlement to commercial aircraft disagreements.¹²¹ The Committee’s records reveal how the United States and the EEC repeatedly and inconclusively aired their grievances.¹²² Yet policymakers stated their support for the Commit-

¹¹⁶ *Id.* art. 4.4.

¹¹⁷ *Id.* pmb1, at 162.

¹¹⁸ See *Tokyo Round Statement*, *supra* note 104, at 1, 5 (dating the parties’ agreement to address aircraft subsidies to mid-1978, less than a year before the Tokyo Round’s conclusion); ALFRED E. ECKES, JR., REVISITING U.S. TRADE POLICY: DECISIONS IN PERSPECTIVE 167 (2000) (quoting then-Deputy Special Trade Representative Alan Wolff: “We formed a partnership with the European Community . . . we didn’t cure the Airbus problem, but each one of the problems [had] some idiosyncrasies to it. If you went to Boeing at the time and said, Should we go to war over whether Europe has an aircraft industry, the answer was no. The answer was no from Congress as well. One can only do what the domestic constituency allows you to do in most instances.”).

¹¹⁹ See Cunningham & Lichtenbaum, *supra* note 107, at 1168.

¹²⁰ See Civil Aircraft Agreement, *supra* note 52, art. 8.1 (“[The Civil Aircraft Committee] shall . . . afford[] Signatories the opportunity to consult on any matters relating to the operation of this Agreement . . . [and] to examine any matter for which it has not been possible to find a satisfactory solution through bilateral consultations . . .”).

¹²¹ See *id.* art. 8.8. Countries could utilize GATT dispute settlement by filing complaints with either the Civil Aircraft Committee or the Subsidies Committee. See *id.*

¹²² See, e.g., Committee on Trade in Civil Aircraft, *Minutes of the Meeting Held in the Centre William Rappard on 10 October 1984*, ¶¶ 21, 25–28, AIR/M/13 (Jan. 7, 1985); Committee on Trade in Civil Aircraft, *Minutes of the Meeting Held in the Centre William Rappard on 6–7 October 1982*, ¶¶ 28, 30, 32, AIR/M/9 (Jan. 19, 1983); Committee on Trade in Civil Aircraft, *Minutes of the Meeting Held in the Centre William Rappard on 28 and 30 October 1981*, ¶¶ 23–27, AIR/M/6 (Feb. 3, 1982); Committee on Trade in Civil Aircraft, *Minutes of the Meeting Held in the Centre William Rappard on 20 February 1980*, ¶ 25, AIR/W/2 (Mar. 10, 1980).

tee,¹²³ and industry and political leaders described it as a restraining force.¹²⁴

By the mid-1980s, the two parties addressed the dispute through the GATT as well as bilaterally.¹²⁵ Following the breakdown of these efforts, the United States utilized the Civil Aircraft Agreement's second key contribution, GATT dispute settlement.¹²⁶ Its complaint against the EEC concerned Germany's debt forgiveness and an alleged exchange rate subsidy included in the privatization of its Airbus arm.¹²⁷ The panel ruled that the subsidy was illicit under the Subsidies Code, after which the United States filed a broader case against all Airbus subsidies.¹²⁸ The Europeans responded by renewing bilateral negotiations, the result of which was the 1992 U.S.-EEC Bilateral Agreement.¹²⁹

The 1992 Bilateral Agreement explicitly built on the provisions of the 1979 Agreement¹³⁰ by including more stringent limits on subsidies.¹³¹ Notably, it involved several "escape clauses," such as the exclusion of equity infusions;¹³² "exceptional circumstances" under which the states could exempt themselves from its provisions;¹³³ the ability to with-

¹²³ See, e.g., *Competitiveness of U.S. Commercial Aircraft Industry: Hearing Before the Subcomm. on Commerce, Consumer Prot., & Competitiveness of the H. Comm. on Energy & Commerce*, 100th Cong. 4 (1987) (statement by S. Bruce Smart, Undersec'y for Int'l Trade, Dep't of Commerce) ("[The Civil Aircraft Agreement] is the only GATT agreement that is specific to one industry. We place great importance upon its success . . .").

¹²⁴ See, e.g., *id.* at 60–62 (statement by James Worsham, Corporate Vice President, Aerospace Group Executive, McDonnell Douglas Corp.) (discussing the positive influences of the Civil Aircraft Agreement).

¹²⁵ See MCINTYRE, *supra* note 86, at 242–44.

¹²⁶ *Id.*

¹²⁷ *Id.* In 1988, the German government sold Messerschmitt-Bölkow-Blohm (MBB), which owned Deutsche Airbus, to private firm Daimler-Benz (DB). THORNTON, *supra* note 89, at 136. To incentivize the sale, Germany absolved DB of past MBB debt, took a twenty percent share in a new company that would manage MBB's Airbus interests, and agreed to protect any losses that DB would incur through exchange rate movements. *Id.* at 136–37.

¹²⁸ See CUMMINGHAM & LICHTENBAUM, *supra* note 107, at 1171.

¹²⁹ *Id.* at 1171–72; see also Agreement Concerning the Application of the GATT Agreement in Trade in Civil Aircraft, U.S.-EEC, July 17, 1992, KAV 3362 (1992) [hereinafter 1992 Bilateral Agreement].

¹³⁰ 1992 Bilateral Agreement, *supra* note 129, pmbl. at 3 ("[T]he GATT Agreement on Trade in Civil Aircraft should be strengthened with a view to progressively reducing the role of government support . . . in pursuit of [the parties'] common goal of preventing trade distortions resulting from direct or indirect government support for the development and production of large civil aircraft . . .").

¹³¹ See *id.* arts. 3–5. Under the Bilateral Agreement, direct support could constitute no more than thirty-three percent of an aircraft's development costs, *id.* art. 4.2, and indirect support could constitute no more than three percent of the state's national industry turnover, *id.* art. 5.2(a).

¹³² *Id.* art. 7.

¹³³ *Id.* art. 9.

hold information on the basis of national security concerns;¹³⁴ and the opportunity to withdraw from the treaty completely.¹³⁵ Like its predecessor, the 1992 Agreement was greeted with some skepticism, but also with hope that the dispute was momentarily resolved.¹³⁶

c. The Creation of the WTO and the 2005 DSM Filings

The aircraft dispute was not a focus issue during the Uruguay Round that led to the creation of the WTO.¹³⁷ The conclusion of the Uruguay Round in 1994, however, resulted in two institutional developments that would play major roles in the revival of the dispute: (1) the DSU and its contribution of a more rigorous DSM;¹³⁸ and (2) the Agreement on Subsidies and Countervailing Measures (ASCM).¹³⁹

A revised version of the GATT Subsidies Code, the ASCM defines a subsidy as “a financial contribution by a government or any public body” where “a benefit is . . . conferred.”¹⁴⁰ The Agreement only applies to subsidies “specific to an enterprise or industry,” which are deemed either “prohibited” or “actionable.”¹⁴¹ The Agreement also determines when and to what extent states may enact countervailing measures to combat a subsidy’s adverse effects—if a member state finds that another member state subsidizes exports that injure its domestic industry, and there is a causal link between the two, then the WTO will allow countervailing measures.¹⁴²

Following Airbus’s launch of the A380 and its capture of a majority market share in the early 2000s,¹⁴³ Boeing and the U.S. government intensified their criticism of the EU and Airbus, with the United States ultimately withdrawing from the 1992 Bilateral Agreement in October 2004.¹⁴⁴ Mandatory consultations followed; upon their failure in May

¹³⁴ *Id.* art. 8.12.

¹³⁵ *Id.* art. 13.3; THORNTON, *supra* note 89, at 147.

¹³⁶ See Spradlin, *supra* note 114, at 1208–09 (“[The Bilateral Agreement] provided a solution . . . [though] many problems still exist.”).

¹³⁷ *Cf. id.* at 1216–18 (discussing why member states did not address LCA during the Uruguay Round).

¹³⁸ See *supra* text accompanying notes 57–79.

¹³⁹ See Stoler, *supra* note 109, at 805.

¹⁴⁰ Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 410 [hereinafter ASCM].

¹⁴¹ *Id.* arts. 2, 3, 5.

¹⁴² *Id.* art. 19.

¹⁴³ See *supra* text accompanying note 98.

¹⁴⁴ Gary G. Yerkey & Joe Kirwin, *U.S., EU Bicker over U.S. Decision to Pull Out of Bilateral Aircraft Agreement*, 21 INT’L TRADE REP. (BNA) 1674 (Oct. 14, 2004); see *America Flies to War*;

2005, the United States requested the formation of a panel,¹⁴⁵ with the EU launching its own complaint on the same day.¹⁴⁶ The filings were immediately complicated by both parties' requests for additional panels concerning concurrent developments,¹⁴⁷ leading the DSB to create a panel for each complaint—DS316 for the U.S. complaint, the “Airbus case,” and DS353 for the EU complaint, the “Boeing case.”¹⁴⁸ Commentators labeled the collective case the “toughest” in the WTO’s history.¹⁴⁹

The DS316 Panel report, made public in June 2010, entails mixed findings, holding that the United States both established and failed to establish certain claims from its filing.¹⁵⁰ Both sides claimed victory fol-

Airbus and Boeing, *ECONOMIST*, Oct. 7, 2004, at 61–62. The A380, explicitly aimed at superseding the Boeing 747 as the world’s largest passenger aircraft, was the first new Airbus product following the 1992 Bilateral Agreement. See Pavcnik, *supra* note 11, at 742–43. EU subsidies for the A380 complied with the 1992 Bilateral Agreement (the launch aid, to be repaid at an interest rate of one-quarter percent within seventeen years, did not exceed thirty-three percent of development costs). *Id.* at 743–44. But the United States contended that the EU violated the ASCM (because the subsidies were targeted and did not account for the aircraft’s commercial risk), which the United States further alleged takes precedence over the 1992 Treaty. *Id.*

¹⁴⁵ U.S. DSM Filing, *supra* note 15, at 1. The filing challenged European (1) launch aid/multi-state funding (LA/MSF); (2) loans; (3) infrastructure development; (4) debt forgiveness; (5) equity infusions; (6) R&D funding; and (7) all other measures related to the development and sale of the entire Airbus family of aircraft. *Id.* at 1–4.

