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Public and private actors redefining the WTO adjudicatory system role in the global arena: examples from the civil aircraft business

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1 Professor of Law.
Abstract: The WTO Dispute Settlement System (WTO/DSS) has been a landmark in furthering the autonomy and institutionalization of the multilateral trade system. This article discusses a frequently ignored function of the WTO/DSS: its adjudicatory enforcement in regard to another trade regime, namely the one regulating the civil aircraft manufacturing sector, from the starting point of an analysis of two leading WTO disputes (Brazil – Aircraft and EC – Aircraft). My objective is to identify the operation of so-called “nodal governance” processes through the application of a socio-legal methodology in order to shed light on the actors, mechanisms and dynamics of this system. The civil aircraft sector is a particularly interesting example because, in addition to its economic and political importance, it has mobilized a number of institutions and actors to regulate and support its financing structure. This study, as well as its conclusion, gives special attention to the situation of Brazil.

Keywords: WTO, aircraft manufacturing sector, Brazil, global governance.

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1 Introduction to the WTO dispute settlement system: threat or opportunity?

The creation of the World Trade Organization (WTO) and the reform of the multilateral trade dispute settlement system towards a more judicialized process under the WTO umbrella – a result of the Uruguay Round negotiations in 1994 – have been under intensive political and academic debate since then. The debate suggests that there are three main reasons for having the WTO as the current star of the global arena: (i) firstly, the centrality that the WTO forum gained in the trade system itself due to its degree of institutionalization and legalized procedures; (ii) secondly, the impact of WTO rules and decisions in limiting the domestic policy space of its members; and, (iii) thirdly, the increasing overlapping WTO trade decisions towards other issue-areas, such as the environment, health, and access to knowledge.

Starting its operations in 1995, the autonomy and institutionalization that the multilateral trade system of the WTO has gained since then is noteworthy. The WTO dispute settlement system (WTO/DSS) has played a vital role for achieving these results. Besides its function to decide on the accomplishment of members’ obligations and the overall implementation of WTO agreements on a case-by-case analysis, the DSS has been described as a locus for advancing in sensitive issues on which member’s have not been able to reach an agreement on the negotiating level. I explore in this article a fourth role for the system: its adjudicatory enforcement towards other regimes, in this case, the civil aircraft sector.

This is a sector study. I depart from a sector that due to its particularities has shaped fundamental alliances between the public and the private sector in its market functioning and

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2 Cf. ABBOTT; SNIDAL, 2000, p. 429. The authors identify the advantages of a legalized system.
3 This is mainly a concern of developing countries members, desirable of spaces and flexibilities to implement developmental policies. About this debate, see Wade (2003), states that “The net result is that the ‘development space’ for diversification and upgrading policies in developing countries is being shrunk behind the rhetorical commitment to universal liberalization and privatization. The rules being written into multilateral and bilateral agreements actively prevent developing countries from pursuing the kinds of industrial and technology policies adopted by the newly developed countries of East Asia, and by the older developed countries when they were developing [...]”. See also, CHANG, 2003; RODRIK, 2007.
4 GOLDSTEIN; RIVERS; TOMZ, 2007, p. 37.
5 For the concepts of autonomy and institutionalization, see DEZALAY; GARTH, 2011.
6 Cf. MARCEAU; TRACHTMAN, 2002, p. 838; the authors classify as positive and negative integration, this reinforced by the DSS. Ostry (2002b; 2002c) desenvolve esta ideia e apresenta o slogan “WTO: ‘legislate’ don’t litigate”, isto é, não concentrar as interpretações das regras e princípios da OMC no mecanismo de solução de controvérsias, como uma das propostas de reforma para aprimorar o sistema da OMC. No mesmo sentido, Ehlermann (2002), jurista membro do Órgão de Apelação da OMC, na avaliação sobre seus seis anos de experiência nesse órgão, aponta para o desequilíbrio entre as instâncias legislativa e executiva da OMC em relação ao seu mecanismo de solução de controvérsias e os riscos para o sistema multilateral de comércio. PAUWELYN, 2000. Ver a esse respeito a análise do papel desempenhado pelo Órgão de Solução de Controvérsias na estrutura da OMC e na relação com os membros da organização em: STEWART; SANCHEZ BADIN, 2009.
regulation. The objective is to identify in this sector the “nodal governance” processes\textsuperscript{7}, contextualizing that new adjudicatory role of the WTO/DSS. The concept of nodal governance has been developed by Peter Drahos, Scott Burris and Clifford Shearing in some of their studies, and is defined as:

\[\ldots\] an elaboration of contemporary network theory that explains how a variety of actors operating within social systems interact along networks to govern the systems they inhabit.