¹⁴⁶ EU DSM Filing, *supra* note 16, at 1. This filing challenged (1) state and local tax incentives; (2) NASA R&D subsidies; (3) NASA informational spillovers; (4) DOD subsidies; (5) Department of Commerce informational spillovers; (6) NASA and DOD intellectual property right waivers; (7) Department of Labor informational spillovers; (8) NASA and DOD contracts; (9) Boeing’s use of NASA and DOD facilities; and (10) federal tax incentives. *Id.* at 2–10.

¹⁴⁷ Request for Consultations by the United States, *European Communities—Measures Affecting Trade in Large Civil Aircraft* add., WT/DS316/1/Add.1 (Feb. 7, 2006); Daniel Pruzin, *WTO Panel Sets New Timetable for Review of U.S. Complaint Against Airbus Subsidies*, 23 INT’L TRADE REP. (BNA) 1562 (Feb. 11, 2006).

¹⁴⁸ Daniel Pruzin, *WTO Delays Release of Interim Decision on Boeing Subsidies Until Mid-September*, 27 INT’L TRADE REP. (BNA) 1076 (July 15, 2010).

¹⁴⁹ Meier-Kaienburg, *supra* note 6, at 242. As one WTO Official put it, the case entailed “time-consuming” discovery and litigation that was “unprecedented” in its intensity. Interview with anonymous WTO Secretariat Official, in Geneva, Switz. (Nov. 18, 2010).

¹⁵⁰ See DS316 Panel Report, *supra* note 21, ¶¶ 8.1–8. For example, it ruled that *all* LA/MSF constituted subsidies under the ASCM, but that only A380 subsidies from Germany, Spain, and the UK (not France) were export-contingent, and thus prohibited. *Id.* ¶¶ 8.1(a)(ii), 8.3(a)(ii). The Panel made similar distinctions for other allegations, such as infrastructure and R&D subsidies. See *id.* ¶¶ 8.1–8. The AB later altered these findings. Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 1414–1415, WT/DS316/AB/R (May 18, 2011) [hereinafter DS316 AB Report].

lowing the Panel's split finding¹⁵¹ and filed subsequent appeals.¹⁵² The AB handed down its report in May 2011, in which it upheld several of the Panel's findings, but reversed others on the basis of procedural disagreements.¹⁵³ Following the report's adoption by the DSB and a standard six-month implementation period, the EU claimed that it satisfied its requirements in December 2011.¹⁵⁴ The United States contested the EU's implementation claim, requesting further consultations and the ability to impose up to \$10 billion in sanctions.¹⁵⁵ Following EU protests over the amount and methodology of the requested sanctions, the WTO commenced arbitration between the two sides.¹⁵⁶

The DS353 Panel report, made public in March 2011, validated some EU complaints; it found U.S. subsidies to be illicit,¹⁵⁷ and gener-

¹⁵¹ See Daniel Pruzin, *Boeing Disputes Significance of EU Win at WTO in Challenge to Aircraft Subsidies*, 27 INT'L TRADE REP. (BNA) 1436 (Sept. 23, 2010). The Panel concluded that Airbus received illegal subsidies including \$15 billion in below-market-rate loans, \$2.2 billion in equity infusions, \$1.7 billion in infrastructure, and \$1.5 billion in R&D subsidies. *Id.* U.S. Trade Representative Ron Kirk called the ruling an "important victory [that would] . . . level the competitive playing field." Daniel Pruzin, *WTO Panel Ruling Slams Illegal Subsidies for Europe's Airbus in Case Brought by U.S.*, 27 INT'L TRADE REP. (BNA) 1029 (July 8, 2010). EU officials quickly contested the outcome as limited, noting that the United States had alleged \$205 billion of subsidies, and that the actual outcome was "worlds away" from that figure; likewise, Airbus noted how "[seventy] percent of the U.S. claims were rejected and wild allegations have been proven wrong." *Id.*

¹⁵² Notification of an Other Appeal by the United States Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 23(1) of the *Working Procedures for Appellate Review, European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/13 (Aug. 20, 2010); Notification of an Appeal by the European Union Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 20(1) of the *Working Procedures for Appellate Review, EC and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/12 (July 23, 2010).

¹⁵³ DS316 AB Report, *supra* note 150, ¶¶ 1414–1415. The AB "overturned the panel's finding that [A380] launch aid provided by Germany, Spain, and the United Kingdom . . . constituted prohibited subsidies . . . [It] concluded that the interpretation of WTO rules used by the panel . . . was incorrect . . . [and] it did not have enough factual evidence on hand to issue its own findings." Daniel Pruzin & Len Bracken, *EU Scores Gains in Airbus Subsidies Ruling by World Trade Organization Appellate Body*, 28 INT'L TRADE REP. (BNA) 819 (May 19, 2011).

¹⁵⁴ Len Bracken, *U.S. Requests WTO Consultations With EU On Compliance With Airbus Subsidy Ruling*, 28 INT'L TRADE REP. (BNA) 2014 (Dec. 15, 2011).

¹⁵⁵ *Id.*

¹⁵⁶ See Tom Miles, *WTO to Arbitrate on U.S. Sanctions in Airbus Case*, REUTERS, Dec. 22, 2011, available at <http://www.reuters.com/article/2011/12/22/wto-airbus-idUSL6E7NM1L520111222>.

¹⁵⁷ DS353 Panel Report, *supra* note 22, ¶¶ 8.1–6. The Panel highlighted that some state tax incentives and federal R&D support constituted illicit subsidies, and it "exercised

ated both declarations of victory¹⁵⁸ and appeals by both sides.¹⁵⁹ Yet beyond the DSM and LCA industry's history, exploration of GATT/WTO dispute settlement's negotiation-oriented provisions is necessary in order to understand the likelihood of a negotiated settlement to this dispute.

II. DISCUSSION

GATT/WTO dispute settlement encourages states to negotiate solutions, rather than automatically to comply with panel or AB decisions.¹⁶⁰ This encouragement results from several factors, which can be categorized into two classes: (1) textual and intrinsic negotiation effects, which result from explicit provisions found within GATT/WTO treaties;¹⁶¹ and (2) empirical and theoretical support for these effects, which result from state behavior under the GATT/WTO system.¹⁶²

The first class of factors includes the development of the GATT/WTO system as one that emphasizes state autonomy, mutual agreement, and amicability,¹⁶³ as well as the parties' definition of success and the aim of dispute resolution in the international trade law system.¹⁶⁴ The

judicial economy" regarding the actual monetary value of the policies' adverse effects. *See id.* ¶¶ 8.1–10.

¹⁵⁸ *See* Daniel Pruzin, *WTO Publishes Final Ruling in Complaint Against Boeing Subsidies; EU, U.S. Claim Win*, 28 INT'L TRADE REP. (BNA) 564 (Apr. 7, 2011). EU representatives contended that the DS353 Panel "clearly confirmed" its "main claims" by finding subsidies of "at least \$5.3 billion" in value; U.S. officials, claiming that they had "prevailed," pointed to the Panel's request that the U.S. government "remove . . . only \$2.7 billion" worth of subsidies, "a fraction of the \$23.7 billion the [EU] had originally claimed." *Id.*

¹⁵⁹ Notification of an Other Appeal by the United States Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 23(1) of the Working Procedures for Appellate Review, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/10 (Apr. 29, 2011); Notification of an Appeal by the European Union Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 20(1) of the Working Procedures for Appellate Review, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/8 (Apr. 4, 2011).

¹⁶⁰ *See* DSU, *supra* note 57, art. 3.7; GATT 1947, *supra* note 41, art. XXII.

¹⁶¹ *See* discussion *infra* Part II.A.

¹⁶² *See* discussion *infra* Part II.B.

¹⁶³ *See* Marrakesh Agreement Establishing the World Trade Organization art. IX:1, Apr. 15, 1994, 1869 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. The WTO aims to "continue the . . . consensus followed under the GATT" but allows for decisions by majority vote where consensus is not possible. *Id.*

¹⁶⁴ *See infra* text accompanying notes 180–183.

second class of factors lies within the results of the DSM's track record.¹⁶⁵

A. Textual and Intrinsic Negotiation Effects

Although the GATT's dispute resolution provisions are relatively meager and few compared to the DSM,¹⁶⁶ they illustrate its sovereignty-centered attitudes towards settlement.¹⁶⁷ This emphasis on sovereignty, however, generated a lack of enforcement mechanisms,¹⁶⁸ and negotiation became essential to harmonized trade.¹⁶⁹ Articles XXII and XXIII thus placed a strong emphasis on "sympathetic consideration;" such willingness to negotiate ultimately underpinned the GATT.¹⁷⁰ States valued a framework that allowed them to determine outcomes rather than cede this responsibility to an external body.¹⁷¹

Corollary agreements further supported the GATT's negotiation effects: during the 1979 Tokyo Round, the GATT Contracting Parties issued an "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (Understanding), which clarified and partially codified the procedures that the GATT 1947 had left unclear.¹⁷² The Understanding notes that use of GATT dispute settlement is not a "contentious act[]" and requires parties' "good faith . . . effort[s] to resolve the disputes."¹⁷³ Other Tokyo Round treaties echo Article XXII and XXIII's emphasis on negotiation.¹⁷⁴ In short, relevant provi-

¹⁶⁵ See Harrington, *supra* note 27, at 323 (discussing DSM empirical patterns that demonstrate a high settlement rate).

¹⁶⁶ Compare GATT 1947, *supra* note 41, arts. XXII–XXIII (outlining dispute settlement procedures in two out of thirty-four articles), with DSU, *supra* note 57, arts. 1–27 (devoting an entirely separate treaty to dispute settlement).

¹⁶⁷ See Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1158–59 (1994).

¹⁶⁸ See Davey, *supra* note 49, at 81, 85–88. Such a lack of enforcement ability was a primary motivating factor in creating a new DSM. See McLarty, *supra* note 59, at 263–66.

¹⁶⁹ Robert Alilovic, *Consultations Under the WTO's Dispute Settlement System*, 9 DALHOUSIE J. LEGAL STUD. 279, 282 (2000).

¹⁷⁰ GATT 1947, *supra* note 41, arts. XXII, XXIII; see Petersmann, *supra* note 39, at 33.

¹⁷¹ See Gary N. Horlick, *The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View*, 32 INT'L LAW. 685, 686 (1998).

¹⁷² Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210–11 [hereinafter Tokyo Round Understanding]; Pauwelyn, *supra* note 33, at 19.

¹⁷³ Tokyo Round Understanding, *supra* note 172, at 211–12.

¹⁷⁴ See Civil Aircraft Agreement, *supra* note 52, arts. 8.5, 8.6 ("Each signatory shall afford sympathetic consideration to and adequate opportunity for prompt consultation . . . to seek a mutually acceptable solution prior to the initiation of an investigation . . .");

sions in the GATT, policy statements by the institution, and subsequent treaties clarify that consultation and negotiation are both precursors to litigation as well as a preferred form of resolution.¹⁷⁵

Even after legalization under the DSU, this spirit of negotiation as a first order preference persists.¹⁷⁶ This persistence leads some to conclude that disputes are merely events that occur between rounds of interstate negotiation, and that the DSM is intentionally built to create multiple negotiation opportunities at every procedural level.¹⁷⁷ The DSU itself highlights such potential opportunities: Article 4, for example, codifies and reinforces Article XXII and XXIII's emphasis on consultation, implying that settlement is preferable before further litigation.¹⁷⁸ Article 3.7 cautions states to exercise judgment with respect to disputes that would be unlikely to succeed, thus warning them of the gravity of enacting a DSM complaint and stating that it is in their best interest to resolve disputes bilaterally.¹⁷⁹

The DSU does not explicitly define success, but the system's efficacy hinges on such a definition, both in the aircraft dispute and in other cases.¹⁸⁰ Some suggest that the DSM is only successful when it re-

Subsidies Code, *supra* note 52, art. 18.6, 18.8 (mandating panels to issue the descriptive parts of their reports first in order "[t]o encourage development of mutually satisfactory solutions"; if the parties fail to develop such a solution, only then can the panel submit its full written report).

¹⁷⁵ See Tokyo Round Understanding, *supra* note 172, at 211; Civil Aircraft Agreement, *supra* note 52, arts. 8.5, 8.6; Subsidies Code, *supra* note 52, arts. 18.6, 18.8; GATT 1947, *supra* note 41, arts. XXII–XXIII.

¹⁷⁶ See Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. ON DISP. RESOL. 141, 147 (2003).

¹⁷⁷ *Id.* By mandating initial negotiation, the DSU provides time lapses during which parties can both negotiate and develop alternative methods of dispute resolution. See Joost Pauwelyn, *The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 121, 133–39 (2003).

¹⁷⁸ Compare DSU, *supra* note 57, art. 4.1 ("Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members."), with GATT 1947, *supra* note 41, arts. XXII–XXIII ("Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation If no satisfactory adjustment is effected between the contracting parties . . . the matter may be referred to [a panel].").

¹⁷⁹ See DSU, *supra* note 57, art. 3.7. The Article warns states to "exercise . . . judgment as to whether action under these procedures would be fruitful. *The aim of the [DSM] is to secure a positive solution to a dispute. A solution mutually acceptable to the parties . . . and consistent with the covered agreements is clearly to be preferred.* In the absence of a mutually agreed solution, the first objective of the [DSM] is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with . . . the covered agreements." *Id.* (emphasis added).

¹⁸⁰ *Cf. id.* (implying that, in its preference for "a solution mutually acceptable to the parties" over mandated withdrawal, the DSU does not foresee a single result to any given

sults in compliance with international law at all costs.¹⁸¹ Others argue that, given the nature of international relations, this is too ambitious.¹⁸² They contend that as long as the DSM can effectively push disputing states to resolve their issues, it has succeeded.¹⁸³ Consultation and negotiation is a direct way to accomplish this goal;¹⁸⁴ only when it fails, and a mutually agreed-upon solution has proven elusive, can the WTO use its enforcement power to bring states into conformity with its laws.¹⁸⁵ The DSU also promotes further consultation, creating negotiation opportunities after the panel process has started.¹⁸⁶

The textual provisions of the DSU that can promote settlement are not limited to those concerning the disputing parties: Article 10 promotes settlement by allowing countries with “a substantial interest in a matter before [the DSB]” to make oral and written submissions during panel proceedings.¹⁸⁷ GATT Article XXIII also permits disputing parties to invite other countries into the consultation process.¹⁸⁸ These provisions enable the disputing parties to broaden their disagreement beyond their immediate issues, creating incentive to find a solution that will be agreeable to *all* parties, not just disputing ones.¹⁸⁹

dispute, and states, thus playing an active role in determining such outcomes, can lay out their goals for success). Such flexibility has enabled parties to create heterogeneous resolutions to large and complex disputes, utilizing panel and/or AB reports alongside their own negotiated terms. *See infra*, text accompanying notes 231–245.

¹⁸¹ *See, e.g.*, Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789, 797 (2009) (pointing to the WTO's relatively strong enforcement power and oversight of states' gradual relinquishment of sovereignty).

¹⁸² *See, e.g.*, Pauwelyn, *supra* note 33, at 29–30 (discussing the WTO's institutional development and legalization, and implying that member states still operate in the international system, where they value their sovereignty and structure their behavior around it).

¹⁸³ Interview with anonymous WTO Secretariat Official, in Geneva, Switz. (Nov. 19, 2010).

¹⁸⁴ *Cf.* Harrington, *supra* note 27, at 323 (arguing that the strength of the DSM lies in its deterrent effect, which leads states to negotiate). Given the language of Article 3.7 and the overall history of GATT/WTO dispute settlement, the organization has indicated that the DSM's success depends on mutually agreed-upon solutions. *See* DSU, *supra* note 57, art. 3.7. Thus, while the WTO seeks to enforce its regulations and remove illegal national policies, this goal is secondary to ensuring states' satisfaction with the resolution of trade disputes. *See id.*

¹⁸⁵ *See* DSU, *supra* note 57, arts. 21, 22.

¹⁸⁶ *Id.* arts. 5.5, 5.6 (noting that parties can renew or continue negotiation at any point during the panel process, and that the DSU itself is meant to promote equivalent consultation provisions in other WTO agreements).

¹⁸⁷ *Id.* art 10.2.

¹⁸⁸ GATT 1947, *supra* note 41, art. XXIII.

¹⁸⁹ *See* William J. Davey & Amelia Porges, Comments, *Performance of the System I: Consultations & Deterrence*, 32 INT'L LAW. 695, 701 (1998).

Finally, consultation is not the DSU's only form of alternative dispute resolution: Article 5 allows for conciliation and mediation,¹⁹⁰ and Article 25 enables the parties to elect arbitration.¹⁹¹ With binding panel and AB decisions, however, stakes under the DSM are higher than under the GATT, providing incentives for states to settle their disputes.¹⁹²

B. Theoretical and Empirical Support for Negotiation Effects

Along with the text of the GATT and the DSU, empirical and theoretical factors also push states towards negotiation. These factors include: (1) states' level of development and experience with the DSM;¹⁹³ (2) the role of informational availability;¹⁹⁴ and (3) the binding nature of compliance measures.¹⁹⁵

1. States' Level of Development and Experience with the DSM

A positive correlation exists between the frequency with which states file DSM cases, their level of economic development, and the prospects for settlement.¹⁹⁶ The higher a state's level of economic development, the more resources it has to litigate within and gain experience under the DSM.¹⁹⁷ This experience enables such a state to identify settlement junctures and opportunities, thus making it more likely to settle.¹⁹⁸

During the first ten years of the WTO's history, 45 percent of cases went on to litigation, while the remaining 55 percent were settled or resolved outside the DSM.¹⁹⁹ During this same period, the United States and the EU were the two most frequent participants in the DSM system.²⁰⁰ Political and economic characteristics may explain this behavior—because developed states have the resources to file numerous

¹⁹⁰ DSU, *supra* note 57, art. 5.

¹⁹¹ *Id.* art. 25. The introduction of new and alternative forms of non-litigious dispute resolution, despite the formalization of litigation under the WTO, demonstrates that the WTO's emphasis on amicable resolution is equal to, if not greater than, the GATT's. *See* Pauwelyn, *supra* note 177, at 137–40.

¹⁹² *See* Horlick, *supra* note 171, at 687.

¹⁹³ *See infra* text accompanying notes 196–206.

¹⁹⁴ *See infra* text accompanying notes 207–221.

¹⁹⁵ *See infra* text accompanying notes 222–252.

¹⁹⁶ *See* Joseph A. Conti, *Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization*, 35 LAW & SOC. INQUIRY 625, 639–40, 648–52 (2010).

¹⁹⁷ *See id.* at 639–40.

¹⁹⁸ *See id.* at 648–52.

¹⁹⁹ *See id.* at 637.

²⁰⁰ *Id.* at 631.

claims, they resort to the DSM most frequently, leading to greater experience with the process, which they can draw upon when dealing with less-experienced adversaries.²⁰¹

The nature of precedent within the WTO reinforces the importance of repeat interaction.²⁰² Despite a lack of binding precedent, WTO legal institutions frequently rely upon previous decisions, leading many to conclude that the WTO utilizes a form of “*de facto stare decisis*.”²⁰³ This jurisprudence enables experienced DSM actors to emphasize rules compliance, the effect of their disputes on macro-legal developments at the WTO, and greater concern for the effects of litigation on their reputations.²⁰⁴ Experienced actors’ filings are thus more strategic and focused on long-term gains, which are more likely to arise out of negotiation and settlement.²⁰⁵ Less-developed and less-experienced DSM litigants are not as strategic, concentrating more on litigation and tangible returns.²⁰⁶

2. Informational Availability

Institutionalist political scientists argue that international organizations like the WTO make conflict less likely by increasing the availability of information.²⁰⁷ States must frequently make policy decisions under

²⁰¹ *Id.* at 629.