This concept is useful for this article as it applies a socio-legal methodology to identify the actors and the mechanisms used by them, as well as their dynamics in operating one system. Drahos, Burris and Shearing propose as the definition for a node:

\[\ldots\] institutions with a set of technologies, mentalities and resources – that mobilize the knowledge and capacity of members to manage the course of events. Nodes are normally but not essentially points on networks, but networks are a prime means through which nodes exert influence.\textsuperscript{8}

The civil aircraft sector has mobilized a group of institutions and actors to regulate one of the most critical issues for the sector: its financing structure. The WTO/DSS has been provoked to play a role in this set of relations, and this has been delineated by a well-developed interaction between the public and private actors. So, what are the main contributions of the WTO/DSS to this set of relations composing a “nodal governance” system? Why has it been invoked? What are the consequences for the WTO/DSS and its operational structure in integrating this “node”? And, what about the WTO system itself and its other members (not part of the node relationships)?

This paper draws upon a case analysis approach. The paper departs from the Embraer dispute in the WTO/DSS (WT/DS46) and the strategy of the country against Canada in that system, the consequent involvement of the Brazilian government and the mobilized constituencies in the Organization for Economic Cooperation and Development’s (OECD) Sector Understanding on Export Credits for Civil Aircraft (acronym ASU), as well as the connected negotiations in the WTO Doha Round. The case evidences the integration process of a new actor in the “nodal governance” system of the civil aircraft sector. Taking into account the situation of Brazil pre-OECD and post-OECD we may consider the implications of the node network on others that are not part of its decision-making processes.

\textsuperscript{7} BURRIS; DRAHOS; SHEARING, 2005, p. 5.
\textsuperscript{8} Idem, ibidem.
Besides this brief introduction, the next section provides key background information about the economic and strategic importance of the civil aircraft sector to Brazil, emphasizing why and how this sector has been developed in Brazil and the consequences for the country’s flow of commerce; and it adds information about the civil aircraft market, the industry and its government dependence. The history of the civil aircraft industry is quite similar in the large world producers, counting on strong support and subsidies from the government. Therefore, the efforts in the international arena to create a “level playing field” for those producers, avoiding market distortions in global sector transactions, have been pursued in specific and member-restricted arrangements. This context favors the analyses of the outcomes of the Embraer dispute in the fourth section, its developments and implications for further negotiations and the inclusion of Brazil in the restricted club-model arrangement on export credit for the civil aircraft industry in the OECD. Finally, the fifth section explores the correlation of agreements regulating the sector but signed on different levels of policy making, from the perspective of the DSS.

2 Essentials of the civil aircraft market

2.1 The importance for Brazil of trade on civil aircraft

Embraer’s history does not differ from that of most aircraft companies. Embraer – Empresa Brasileira de Aeronáutica S.A. was created in 1969 as a Brazilian state-controlled company\(^9\). After years of proficient operation, the 1980s debt crisis seriously affected the company results. At the beginning of the 1990s, Embraer had to reduce its workforce and to rearrange its production process, postponing and canceling significant projects, as well as any new ventures.

After the breakdown years, by the end of 1994, Embraer was finally privatized. According to the company’s public statement, after that: “Embraer embarked on a sweeping

\(^9\)The aircraft industry is highly dependent on state financial support, either having the state as a shareholder (if not the case of fully state-owned companies), or being base on programs of support. In most cases, considering the international market, the aircraft industry is identified with the concept of national champions for special public policies of support and regulation. See for further details at BLUESTONE; JORDAN; SULLIVAN, 1981; and PAVCNIK, 2002.
cultural and business transformation which culminated in its recovery and return to growth, spurred by the EMB 145 project, later renamed ERJ 145\textsuperscript{10}.