²⁰² See Marrakesh Agreement, *supra* note 163, art. IX:2. The WTO General Council and Ministerial Conference have ultimate authority to definitively interpret the treaties; panel and AB interpretations do not constitute binding precedent. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 254 (2004).

²⁰³ Steinberg, *supra* note 202, at 254.

²⁰⁴ See Conti, *supra* note 196, at 655–57. This focus on reputation results from the ability to participate in, and in turn build experience with, the DSM. See *id.* at 655–56.

²⁰⁵ See *id.* at 629. Because negotiation and consultation enable states to dictate their own terms, experienced states can better ensure long-term resolutions in their interest. See *id.* at 656–58 (“Repeat players are able to anticipate the implications of a ruling and act to secure changes to case law that they favor.”).

²⁰⁶ *Id.* at 629. The author of this Note does not mean to suggest that developed countries are superior to developing ones. Nevertheless, some commentators note that developing countries feel marginalized within the GATT/WTO system. See, e.g., Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 335 (2004). The WTO has addressed this concern through measures such as the Advisory Centre (a legal aid bureau for developing states) and lenient DSU provisions for developing states. See *id.* at 348. Yet repeat litigants, largely consisting of developed states, are more likely to settle. See Conti, *supra* note 196, at 629.

²⁰⁷ See Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT’L ORG. 729, 740 (1998).

imperfect conditions, generating less optimal outcomes.²⁰⁸ By improving information sharing, institutions lead states to make decisions that are more attuned to one another's concerns and, thus, to cooperate.²⁰⁹ The DSM consultation requirement enables it to encourage states to reveal information.²¹⁰ Yet because information asymmetries are most likely to exist before discovery and the panel process, and each side is optimistic that it can win, early settlement is usually unlikely.²¹¹

Because the WTO gives panels a broad mandate to serve as triers of fact and interpret legal rules,²¹² the odds of information sharing increase substantially once parties initiate the panel process.²¹³ Junctures before, during, and after panel proceedings provide opportunities to make information available and for parties to suspend proceedings in order to renew negotiations.²¹⁴

States utilize these junctures: during the WTO's first five years, fifty-two percent of cases resulted in the establishment of a panel, but only thirty-five percent resulted in a panel ruling.²¹⁵ Thus, in almost twenty percent of cases, a panel was established but the parties settled the dispute themselves.²¹⁶ Moreover, this figure does not include cases where parties settled after a panel ruling.²¹⁷ Even the AB, the last source of rule interpretation before states must implement findings, has been called an effective "starting point" for further talks or arbitration.²¹⁸

²⁰⁸ See *id.* at 744–45 (utilizing the Prisoners' Dilemma model to exemplify this challenge and illustrate international relations' anarchic nature).

²⁰⁹ See *id.* at 742.

²¹⁰ Horlick, *supra* note 171, at 692. Textual provisions in the DSU, such as sympathetic consideration and confidentiality, encourage disclosure and thus increase informational availability. See DSU, *supra* note 57, arts. 4.2, 4.6.

²¹¹ Porges, *supra* note 176, at 174. Similar conditions exist in domestic litigation; however, because WTO laws and obligations are continuously developing, such information may not be as easily available at the outset of a DSM dispute. See *id.* at 147.

²¹² DSU, *supra* note 57, art. 11; Gavin Goh & David Morgan, *Political Considerations and Pragmatic Outcomes in WTO Dispute Rulings*, 30 U. NEW S. WALES L.J. 477, 496 (2007).

²¹³ Cf. Porges, *supra* note 176, at 147 (noting that panels adjudicate between two negotiations—a failed and a successful one, respectively—thus increasing the likelihood for shared information and settlement upon initiation of panel proceedings).

²¹⁴ See Pauwelyn, *supra* note 177, at 133–37 (providing an outline of settlement opportunities before, during, and after panel proceedings). For example, the interim review period is ideal for settlement, as the panel has reached all of its factual and legal conclusions; this generates maximum information that is balanced by the protection of confidentiality. See *id.* at 135–36.

²¹⁵ Porges, *supra* note 176, at 142.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ Harrington, *supra* note 27, at 339. Because the AB may reinterpret WTO rules, it can provide an opportunity for parties to negotiate along re-characterized legal norms that

Of the 427 cases filed to date, 138 remain in consultation; in 88, states either settled or withdrew at some point during the dispute process.²¹⁹ Thus, over fifty percent of cases have either yet to produce a decision or have been settled.²²⁰ Commentators suggest that such a rate is largely due to the increase of information following the initiation of panel proceedings.²²¹

3. States' Reactions to the Binding Nature of DSM Ramifications

Because states must implement DSB recommendations, negotiation offers an opportunity for states to settle on their own terms and avoid expensive and protracted litigation.²²² This binding nature sets the DSM apart from GATT dispute settlement.²²³

When consultations fail and the DSB issues a report, the DSM's central focus becomes compliance with WTO law.²²⁴ Compliance primarily occurs through the offending state's mandated withdrawal or alteration of the violative policy.²²⁵ If the state fails to do so, the WTO can authorize the complaining state's use of retaliatory measures.²²⁶ The DSB has rarely authorized retaliation, which causes economic harm, discord in the global trading system, and damage to states' reputa-

may differ from the panel's decision, generating a new negotiation environment. See Conti, *supra* note 196, at 656–57.

²¹⁹ *Current Status of Disputes*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm (last visited Jan. 17, 2012).

²²⁰ See *id.*

²²¹ See Porges, *supra* note 176, at 172–176 (discussing the influence of information revealed through the panel process on the likelihood of settlement).

²²² See Alilovic, *supra* note 169, at 298–99 (“[T]he automatic adoption of a potentially harsh report which *must* be complied with in a set period of time is a powerful incentive to resolve a dispute in a more conciliatory manner.”).

²²³ Compare DSU, *supra* note 57, art. 22.2 (“[T]he DSB [may] suspend the application to the Member concerned of concessions or other obligations of the covered agreements.”), and Horlick, *supra* note 171, at 687 (“The key factor in WTO consultations is the binding nature of the [DSM].”), with sources cited *supra* notes 53–55 (highlighting non-compliance as a problem with GATT dispute settlement).

²²⁴ DSU, *supra* note 57, art. 12.7 (“Where the parties . . . have failed to develop a mutually satisfactory solution . . . the report of a panel shall set out the findings of fact, the *applicability of relevant provisions* and the basic rationale behind any findings and recommendations that it makes.”) (emphasis added); Patricio Grané, *Remedies Under WTO Law*, 4 J. INT’L ECON. L. 755, 761–62 (2001).

²²⁵ See DSU, *supra* note 57, art. 22.2.

²²⁶ *Id.* arts. 22.2–3; Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization’s Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 228 (2005).

tions.²²⁷ Consultation enables states to avoid these problems altogether.²²⁸ Yet even if initial negotiations fail, the DSU’s “reasonable period of time” for implementation enables “losers” to find common ground with “winners” and create an outcome in which compliance occurs in a mutually agreeable fashion, providing autonomy in the implementation of DSB recommendations.²²⁹

Such autonomy may weaken the DSM.²³⁰ Yet because the DSM’s primary function is to lead states to mutually agreeable outcomes, this autonomy strengthens the DSM’s ability to accomplish its main goal.²³¹ The dispute in *European Communities—Regime for the Importation, Sale, and Distribution of Bananas* exemplifies this debate.²³² *Bananas* centered on the EU’s more favorable treatment of its former colonies in the global banana trade and entailed multiple panels and appeals.²³³ Although the DSB issued guidelines, the parties never implemented its rulings.²³⁴

Many cited *Bananas* as evidence that some cases, due to their complexity and political contentiousness, can neutralize the DSM’s binding nature.²³⁵ Yet the disputing parties ultimately used the AB’s findings as a basis for their own agreement, which combined various DSB recommendations.²³⁶ Thus, despite not strictly following the AB report, the parties still complied with it by structuring a negotiated outcome and eventual resolution per its recommendations.²³⁷

²²⁷ See Conti, *supra* note 196, at 655; William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT’L L.J. 119, 124–25 (2009); Nzelibe, *supra* note 226, at 228–29.

²²⁸ See Alilovic, *supra* note 169, at 298–99.

²²⁹ See DSU, *supra* note 57, art. 21.3(b). The ability to negotiate thus persists after the decision, though parties are constrained by the panel ruling. See Pauwelyn, *supra* note 177, at 136.

²³⁰ See Ryan E. Lee, Comment, *Dogfight: Criticizing the Agreement on Subsidies and Countervailing Measures Amidst the Largest Dispute in World Trade Organization History*, 32 N.C. J. INT’L L. & COM. REG. 115, 153 (2006).

²³¹ See Jackson, *supra* note 19, at 204.

²³² See Len Bracken, *U.S., EU Agree to Settle Dispute over Latin American Bananas*, *USTR Says*, 27 INT’L TRADE REP. (BNA) 856 (June 10, 2010).

²³³ Lee, *supra* note 230, at 143–44.

²³⁴ See Porges, *supra* note 176, at 146.

²³⁵ See, e.g., Lee, *supra* note 230, at 145 (“[T]he Banana Wars have haunted the WTO for most of its history.”); see also Douglas Ierley, *Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute over Bananas*, 33 LAW & POL’Y INT’L BUS. 615, 626 (2002) (noting that *Bananas* changed the “ambiance” in the DSM, reflecting a “loss of confidence” and “put[ting] the DSU in doubt”).

²³⁶ See Porges, *supra* note 176, at 146.

²³⁷ See *id.* (“[T]he outputs in WTO disputes almost always permit more than one possible compliance outcome[.] . . . [In *Bananas*,] the panel recognized there were multiple compliance paths possible and picked one as a reasonable benchmark for comparison. . . .

Frequently, critics of the DSM's ability to bind states also cite a series of cases filed by Brazil and Canada regarding export credit financing of small regional aircraft (collectively "*Brazil/Canada-Aircraft*").²³⁸ After years of hearings and appeals, the WTO authorized both sides to retaliate.²³⁹ Rather than retaliating, however, the two addressed many of their outstanding issues through a 2007 Organization of Economic Cooperation and Development (OECD) agreement.²⁴⁰

Those who contend that the DSM's strength comes from its ability to bind states to outcomes did not find much comfort in *Brazil/Canada-Aircraft*.²⁴¹ Yet these are but two of the hundreds of DSM cases that have generated compliance.²⁴² Moreover, in *Brazil/Canada-Aircraft*, retaliation would have sparked a trade war.²⁴³ This became clear when Brazil and Canada faced the choice of either complying with the DSB's ruling or an extrinsic negotiated resolution.²⁴⁴ Were the DSB's measures *not* binding, the parties may not have had an incentive to negotiate an outcome instead.²⁴⁵

The above cases demonstrate that the binding force of DSB decisions works even when it may seem otherwise: it can (1) push states into negotiation and in turn, resolution;²⁴⁶ (2) provide a foundation, as in *Bananas*, upon which states create and enact their own compliance measures;²⁴⁷ or (3) as in *Brazil/Canada-Aircraft*, cause states to recog-

[The parties] arrived at . . . a solution that was hybrid, heterodox, and determined by negotiation.").

²³⁸ See Helena D. Sullivan, *Regional Jet Trade Wars: Politics and Compliance in WTO Dispute Resolution*, 12 MINN. J. GLOBAL TRADE 71, 71-72 (2003). The *Brazil/Canada-Aircraft* cases are frequently cited as important with regard to the Boeing-Airbus dispute, given the similar products and use of subsidies. See Lee, *supra* note 230, at 146.

²³⁹ See Lawrence J. Speer, *Brazil Joins Updated OECD Pact on Export Credits for Civil Aviation*, 24 INT'L TRADE REP. (BNA) 1107 (Aug. 2, 2007).

²⁴⁰ *Id.*

²⁴¹ See, e.g., Ivan Krmpotic, *Brazil-Aircraft: Qualitative and Temporal Aspects of "Withdrawal" Under SCM Article 4.7*, 33 LAW & POL'Y INT'L BUS. 653, 673 (2002) ("The decision in *Brazil-Aircraft* is more akin to GATT-era decisions whose deference to national policies [reflects] an anarchic international system devoid of coercive power" and "amounts to a step backwards in WTO jurisprudence.").

²⁴² See *Current Status of Disputes*, *supra* note 219.

²⁴³ See Lee, *supra* note 230, at 148.

²⁴⁴ See Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397, 403 (2007).

²⁴⁵ See Daniel Pruzin, *WTO Gives Brazil Green Light to Impose Sanctions in Canadian Aircraft Dispute*, 20 INT'L TRADE REP. (BNA) 564 (Mar. 27, 2003) (noting that, when faced with the DSB's permission to retaliate, representatives from Canada and Brazil vowed to intensify efforts to negotiate a mutually acceptable solution and avoid sanctions).

²⁴⁶ See *supra* text accompanying notes 224-229.

²⁴⁷ See *supra* text accompanying notes 232-237.

nize the perils of retaliation in order to produce a more effective outcome.²⁴⁸

Finally, the WTO's ability to bind states relates to a broader issue: the political sensitivity of panels and the AB, and the latter's judicial restraint.²⁴⁹ This reflects the notion that, as an influential international organization, the WTO—and by extension, the DSB—does not operate in a vacuum.²⁵⁰ Rather, panelists and AB members are acutely aware of the broader ramifications of their decisions, structuring their legal reasoning and jurisprudence so as to not agitate international economic relations.²⁵¹

In other words, the system, while legalized, accounts for the nature of international diplomacy, continuing developments, and the importance of avoiding unrealistic expectations.²⁵² In light of the LCA dispute's history and the above structural mechanisms, the likelihood of a negotiated settlement becomes apparent.

III. ANALYSIS

Under the right circumstances, GATT/WTO dispute settlement leads parties to settle their disputes rather than seek a mandated solution through litigation.²⁵³ Such effects are evident in the transatlantic aircraft dispute in the era leading up to the 1992 Bilateral Agreement,²⁵⁴ as well as in the contemporary litigation.²⁵⁵

A. *The Era Leading up to the 1992 Bilateral Agreement*

The GATT/WTO system's ability to generate a negotiated settlement to the transatlantic aircraft conflict is evident in the dispute's recent history.²⁵⁶ In the years prior to the 1992 Bilateral Agreement, the United States and the EEC went through two stages before resorting to

²⁴⁸ See *supra* text accompanying notes 240–245.

²⁴⁹ See Goh & Morgan, *supra* note 212, at 482–84; Steinberg, *supra* note 202, at 263–67.

²⁵⁰ See Steinberg, *supra* note 202, at 263–67. Some point to the DSM's political awareness as the reason for its success and the WTO's influence. See *id.* The DSM possesses and utilizes “the most effective dispute resolution procedures” in the international legal system. Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 321 (2004).

²⁵¹ See Steinberg, *supra* note 202, at 257.

²⁵² See Goh & Morgan, *supra* note 212, at 480–82 (discussing how the WTO deals with extant circumstances by involving civil society, selecting language carefully, avoiding contentious findings, and coordinating timing with other international political events).

²⁵³ See discussion *supra* Part II.

²⁵⁴ See discussion *infra* Part III.A.

²⁵⁵ See discussion *infra* Part III.B.

²⁵⁶ See discussion *infra* Part III.B.

GATT dispute settlement: (1) talks in the GATT Civil Aircraft Committee, and (2) bilateral negotiation.²⁵⁷ The former failed due to weak treaty provisions and enforcement,²⁵⁸ and the latter broke down due to the parties' inability to agree on common terms, definitions, and guidelines.²⁵⁹

The U.S. strategy of investigating Airbus subsidies²⁶⁰ and requesting Article XXII consultations regarding EEC Subsidies Code violations enabled the United States to legitimize its viewpoint that the Europeans were not serious about resolving the aircraft dispute.²⁶¹ By contesting only the merger/debt forgiveness issue, the United States attained an efficient GATT ruling that provided a legal definition of the debt program as an illicit subsidy.²⁶² This gave the United States some needed international support to force the EEC to negotiate in earnest.²⁶³ In turn, it accomplished the stated goal of GATT dispute settlement to find a mutually agreeable solution by providing information and establishing norms.²⁶⁴ Moreover, the decision provided a starting point for a wider case against all Airbus subsidies, further catalyzing the EEC to move toward a bilateral resolution.²⁶⁵

²⁵⁷ See *supra* text accompanying notes 120–129.

²⁵⁸ See *supra* text accompanying notes 114–119, 122.

²⁵⁹ See generally STEVEN MCGUIRE, AIRBUS INDUSTRIE: CONFLICT AND COOPERATION IN US-EC TRADE RELATIONS 144–54 (1997) (highlighting the progress and challenges of U.S.-EEC negotiations in the late 1980s).

²⁶⁰ See THORNTON, *supra* note 89, at 138. Following the failure of bilateral talks, the U.S. government hired Gellman Research Associates (GRA) to conduct a private investigation of Airbus's subsidization. See *id.* GRA's report, released in 1990, was widely seen as a calculated effort to pressure the Europeans into negotiations and ultimate concessions. See *id.* at 138–41.

²⁶¹ See *Competitiveness of U.S. Commercial Aircraft Industry: Hearing Before the Subcomm. on Commerce, Consumer Prot., & Competitiveness of the H. Comm. on Energy & Commerce*, 100th Cong. 25 (1987) (statement of Michael B. Smith, Deputy U.S. Trade Rep.). The United States saw the EEC as a flippant and intransigent negotiating partner; it thus needed a foundation for its allegations, so that the Europeans would "understand [its] seriousness and depth of concern." *Id.* The United States thus pursued a two-pronged approach by seeking domestic political backing through the GRA Report and concurrent international legal support through a favorable GATT ruling. THORNTON, *supra* note 89, at 136.

²⁶² See Report by the Panel, *German Exchange Rate Scheme for Deutsche Airbus*, ¶ 6.1, SCM/142 (Mar. 4, 1992) (unadopted); see also THORNTON, *supra* note 89, at 137–38 (noting that the time between the complaint and the ultimate panel report was less than a year). "Contrary to the [European] position . . . the [Subsidies] Committee agreed with the United States that the Subsidies Code was the proper forum for the U.S. dispute. . . . We cannot forego our legal rights under the Subsidies Code." Comm. on Subsidies & Countervailing Measures, *Communication from the United States* 1–2, SCM/125 (Sept. 18, 1991).

²⁶³ See MCGUIRE, *supra* note 259, at 154–55.

²⁶⁴ See *supra* text accompanying notes 39–44.

²⁶⁵ See MCGUIRE, *supra* note 259, at 154–55.

At the time, however, feelings about GATT dispute settlement were mixed.²⁶⁶ Some policymakers expressed concern that U.S. efforts would bear little fruit, due to the GATT's weak enforcement and failure to bind states, or worse, a possible loss.²⁶⁷ Yet the involved actors believed in the GATT's legitimacy, encouraging the EEC to take the debt case panel's finding seriously.²⁶⁸

In sum, GATT dispute settlement during the pre-1992 era brought about a negotiated solution in several ways:²⁶⁹ (1) the Article XXII guidelines encouraged negotiation;²⁷⁰ (2) the information-provision function legitimized U.S. allegations, forcing the EEC to treat them seriously;²⁷¹ and (3) the threat of a wider GATT case, which, even if it were to remain unadopted (like the debt case), would further legitimize U.S. views and weaken the Europeans.²⁷²

Following negotiation of the Bilateral Agreement, the United States suspended its wider case against the EEC and Airbus, but did not withdraw it.²⁷³ Only after all outstanding GATT cases were terminated as part of the transition to the WTO did the case cease to exist, although its claims were resurrected a decade later.²⁷⁴ Yet just as GATT dispute settlement deterred the litigation of a wider case in the 1990s, it can now, through the updated DSM, prevent the negative ramifications of such litigation.