ERJ-145, a regional jet, helped Embraer to escape from that critical scenario. Embraer later also invested in executive aircrafts, and kept focusing on specific market segments with high growth potential. The company has become one of the largest aircraft manufacturers in the world\textsuperscript{11}. Such figures and successful results in certain bids make the presence of Embraer on the global market for small and medium jets notable, disarranging previous structures of the market\textsuperscript{12}. This was a reason to call the attention of Bombardier, the largest producer and seller of medium jets at the time, to question the reasons for such a good performance before the WTO/DSS (as described below).

Embraer is today recognized as one of the largest regional jet producers. It shares the world market leadership with the Canadian Bombadier. However, both regional jet producers are increasingly advancing on the technology for the production of large aircrafts\textsuperscript{13}, as evidenced in the figure on aircraft models below. Although specialization is highly valuable to keep market share and the fact that the production of large aircraft requires increasingly large investments and support from the government on R&D, the figure below is a reality that might change the allocation of interests and investments and increase rivalry in the world market.

**Regional and Large civil aircrafts**

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\textsuperscript{12} Interview with Embraer employee, June 2009.

\textsuperscript{13} Aircrafts are considered large if they have more than 100 seats. See PAVNICK, 2002.
Domestically, Embraer numbers have had even more impact, during the last two decades. Since 1996, Embraer, responding to more than 70% of the aircraft sector line, pushes the first position in high technology products exports from Brazil, according to the figure below.

![High technology products exports from Brazil 1996-2008 (US$ FOB)](chart)

Source: MDIC/SECEX (June 2010). Formulated by the author.
Note: At axis “X” number 1 corresponds to 1996; and number 13, to 2008.

Given those numbers, Embraer was Brazil’s largest exporter from 1999 to 2001 and the second largest from 2002 to 2004. Embraer annual revenues are around US$3 billion, and it employs more than 16,853 people. Although the company has expanded its investments and activities to other countries, 94.7% of its employees are based in Brazil. Therefore, Embraer is strategically very important to Brazil due to its impact on the trade flow with other countries, its investments and capacity for innovation and employment.

2.2 Political support to a privileged sector

The aircraft industry has singularities that strongly impact on the operation of its market, government relations with the private actors, and any public arrangement concerning the sector. This is due to the fact that: (i) the aircraft sector is technology intensive; (ii) it operates in an oligopolistic market; (ii) it dependents on heavy investments and financial structure, normally counting on governmental support; (iii) it plays a very relevant role in the

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15 Bluestone, Jordan and Sullivan (1981, p. 5) divides this industry in three sectors, according to US regulation: (i) “aircraft”, that corresponds to the process of manufacturing and assembling complete aircraft; (ii) “aircraft engines and engine parts”; and (iii) “aircraft parts and auxiliary equipment, not elsewhere classified”. In this article the reference to the aircraft industry and/ or market corresponds exclusively to the “aircraft” sector.
16 According to Bluestone, Jordan and Sullivan (1981), “The enormous capital requirements, and increasingly the crucial race to get into the market first with a new product, explain both the oligopolistic nature of the industry and the intensive rivalry between the limited number of agents” (p. 8).
economy of the country where its plants are based\(^\text{17}\); and (iv) often, it deals simultaneously with the defense and the commercial fields.

The numbers above on the contribution of the aircraft sector to Brazilian exports and to the domestic GDP – with emphasis on high-technology sector – may be replicated to the countries where the main aircraft industries are based\(^\text{18}\). This is a good reason for governments to give a different status to the sector and to often meet its demands.

One of the most detailed works about the aircraft industry, written by Barry Bluestone, Peter Jordan and Mark Sullivan, confirms such strong dependence: “With the possible exception of the ordnance industry, no other industry is more dependent on government policy and governmental purchasing power for its livelihood than aircraft”\(^\text{19}\). According to the author,

> The aircraft industry benefits from a wide array of shelters that have been cultivated over the years. The major shelters can be placed into three categories: research and development funding, government-subsidized plant and equipment, and contracting procedures\(^\text{20}\).