²⁶⁶ See Davey, *supra* note 49, at 61.

²⁶⁷ See McGUIRE, *supra* note 259, at 152; *cf.* THORNTON, *supra* note 89, at 137 (“[T]he multinational forum and process really were inadequate to handle a dispute between powerful adversaries with vital economic and industrial interests at stake.”).

²⁶⁸ See JOHN W. FISHER, CONG. RESEARCH SERV., 93-425E, THE AIRBUS CONTROVERSY: REVISITED? 3 (1993); Cunningham & Lichtenbaum, *supra* note 107, at 1171.

²⁶⁹ See JOHN W. FISCHER ET AL., CONG. RESEARCH SERV., AIRBUS INDUSTRIE: AN ECONOMIC AND TRADE PERSPECTIVE 41 (1992) (“Without the GATT committees and dispute process, the [parties] might not have an adequate alternative forum and the dispute might have ended in a destructive trade war . . .”).

²⁷⁰ See *supra* text accompanying notes 39-44.

²⁷¹ See McGUIRE, *supra* note 259, at 154-55; *cf.* *supra* text accompanying notes 207-214 (describing the WTO information-providing function, based on earlier GATT dispute resolution provisions).

²⁷² See MARC BENITAH, THE LAW OF SUBSIDIES UNDER THE GATT/WTO SYSTEM 344 (2001).

²⁷³ Cunningham & Lichtenbaum, *supra* note 107, at 1172. Such a move seemingly reflects American doubt over the Bilateral Agreement's long-term viability. *See id.*

²⁷⁴ See U.S. DSM Filing, *supra* note 15, at 1-4; Cunningham & Lichtenbaum, *supra* note 107, at 1171-72.

B. *The Contemporary Era and Prospects for Settlement*

When the two parties filed their consultation and subsequent panel requests in 2004 and 2005, commentators predicted that the case would generate a range of adverse effects.²⁷⁵ Some argued that the WTO was the wrong forum in which to litigate this dispute²⁷⁶ and that the reciprocal filings themselves represented the failure of both diplomacy and the DSM.²⁷⁷

Hindsight improves the picture, and after extensive litigation, settlement is likely.²⁷⁸ While the prospects for a negotiated outcome are not certain, they are substantial, given the DSM's proclivity to generate negotiated solutions.²⁷⁹ Additionally, historical patterns in this case also support settlement—the years prior to the 1979 and 1992 treaties saw increasing confrontation followed by successful negotiation.²⁸⁰ As such, this section outlines the factors underlying a negotiated outcome and its potential implementation.

²⁷⁵ See Lee, *supra* note 230, at 156–57 (predicting outcomes that ranged from at best, a stalemate that would discredit the WTO, to at worst, a trade war between the world's two most powerful economies in one of its most lucrative sectors).

²⁷⁶ See, e.g., Meier-Kaienburg, *supra* note 6, at 237–39, 250 (“[T]his dispute should not have been brought to the WTO because it is too complex The DSU [also] has . . . a poor track record in resolving high-stakes cases [it] is not the appropriate forum to resolve the dispute between Airbus and Boeing.”); Mathis, *supra* note 94, at 214 (“[T]his current dispute over subsidies and large civil aircraft poses a long-term threat to the WTO’s relevance and viability.”); Jens van Scherpenberg & Nicolas Hausséguy, *The Airbus-Boeing Dispute: Not for the WTO to Solve*, GER. INST. FOR INT’L. & SECURITY AFF. (July 2005), http://www.swpberlin.org/fileadmin/contents/products/comments/comments2005_30_spb_hausseguy_ks.pdf (“It is a purely bilateral dispute in which there is no clear division of the plaintiff’s and the defendant’s roles between the two sides.”).

²⁷⁷ Cf. Mathis, *supra* note 94, at 214 (“The continuing friction over [the aircraft subsidies dispute] and other trade issues has led some to question the long term efficacy of the WTO”). Curiously, many imply that resolution through the DSM and bilateral channels are mutually exclusive, thereby failing to see that the former can effectively lead to the latter. See, e.g., Mathis, *supra* note 94, at 203 (citing the negotiated settlement in *Bananas* as evidence of the DSM’s ineffectiveness); Meier-Kaienburg, *supra* note 6, at 248 (“Regardless of a possible decision made by the WTO, the parties to the Airbus-Boeing dispute need to enter into a new agreement governing subsidies because a decision by the WTO will not completely solve the issue of aircraft subsidies.”); Scherpenberg & Hausséguy, *supra* note 276, at 7 (“A bilateral U.S.-EU agreement on what constitutes prohibited subsidies and what doesn’t . . . is still required. The alternative would be leaving the decision to the WTO dispute-settlement body.”).

²⁷⁸ See Pauwelyn, *supra* note 177, at 128 (“As the resolution in the Bananas saga has shown, in those ‘hard cases,’ endless litigation does not offer a way out; negotiation does.”).

²⁷⁹ See discussion *supra* Part II.B.

²⁸⁰ See *supra* text accompanying notes 102–136.

1. Factors Underlying a Negotiated Outcome

Three factors underlying a negotiated settlement establish the foundation for its likelihood: the initial failure of consultations, the appellate process, and the involvement of third parties.²⁸¹

a. *The Failure of Consultations*

Some suggest that parties merely negotiate as a formality because the DSM requires it.²⁸² Following this logic, a negotiated outcome is unlikely in this case because initial consultations failed.²⁸³ If the United States and the EU could not be pulled back from the brink of litigation, then nothing would be able to restrain them from pushing for and later instituting damaging retaliatory measures.²⁸⁴

Yet expecting consultations to have worked at the outset of this case is unrealistic: *pro-forma* negotiations would have little chance of success, especially in light of the parties' outlooks and viewpoints at the time of filing.²⁸⁵ The stakes were too high, and the investment too deep, for either party to compromise at the outset.²⁸⁶ But this does not necessarily mean that negotiations fail in the long-term.²⁸⁷ The role of information availability is crucial:²⁸⁸ as the two sides litigate, the panel makes factual and legal determinations that may affect states' attitudes toward the likelihood of victory and thus, the dispute as a whole.²⁸⁹ The

²⁸¹ See *infra* text accompanying notes 282–326.

²⁸² See Porges, *supra* note 176, at 160.

²⁸³ See Meier-Kaienburg, *supra* note 6, at 211–13. Because the parties spent the consultation phase “quarrelling over the clarity of the other’s request for consultations” rather than “discuss[ing] the claims asserted [to] possibly settle the dispute,” the DSM will not likely lead to a resolution of the transatlantic aircraft dispute. *Id.* at 213.

²⁸⁴ See *Nose to Nose—Boeing v Airbus*, *ECONOMIST*, June 25, 2005, at 67–69.

²⁸⁵ See William Drozdiak, *The North Atlantic Drift*, *FOREIGN AFF.*, Jan./Feb. 2005, at 88, 90 (pointing out the trade-related tensions between the two powers, including the completion of the Doha Round); *Nose to Nose*, *supra* note 284 (noting that Boeing had just witnessed Airbus eclipse its market share and launch the A380, which robbed it of its claim to producing the world’s largest passenger aircraft, the 747). The aircraft dispute, in addition to being its own long-standing conflict, enabled both sides to express their broader discontent. See Drozdiak, *supra* note 285, at 90–91.

²⁸⁶ See *Nose to Nose*, *supra* note 284 (describing hardened U.S. and EU attitudes at the time of filing).

²⁸⁷ See Pauwelyn, *supra* note 177, at 135–36. Negotiated settlements can still occur despite the continuing progress of crucial DSU mechanisms, such as the establishment of a panel. *Id.*

²⁸⁸ See *supra* text accompanying notes 207–218.

²⁸⁹ See Pauwelyn, *supra* note 177, at 135–36 (“[The] interim review stage—in which the panel sends out its interim findings for comments by the parties before it sends out its final

DS316 Panel's identification of some, but not all, subsidies as illicit demonstrates this trend.²⁹⁰ Moreover, the dispute's length has tempered the parties' attitudes, increasing the likelihood of a negotiated settlement as both sides are worn down.²⁹¹

The United States and the EU are seemingly less committed to the strict implementation of a DSM ruling than they were in 2005—essentially, they had to fail before they could succeed.²⁹² Aborted negotiations followed by protracted litigation, informational availability, and a DSM that creates multiple negotiation opportunities can collectively draw states away from extreme attitudes, even as they seek sanctions—an additional way to generate concessions and ultimately, settlement, be it independent or arbitrated.²⁹³

b. *The Appellate Process*

The case's complexity and the number of appeals generate doubts about the imminence and likelihood of an agreement: both imply that litigation will continue for some time.²⁹⁴ However, the negotiation effects inherent to the DSM can mitigate such concerns.²⁹⁵

The United States and the EU are the two most experienced litigants in the WTO.²⁹⁶ Moreover, as the DSM has developed, appeals

report to all WTO Members—could constitute an important gateway to a last minute settlement.”); Porges, *supra* note 176, at 162.

²⁹⁰ See DS316 Panel Report, *supra* note 21, ¶¶ 8.1–8. By distinguishing between types of launch aid provided by different European states, the Panel report provides the EU with a platform on which to recalibrate its legal argument, as well as its litigation and negotiation strategies. See *id.*

²⁹¹ See Pilita Clark, *Airbus Chief Warns Dispute with Boeing Will Aid Rivals*, FIN. TIMES, Oct. 22, 2010, at 6 (quoting Airbus CEO Thomas Enders, who called for a negotiated resolution and labeled the prolonged dispute an “absurdity”).

²⁹² See Julie Johnsson & Kathy Bergen, *U.S. Puts Condition on EU Trade Talks*, CHI. TRIB., Apr. 15, 2011, at 28 (quoting U.S. Trade Representative Ron Kirk) (“[A] negotiated resolution would be the best thing . . .”); Daniel Pruzin & Len Bracken, *U.S., EU Set Out Arguments on Subsidies for Boeing at WTO Appellate Body Hearing*, 28 INT’L TRADE REP. (BNA) 1492 (Sept. 15, 2011) (“[EU] trade commissioners, including the current office holder, have said they would like to reach a settlement . . .”). The United States, however, has conditioned its offer to negotiate settlement on a European disavowal of any further subsidies. See Johnsson & Bergen, *supra*.

²⁹³ See Harrington, *supra* note 27, at 339–40; Miles, *supra* note 156 (“Although the arbitration process has been triggered, nothing may happen until the two sides have exhausted other legal avenues. Many trade experts expect the two sides . . . to attempt to negotiate a settlement as the legal appeals and counter-appeals become more and more entangled.”).

²⁹⁴ See Pruzin, *supra* note 17.

²⁹⁵ See discussion *supra* Part II (outlining the DSM's inherent and exigent negotiation effects).

²⁹⁶ Conti, *supra* note 196, at 631.

have become routine—between 1995 and 2010, one or both of the disputing parties appealed in 67 percent of cases.²⁹⁷ States are practically expected to appeal upon a panel report's release.²⁹⁸

Parties are unlikely to appeal when they commence negotiations immediately following the panel report or when the costs of appeal are prohibitive.²⁹⁹ In this case, however, immediate post-report negotiations did not occur, and given the size and power of the United States and the EU, cost is not an obstacle.³⁰⁰

Moreover, an appeal gives the parties an opportunity to gain further-defined rules and norms,³⁰¹ which will, as with other DSM cases, guide the eventual negotiation process.³⁰² For example, the AB hearings in DS316 saw the United States and the EU specifically focus on several of the Panel's decisions relating to infrastructure development,³⁰³ the length of subsidy benefits,³⁰⁴ and capital contributions.³⁰⁵ The AB had heretofore not addressed these issues with regard to LCA and the ASCM.³⁰⁶

Because both sides have invested so much time and money into the proceedings, they will likely wait for the AB's rulings before negoti-

²⁹⁷ Appellate Body, *Annual Report for 2010*, 5, WT/AB/15 (July 18, 2011).

²⁹⁸ See Konstantin J. Joergens, *True Appellate Procedure or Only a Two-Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding*, 30 *LAW & POL'Y INT'L BUS.* 193, 221 (1999) (“[T]he more legalistic approach embodied in the addition of the Appellate Body might require frequent use of the right of appeal to make the system work.”).

²⁹⁹ See Jackson, *supra* note 19, at 189; Pauwelyn, *supra* note 177, at 135–36.

³⁰⁰ See Conti, *supra* note 196, at 652–53 (“The United States [and the EU have] the personnel, organization, and resources necessary to manage litigation, even multiple simultaneous disputes.”); *supra* text accompanying notes 152, 159 (noting that both parties appealed both panel reports).

³⁰¹ See Conti, *supra* note 196, at 632.

³⁰² Cf. *supra* text accompanying notes 231–237 (discussing negotiations in *EC–Bananas*).

³⁰³ See Opening Statement of the European Union at the First Hearing, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 108, AB-2010–1/DS316 (Nov. 11, 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_147021.pdf [hereinafter EU AB Opening Statement]; Oral Statement of the United States at the First Oral Hearing, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 81, AB-2010–1/DS316 (Nov. 11, 2010), available at http://www.ustr.gov/webfm_send/2386 [hereinafter U.S. AB Oral Statement].

³⁰⁴ See EU AB Opening Statement, *supra* note 303, ¶ 11; U.S. AB Oral Statement, *supra* note 303, ¶ 19.

³⁰⁵ See EU AB Opening Statement, *supra* note 303, ¶¶ 121–123; U.S. AB Oral Statement, *supra* note 303, ¶ 86.

³⁰⁶ Cf. Meier-Kaienburg, *supra* note 6, at 236–37, 242–43 (highlighting the ability of the WTO to create new legal standards in this case).

ating further.³⁰⁷ But when both rulings emerge, the United States and the EU will possess an unprecedented amount of information,³⁰⁸ allowing both to recalibrate their positions with new legal norms.³⁰⁹ Thus, appeal reflects not only experience litigating before the DSM, but also an acknowledgement by both sides that they seek more information and interaction—factors that have proven to lead states to the bargaining table.³¹⁰

c. Third Parties and Changing Market Conditions

The final element that will contribute to a negotiated resolution involves the DSM's third-party mechanism.³¹¹ Third-party concerns force the disputants to focus on the bigger picture, thereby encouraging settlement.³¹² When they filed their panel requests, both parties sought consultations under Article XXIII, thus enabling third parties to participate in negotiations.³¹³ The third parties include Brazil, Canada, and China,³¹⁴ all of which host firms that are planning products to compete with those of Boeing and Airbus.³¹⁵

Theory and empirical evidence suggest that third-party involvement will influence U.S. and EU policymakers.³¹⁶ The complaints and concerns in this case represent those of countries whose firms are locked in a duopoly that is on the verge of cessation.³¹⁷ Yet the United

³⁰⁷ Cf. Porges, *supra* note 176, at 168 (noting parties' commitment to the completion of panel proceedings once they have commenced).

³⁰⁸ See THORNTON, *supra* note 89, at 138–45 (discussing both sides' information-gathering techniques throughout this dispute). Much of the conflict has its roots in legal loopholes (for example, Airbus's corporate structure for its first thirty years exempted it from reporting financial results) that generated ambiguity. See *id.* at 88–93. Through the DSM process, the two sides will now have access to facts and figures that were previously unattainable. See *id.* at 138–145.

³⁰⁹ See Conti, *supra* note 196, at 632.

³¹⁰ See *supra* text accompanying notes 196–218.

³¹¹ See DSU, *supra* note 57, art. 4.11, 10; GATT 1947, *supra* note 41, art. XXIII:2.

³¹² See *supra* text accompanying note 189.

³¹³ See EU DSM Filing, *supra* note 16, at 1; U.S. DSM Filing, *supra* note 15, at 1.

³¹⁴ *Dispute DS316: European Communities—Measures Affecting Trade in Large Civil Aircraft*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm (last visited Jan. 17, 2012).

³¹⁵ Kyle James, *Airbus Chief Says Subsidy Spat with Boeing Helps Emerging Rivals*, DEUTSCHE WELLE (Oct. 22, 2010), <http://www.dw-world.de/dw/article/0,,6140280,00.html>.

³¹⁶ See Davey & Porges, *supra* note 189, at 700–02. For example, Airbus CEO Tom Enders noted that the DSM dispute could hasten the competitive entry of new rivals and asked whether, upon a DSM decision, “anyone . . . believe[s] that they will step back and say: ‘Now we understand the WTO rules, we will play exactly by the rules?’ . . . Absolutely not . . .” James, *supra* note 315.

³¹⁷ See James, *supra* note 315.

States and the EU realize that, no matter what the AB decides, its rules will apply in an industry with new players who will likely react in their own unique ways.³¹⁸

By providing third-party involvement, the DSM has endowed the United States and the EU with an ability to make explicit choices about how to move forward based on third-party attitudes.³¹⁹ The two sides could thus create an agreement permitting forms of subsidization that favor their production methods, as opposed to those of competitors that threaten their market share.³²⁰

Alternatively, the United States and the EU could take a more multilateral approach and include new market entrants in any eventual agreement.³²¹ They have already begun to do so: the United States, EU, Brazil, Canada, and Japan negotiated the December 2010 Aviation Sector Understanding (ASU) through the OECD.³²² The ASU regulates government export credits for commercial aircraft and may expand to China and Russia.³²³

The enactment of and multilateral involvement inherent to the ASU demonstrate a willingness to negotiate, even if it only concerns one form of subsidization and does not resolve the transatlantic dis-

³¹⁸ See *id.*; Wall, *supra* note 100. For example, the Airbus A320neo (New Engine Option) and Boeing 737 MAX are direct competitors to the Bombardier CSeries, indicating that Boeing and Airbus are taking new entrants seriously. See François Shalom, *Who'll Buy CSeries? Boeing CEO Asks*, MONTREAL GAZETTE, Oct. 5, 2011, at B6. Given Chinese and Russian aircraft subsidization, Boeing and Airbus will likely lobby their governments to take action at the interstate level, as they have in the past. Pierre Sparaco, *Leveling the Field*, AVIATION WEEK & SPACE TECH., Sept. 21, 2009, at 62 (“China and Russia are pouring money into ambitious commercial transport programs Such goals could not be attained without government subsidies.”); see *supra* notes 84–89, 102–103 (discussing U.S. and EU firm-government ties and attendant lobbying).

³¹⁹ Cf. DVD: Third-Party Opening Statements Before the Appellate Body in *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft* (World Trade Org. 2010) (on file with World Trade Org.) (containing Brazilian, Canadian, and Chinese attitudes towards the dispute, including rules and norms governing infrastructure development).

³²⁰ See Jeffrey J. Schott, *America, Europe, and the New Trade Order*, BUS. & POL., Oct. 2009, at 1, 12–13 (2009). Such behavior represents a broader shift in the WTO, where non-western economies are gaining increasing clout, and the transatlantic powers must coordinate their policies to adjust to this new political-economic landscape. See *id.* at 12–14. One way to do so is by resolving outstanding trade disputes, including LCA. See *id.* at 13.

³²¹ Cf. *id.* at 17 (discussing the need to consider the interests of increasingly influential non-Western economies in international trade discussions).

³²² Len Bracken, *U.S. Official Praises Deal on Export Credits for Aircraft; Industry Support More Guarded*, 28 INT'L TRADE REP. (BNA) 14 (Jan. 6, 2011).