As a consequence, aircraft firms have been competing more on price than on quantity\(^\text{21}\), and the struggle among countries to strengthen the competitiveness of their industries has been part of this game (the international trade in civil aircraft).

### 2.3 Agreeing on rules

During the 1980s and the 1990s the civil aircraft market developed its strength for commercial purposes. Taking into consideration those particularities of the sector, increasing support by governments was required to the point that statesmen decided to rule a “level playing field” in the global arena. The rationality behind the agreements is: government will maintain its

\(^{17}\) This relevance is not only related to the capacity for innovation and to the number of employees, but also to the fact that this industry is very dependent on external trade (impacting on the international trade balance of the exporters). See STEHMANN, 1999.

\(^{18}\) See Bluestone, Jordan and Sullivan (1981), indicating the aircraft industry as the second largest manufacturing in US in the early1980s.

\(^{19}\) BLUESTONE; JORDAN; SULLIVAN, 1981, p. 9. Considering that a market conception for the sector starts to be built by the 1970s, based mainly on government procurement, an international market for commercial flights guided by competitiveness was established by the 1980s.

\(^{20}\) BLUESTONE; JORDAN; SULLIVAN, 1981, p. 158. The author defines “shelter” as “any market entry barrier provided by some level of government that insulates and industry or firms within it from normal competitive pressures” (p. 157). About government financial support to the sector, see: GOLICH, 1992; YOSHINO, 1986.

\(^{21}\) See PAVNICK, 2002, p. 738. The author states, though, that due to data hurdles, no empirical evidence exists on how government support affected firms’ strategic interactions and profits.
support to the industry, but it has to do it under certain conditions, both on behalf of (a more) free market and for the sake of state’s treasury. Therefore, governments have bound themselves to limit financial support and consented to be transparent with their financial operations. For that purpose, international arrangements on the civil aircraft sector have been negotiated.

The civil aircraft market is segmented by the number of seats in the jets, and so in their agreements. Therefore, the duopoly on large aircraft of Boeing-Airbus was regulated under the umbrella of the bilateral EU-US Agreement on Trade in Large Civil Aircraft, dated of 1992. The Organization for Economic Cooperation and Development’s (OECD) Sector Understanding on Export Credits for Civil Aircraft (acronym ASU) firstly negotiated in 1986 and revised and amplified in 2007 regulates export credit to both the medium and the large jets industry. Despite that, general rules, such as the multilateral trade agreements administered by the WTO, might be applied to this market as well. The set of regulations at the international level applied to the sector compose a patchwork, in which the connection of one piece to the other has been defined by the interaction of the actors involved, both private and public ones.

3 Public-private actors building their regimes: the example of the Embraer case

In this section I will analyze in more detail the strategies of Brazil to technically and financially set up the case of Embraer before the WTO/DSS. Focusing specifically on the public-private partnership established for the preparation of the case and the importance of such experience for the later development of the ASU negotiations in the OECD. The main purpose of the section is to explore the fact the organization of the aircraft sector and the negotiations concerning the sector in the international level has certain particularities that Brazil has learned with the process. Finally, the section also intends, based on interviews, to confirm the learning process by both the public and the private sector on the legal interplays that are part of the aircraft sector.

3.1 Launching the Brazilian strategy before the WTO/DSS
3.2 Brazil into the OECD club: outcomes of the WTO/DSS decision
3.3 Brazil and the new aircraft strategy: the interplay of rules and actors
4 The WTO as a piece in the patchwork: coordination, juxtaposition or mere irritation?

4.1 The Embraer case as a translator of the OECD and the GATT/WTO rules interplay

In a previous work, with a focus on the regional jet market, I have analyzed the historical negotiations on subsidies in the multilateral trade system and a co-relation of works, rulings and actors with those at the OECD for export credits regulation. The Appendix to this article briefly outlines that information.

The GATT-OECD marriage on the regulation of export credits dates back to the 1960s, a decade after the creation of both organizations. Since then the rules on export credits have evolved significantly, the OECD took over the role of the main forum for the creation of new rules. Such negotiations benefited from the organization’s technicality and flexibility in its works. On the other hand, GATT/WTO has been the receptor of the ideas first defined in the OECD arena, with the purposes of both attracting new associates and benefiting of GATT/WTO structure (mainly the dispute settlement system). The interest in regulating trade subsidies and export credits increased throughout the XXth Century, according to the capacity of financial intervention of the countries. During the GATT years, the issue remained as a plurilateral issue, although it was often demanded in the system of dispute settlement. The Agreement on Subsidies and Countervailing Measures (ASMC), signed in 1994, was the first multilateral regulation on subsidies, and it incorporated into its Annex 1, the Illustrative List on Prohibited Subsidies (that reproduces OECD standards). Brazil only adopted part of the subsidies regulation at the multilateral level with the signature of the ASMC.

Since the 1980s, but mostly throughout the 1990s, the regulation of export credits remarkably developed into details. At the OECD level, the members of the OECD Arrangement tried to encompass different forms and instruments – moving forward on new rules and defining the level of commitment by the parties; at the WTO level, there was a twofold development: firstly, its members realized the significance of Item (k) as an open

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22 SANCHEZ BADIN, 2008.
23 For detailed information, see OECD, 1998.
24 For a compilation of the documents and proposals during the Uruguay Round concerning the ASCM negotiation, check: <http://www.worldtradelaw.net/history/urscm/urscm.htm> (database available upon subscription) (February 2008).
25 For more details see SANCHEZ BADIN, 2008, pp. XXX.
window to the multilateral trade system, and secondly this launched a new debate about the method of defining export credits and WTO members commitments on the issue, as put into consideration in the Doha Round negotiations.

The Embraer case is what raised that debate at the WTO. The case brought to the table a highly contested point in the multilateral system: who is deciding about export credit rules generally (not only for the civil aircraft sector). The case started in 19th June 1996, after Brazil and Canada failed in negotiations. Canada then formally requested consultations with Brazil under the WTO/DSS. Canada claimed that the export subsidies granted under the Brazilian Export Financing Programme (PROEX) were illegal before the WTO agreements. This was the first case brought to the DSS to analyze subsidies granted by members and the ASCM rules. The case may be highlighted – among a few others – as one of the lengthiest cases in the WTO Dispute Settlement System: it ran for more than five years.

During the DSS proceedings of decision and revision, the interpretation of the Illustrative List’s Item (k) of the ASCM was central. Such provision curiously was increasingly brought into line with the terms of the OECD Arrangement on Officially Supported Export Credits (OECD Arrangement). Four main topics raised that question. The first and the second regarding the methods of interpretation and calculation of the expression “material advantage” in the first paragraph: (i) which should be the reference to assess the advantage and (ii) whether it is a conditio sine qua non for the measure to be considered as an example of prohibited subsidy (the a contrario interpretation). The third and fourth topics were about the connection between the first and the second paragraphs of Item (k). One addressed how far the second paragraph exception satisfies developing countries needs – to the extent that paragraph one should be read separately and in favor of developing countries in establishing the a contrario interpretation. The fourth requested an analysis about the

26 An analysis of the Item (k) came up, then, for the first time in whole history of the multilateral trade system. The writing of Item (k) provision is the following: “The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms. Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement”. The provision appoints a rule (an example of prohibited export subsidy) and, in its second paragraph, an exception to it.

27 The ASMC is, together with the Antidumping Agreement, the most demanded agreement in the WTO/DSS. See BOWN, 2005.
standards mentioned in the second paragraph and how they should be also applied to paragraph one (especially in defining the material advantage content).

Taking into account those four topics, Brazil brought arguments to the case mostly in order to find another exception for export credit subsidies, besides those of the second paragraph of Item (k) (corresponding to the OECD Arrangement), arguing on behalf of developing countries non-OECD members. In addition to this, Brazil tried to secure how OECD standards should be taken into account in the interpretation of the ASCM, limiting the reference period28.