³²³ Len Bracken, *OECD's Gurría Invites China, Russia to Join New Aircraft Sector Understanding*, 28 INT'L TRADE REP. (BNA) 345, (Mar. 3, 2011).

pute.³²⁴ Yet as one WTO official noted, the proclivity to include third parties is more a sign of the U.S. and EU's acknowledgement that the "real world is changing," rather than any structural effect inherent in the DSM.³²⁵ The DSM's third-party mechanism, however, enables disputing parties to further recognize this and plan accordingly.³²⁶

2. The Implementation of a Negotiated Outcome

Once a negotiated solution is likely, the question arises of how to implement and reconcile it with DSB decisions.³²⁷ Three outcomes are possible: the parties could (a) seek a waiver concerning aircraft subsidization;³²⁸ (b) attempt to integrate any potential agreement into the current Doha Round;³²⁹ or (c) let the conflict settle with time.³³⁰

a. Waiver

Under Article IX:3 of the Agreement Establishing the WTO, Member States may seek waivers of certain provisions "[i]n exceptional circumstances."³³¹ The United States and the EU could thus approach the WTO Ministerial Conference and ask for a waiver from relevant ASCM provisions.³³² This approach is fraught with challenges—because waivers require parties to admit explicit violations of WTO provisions, and the United States and the EU have largely denied LCA subsidization, such a tacit admission is unlikely.³³³

³²⁴ See Bracken, *supra* note 322; see also EU DSM Filing, *supra* note 16, at 2–10; U.S. DSM Filing, *supra* note 15, at 1–4.

³²⁵ Interview with anonymous WTO Secretariat Official, in Geneva, Switz. (Nov. 18, 2010).

³²⁶ See *supra* text accompanying notes 319–320.

³²⁷ See *supra* text accompanying notes 67–77, 222–240. Were the AB to issue rulings ordering retaliation, a U.S.-EU negotiated settlement would likely seek to avoid such action on account of its adverse ramifications. See *supra* text accompanying notes 224–229.

³²⁸ See Marrakesh Agreement, *supra* note 163, art. IX:3.

³²⁹ Cf. *Speeches—DG Pascal Lamy: Lamy Cautions Against Weakening the WTO*, WORLD TRADE ORG. (Mar. 22, 2011), http://www.wto.org/english/news_e/sppl_e/sppl189_e.htm (indicating the importance of subsidies to Doha Round negotiations).

³³⁰ See *infra* text accompanying notes 343–355.

³³¹ Marrakesh Agreement, *supra* note 163, art. IX:3.

³³² See *id.* art. IX:3(a).

³³³ See *supra* note 10 (demonstrating each side's unwillingness to acknowledge its own subsidies); cf. Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 620 (2009) ("[T]he ability to request waivers . . . serves the function of a safety valve when individual members are unable to perform their obligations.").

The two parties would also have to engage the WTO in a lengthy process entailing significant hurdles—at least a three-fourths majority decision of the Ministerial Conference is needed for a waiver.³³⁴ Finally, a waiver would constitute effective permission for potential competitors to subsidize aircraft production, as waivers suspend obligations for either all Member States or individual groups.³³⁵ A waiver would thus presumably apply to all WTO members that manufacture commercial aircraft.³³⁶

b. *Integration into the Doha Round*

Alternatively, the United States, the EU, and other potential parties to an agreement regarding aircraft subsidization could integrate it into the Doha Round.³³⁷ Due to multiple delays and despite the stated goal of finishing the Round by late 2011,³³⁸ it will not likely be concluded until “2012 and possibly beyond.”³³⁹ This provides an opportunity for the parties to integrate an aircraft agreement into Doha, as they did during the Tokyo Round.³⁴⁰

Granted, the odds of success are moderate at best, given the controversies surrounding the aircraft dispute and the Doha Round, as well as the limited timeframe.³⁴¹ However, states could take advantage of the ASU, negotiated through the OECD, and the Doha Round, negotiated through the WTO, to integrate the former into the latter, rather than working through each organization separately.³⁴²

³³⁴ Marrakesh Agreement, *supra* note 163, art. IX.3. Moreover, GATT/WTO “waiver competence is intended to legalize non-compliant measures . . . in concrete situations of urgency in which compliance is not a feasible option.” Feichtner, *supra* note 333, at 620 (emphasis added).

³³⁵ See Feichtner, *supra* note 333, at 621.

³³⁶ See *id.*

³³⁷ Cf. *Speeches—DG Pascal Lamy*, *supra* note 329 (discussing the completion of the Doha Round and relevance of subsidies).

³³⁸ Daniel Pruzin, *WTO Members Endorse Work Plan to Secure Doha Agreement in 2011*, 27 INT’L TRADE REP. (BNA) 1832 (Dec. 2, 2010). Having started in 2001, the Doha Round of negotiations has consistently faltered over issues including agriculture and divergent views between the developed and developing world. See *id.*

³³⁹ Pruzin, *supra* note 1.

³⁴⁰ See *supra* text accompanying notes 102–119.

³⁴¹ Cf. *supra* text accompanying notes 104, 109–119 (noting that the time pressure of concluding similar agreements during the Tokyo Round generated a weak treaty that failed to stave off later confrontation).

³⁴² See *The WTO and the Organization for Economic Cooperation and Development (OECD)*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/coher_e/wto_oecd_e.htm (last visited Jan. 17, 2012) (highlighting extensive cooperation between the WTO and the OECD).

c. *Settlement over Time*

Finally, the parties could negotiate an agreement regardless of the AB's decision; such outcomes have occurred in particularly contentious cases such as *Bananas* and *Brazil/Canada–Aircraft*.³⁴³ This result, however, may engender doubt about the DSM's enforcement ability.³⁴⁴ Previous cases such as *Canada–Aircraft* led to rulings whose measures were not implemented,³⁴⁵ though the system remained intact and states continued to treat it seriously.³⁴⁶ Some argue that an outcome akin to that in *Canada–Aircraft* would be a “waste of time.”³⁴⁷ Yet *Brazil/Canada* evolved from Brazil's desire to prove itself as an economic power vis-à-vis Canada.³⁴⁸ There is no such disparity here.³⁴⁹

In short, a ruling without implementation can still be useful because the DSM's primary goal is to lead states to mutually agreeable outcomes.³⁵⁰ Concomitant with this goal, a decision followed by a lack of retaliation demonstrates a positive outcome, as inaction could signify the parties' satisfaction with the end result.³⁵¹ A lack of compliance in a few cases will not undo a half-century of GATT/WTO development that has repeatedly catalyzed international cooperation.³⁵²

The United States and the EU have invested a great deal of time, money, and political capital into resolving this dispute.³⁵³ But its history demonstrates that they are more likely than not to attempt resolution through negotiation.³⁵⁴ This, along with a DSM that pushes states to negotiate, means that a negotiated settlement to the most recent round of this rivalry is likely.³⁵⁵

³⁴³ See *supra* text accompanying notes 233–248.

³⁴⁴ See *supra* text accompanying notes 233–248.

³⁴⁵ See Speer, *supra* note 239.

³⁴⁶ See Harrington, *supra* note 27, at 341 (“[T]he WTO has created a truly democratic legal entity in the [DSB] . . . through which trade fights can be waged civilly . . .”).

³⁴⁷ Lee, *supra* note 230, at 156–57.

³⁴⁸ See Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, 415–16 (2008).

³⁴⁹ See Schott, *supra* note 320, at 2–3 (discussing the existence of economic hegemony between the United States and the EU in the GATT/WTO system).

³⁵⁰ See *supra* text accompanying notes 166–192.

³⁵¹ See *supra* text accompanying notes 230–248 (highlighting similar outcomes in *Bananas* and *Brazil/Canada–Aircraft*).

³⁵² See Conti, *supra* note 196, at 637 (“[Even disputes with] no official resolution . . . nonetheless constitute outcomes of the legal system . . .”); Harrington, *supra* note 27, at 339–41 (emphasizing the cooperative and democratic nature of the DSM).

³⁵³ See text accompanying notes 102–159.

³⁵⁴ See *id.*

³⁵⁵ See *supra* text accompanying notes 144–252.

CONCLUSION

Despite its length and recalcitrance, the aircraft dispute between the United States and the EU will likely generate a negotiated settlement. The likelihood of this outcome is apparent considering the settlement-oriented nature of the DSM and its extrinsic effects, along with the history and nature of the aircraft dispute.

With the DSM, WTO members created enforcement mechanisms to improve an ineffective dispute settlement system. Yet they could not escape its foundations and the fact that states value autonomy. The DSM reconciles these concerns; by providing a legalized system, the WTO brings scofflaw countries into conformity with international rules. Through negotiation opportunities, it encourages experienced rational actors to consult early and frequently to seize the opportunity for settlement. Extrinsic factors, including state development and DSB experience; informational availability; and the prospect of binding compliance measures further cause disputing parties, in different cases, to choose litigation or settlement. Even with litigation, some states use DSB decisions as a foundation for negotiated settlements.

From a practical perspective, these observations are crucial for those who litigate before the WTO. The fact that the DSM is aimed at long-term negotiated solutions can profoundly affect how government and private attorneys approach certain cases, taking into consideration issues such as their representative state's experience with the DSB, its level of development, and individual points in the DSM timeline that they can utilize in order to settle with the other side.

As history shows, this is not the first time that the two parties come to the brink of a trade war over LCA: the 1970s and 1980s saw periods of escalation followed by settlement, first through the Tokyo Round, and later through bilateral talks. In each instance, the GATT enabled both sides to air their grievances before negotiating a solution. This dispute has operated in cycles of interstate conflict followed by cooperation, none of which catalyzed a trade war. The DSM provides further reason to believe that this era is no different.

The entry of new competitors will also exert pressure on the two rivals to resolve their conflict, as delays will put the United States and the EU at greater risk of losing their market position. Granted, settlement will not eliminate new rivals. Rather, both sides will recognize that they are better served when they are not constantly at odds over subsidies, which only distracts them from larger issues.

Nor will a negotiated settlement necessarily provide a lasting resolution. As long as Boeing and Airbus exist, their home governments will

find something to contest. As they face new competition, the United States and the EU may even intensify their use of rhetoric and legal mechanisms with regards to LCA; it will just be aimed at other states. They may even ironically find themselves, after thirty years of rivalry, on the same side of this hotly contested issue.