On the other hand, Canada, the European Communities and – to a certain extent – the United States – all OECD Members, claimed for a holistic interpretation of paragraphs one and two of Item (k). They advocate in favor of an interpretation that could take the allusion to the OECD Arrangement as the core part of Item (k), claiming for an equitable application to all WTO members of the reasoning, be they developed or developing countries.

Briefly, the Embraer case rulings in the WTO dispute settlement system had the following outcomes: (i) named the undertaking of the second paragraph of Item (k) as the OECD Arrangement; (ii) decided on the extent that the standards of such Arrangement should be incorporated in interpreting Item (k) – i.e. the whole content of the Arrangement and its annexes; (iii) decided on the extension of the OECD Arrangement rationale to the first paragraph of Item (k) – including its connection to the “material advantage” issue; and (iv) confirmed that the allusion to the OECD Arrangement is to be understood to its dynamic negotiation, i.e., any new arrangement in the OECD replacing the 1979 undertaking is to be considered by the WTO (as well as the annexes in force). All such conclusions showed to members that there is an open window in the WTO agreements – in the ASCM, specifically.

The question about developing countries needs was understood in the following terms: developing countries, like any other WTO member, may use the exception allowed by the second paragraph of Item (k) – applying the OECD standards, and Article 27 of the ASCM is the sole clause that provides developing countries with special and differential treatment29. The puzzle in that conclusion is that although developing countries have negotiated that vague ASCM rule, they neither participated in the OECD negotiations, nor in the specific arrangements on exports credit.

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28 Brazil argued that members’ should limit the application of the OECD Agreement on Export Credits to the one in force when the ASCM was signed (1978). OECD members invoked the importance of continuous negotiation inside the OECD.

Reactions to those outcomes were put across by a limited group of WTO Members during the meetings of both the DSS\textsuperscript{30} and the Committee on Subsidies and Countervailing Measures\textsuperscript{31}. Members discussed the issue not only on specific elements of the export credit regulation but also on the systemic impacts of the evidenced link between OCDE and the WTO. These manifestations have even given rise to proposals of amendment of the ASCM in the Doha Development Round\textsuperscript{32}.

4.2 The boomerang in the large civil aircrafts negotiations: bilateralism and the WTO

As previously mentioned, the trade relations in the large aircraft sector are also settled by specific agreements, though restricted to the two leading producers, this means, the EU and the US. These countries entered for the first time into a bilateral agreement pertaining to trade in large civil aircraft in 1992 (Agreement on Trade in Large Civil Aircraft – “1992 Agreement”). This agreement regulated the forms of government support for the civil aircraft industry, such as launch aid in Europe and indirect subsidies in the United States, with a strong concern about research and development aid. Interestingly the agreement also defined that financing should comply with the terms of the Large Aircraft Sector Understanding of the OECD Understanding on Official Export Credit (Article 6)\textsuperscript{33}.

The 1992 Agreement was successful in organizing the standard setting of aid for almost a decade. But, after a couple of years of consultations, in October 2004, the US decided to terminate the agreement and to initiate WTO dispute settlement procedures regarding subsidies from certain countries to the European aircraft industry – Airbus\textsuperscript{34}. In


\textsuperscript{32} The Members that have presented formal proposals are Brazil, India and the European Communities. Negotiating Group on Rules ((Aug. 22, 2003)). Note by the Chairman: Compilation of Issues and Proposals Identifies by Participants in the Negotiating Group on Rules. WT/RL/W/143.


\textsuperscript{34} WT/DS316, European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft (Complainant: United States of America), 6 October 2004. See <www.wto.org> for details about the
response, the EU initiated similar WTO proceedings against the US about Federal, State and local subsidies benefiting Boeing. Both cases are challenging subsidies and members’ policies conformity to WTO rules on subsidies (the ASCM), as well as with the national treatment observation of GATT Article III:4.

According to US and EU statements, the 1992 Agreement does not preclude them from bringing a case to the WTO/DSS. That agreement was signed, according to the expert’s analysis: with the recognition that terms and obligations under the bilateral agreement are separate and distinct from the terms and obligations of the ASCM.

All attempts to get the two parties back to the negotiating table have failed. Nevertheless, both sides have reiterated their preference for resolving the matter without recourse to the WTO. Specialists alert that it is unlikely that there will be a clear winner — given the huge amounts of aid both sides have received and the interdependence of their markets. Eric Heymann announced as a result of the cases two Pyrrhic victories.

WTO analysis is still ongoing, on June 30th, 2010, the panel on the first case questioning the EU was just published and many other proceedings are still expected for this case, before having a solution.

case. Seven European countries provided financial support to A-380 model (the main contested project of Airbus): France, Germany, the United Kingdom, Belgium, Spain, the Netherlands and Finland.

35 WT/DS317, United States of America — Measures Affecting Trade in Large Civil Aircraft (Complainant: European Communities), 6 October 2004. EU publicly assumed that this cases is a adjusted response to the case initiated by the US, in the following statement: “[…] the EU for its part on 12 October 2004 decided to mirror the US steps by initiating WTO dispute settlement procedures regarding a number of US measures, including federal and state subsidies.” EU estimates a total of USD 23.7 billion prohibited subsidies benefiting Boeing over the past two decades and up to 2024. Check <http://trade.ec.europa.eu/doclib/html/133279.htm> (June 2010), for EU statements.

36 Its is possible to make analogies with Article 10.2 of the 1992 Agreement – when the WTO/DSS was still in negotiation – about bringing cases to domestic courts: “The Parties will not self-initiate action under their national trade laws with regard to government supports granted in conformity with this Agreement for as long as this Agreement is in force, However, nothing in this paragraph shall prevent a Party from abrogating this Agreement on grounds of non-compliance by the other Party.”


38 David Aaron analyzing the proposals to make the WTO system more effective on transatlantic disputes claim for room to bilateral negotiations. Requiring bilateral negotiations and focused leadership effort. David Aaron, “Strengthening the sinews partnership: resolving and avoiding transatlantic economic disputes. “Some disputes could be avoided or ameliorated if a more robust ‘early warning’ system existed. But others, especially the politically sensitive ones, are likely to require a more focused, but flexible, effort if they are to be resolved” (p. 555). The main reason for this are the difficulties to go on the last step to enforce the decision: the retaliation system, considering the importance of the transatlantic trade for both US and EU producers and consumers. The retaliatory costs in the Boeing–Airbus case might be even higher considering that both companies rely on subcontractors in the rival country for parts and components (PAVNICK, 2002, p. 749).

39 Boeing Vs. Airbus: The Unwinnable WTO Dispute By Eric Heymann, June 26, 2007. Available at <http://www.theglobalist.com/StoryId.aspx?StoryId=6011> (July 2010). “A Pyrrhic victory (pronounced /ˈpɪrɪk/) is a victory with devastating cost to the victor; it carries the implication that another such will ultimately cause defeat”, well defined by Wikipedia (<http://en.wikipedia.org/wiki/Pyrrhic_victory>, July 2010).
Finding a way to solve the controversy seems to be a tough – if not impossible – task. Both parties – the EU and the US – have aspects of their domestic policies to adjust, and both sides are hoping the WTO goes for the jugular of the other. It is not only the parties’ interests and the civil aircraft sector financing that is in question, but also the WTO role as a global entity in ruling trade matters between giant players. In this sense, experts are concerned about the menace these cases may bring to the WTO legitimacy.

4.3 Multiple fora and one dispute settlement system

According to the previous sections and the example of the two set of cases described in this section, we conclude that the aircraft sector perceived by its structure (concentrated on few producers based in a few countries) and its strategic importance (politically and economically), draw the state and private sectors close. Government whilst trying to improve the sector’s competitiveness provide the producer with advantageous financial support. Such financing is designed in variegated apparatus.

International agreements agreed by the states have aimed to avoid a race to the bottom in the financing arrangements, limiting the government aid, defining its standards, as well as ruling on the rules of procedure (related to transparency and conflict resolution). Different kinds of agreements have been reached according to the regulated market, but they have a common ground defined by the WTO/DSS.

Departing from the model of Goldstein et al (2000, p. 404) – based on the type of obligation, the precision of the rules, and the conflict resolution system – to evaluate the degree of legalization of those agreements, generally speaking the OECD/ASU and the 1992 Agreement have both very well delineated rules for the financing of the sector, but no legalized dispute settlement system. The WTO, on the other hand, has a general agreement with mostly obscure contents, but it can counts on a very well structured and legalized dispute settlement system.

The WTO is the multilateral umbrella that engages all aircraft producer countries, the OECD the plurilateral agreement signed by the main aircraft producers and the 1992 Agreement ties the two leaders of the large aircraft sector. Taking into account this group of arrangements, we could see upon the cases examples that parties of the treaties are strengthening their interconnection, and the main hub for their understandings has been the

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41 For an analysis of it, related to the WTO system, see SANCHEZ BADIN, 2004, p. 71.
WTO/DSS. Members also make use of the DSS as a last resource measure, after not reaching a mutual agreement by themselves.

The Embraer case not only evidenced that OECD rules were part of the WTO arrangements, but its outcomes also provoked the invitation to Brazil to become part of the OECD/ASU. The case was then resolved by the possibility of negotiations about a framework adjusting the financing policy of Brazil and Canada, an agreement that had been not possible to reach bilaterally inside the WTO/DSS.

The Airbus-Boeing cases have come out of the limits of a bilateral negotiation, but although the panels are still ongoing and a lot more is to come inside the WTO/DSS, it seems that a bilateral solution will be required at some point.

The WTO/DSS then is playing one of the roles in this network. WTO importance is on providing the structure for policy coordination and enforcement for the major actors of the civil aircraft sector. The cases suggest that the WTO/DSS may be either to favour the integration of new actors in previous arrangements or to provoke or stimulate the revision of previous agreements. Therefore, in the civil aircraft sector, the WTO is revealing itself to be more than a mechanical forum for the application of principles of market rationality, but as a part of a wide range of policy choices onto its member states and a stimulus to promote new trade arrangements.

5 “Findings and conclusions”

Here it is a sketch of some partial conclusions.

- Sectors highly concentrated and with industries dependent on protectionist measures – such as the aircraft sector – tend to be thematically-regulated by formal and informal arrangements. These arrangements tend to be member-exclusive and work on a club model format (prevailing the common ground rules, flexibilities and continuous negotiation). These are exactly the cases of the 1992 Agreement and the OECD/ASU.
- Due to the characteristics of the civil aircraft industry – dependent on high technology expertise and financial support for product development and selling –, this industry is based either on developed countries (such as US, EU and Japan) or in emerging

42 See PAUL, 2003-2004. The author argues that WTO does not contribute to free trade and direct economic growth (there is a lack of empirical research evidencing it, according to the author), but it habilitates a forum political articulation by its Members. The author states that WTO agreements may even distort market forces, according to their terms or the approved relations.
economies (such as Brazil, Russia, India and China). The latter are new in the production market and they are just challenging the structure of the network built on since the 1980s (the Embraer case is an example of it).

- The civil aircraft nodal governance is based on competitive and hierarchical processes of creation of norms and building legitimacy. The agreements and decision-making processes of the different fora are linked. That has been evidenced by the interconnection of OECD arrangements and the GATT/WTO subsidies regulation, as well as by the thematic-arrangements for the sector. Although that interconnection has always been clear to the nodal network’s actors, it has been formalized by the WTO/DSS. The Embraer case is evidence of plurilateral rule defining – or even prevailing over – a multilateral one. The composition of the linkages is extremely sensitive, raising concerns over legitimacy.

- The WTO/DSS is the centre of the global arena based on a predominant multilateral rationality that has been articulated by aircraft producers to contain the force of its competitors. The DSS is seen as the last resource both to empower the agents (such as Brazil before Canada) and to leave them more fragile (such as US before EU and vice-versa). The DSS based on a legal process favours a political approach to settle new legal arrangement to be applied to the sector.

- Integrating the WTO/DSS to this governance network is strengthening the WTO/DSS instead of weakening it. Cases like this require the WTO/DSS to perform a different function, and members – as well as the global community – shall have different criteria to evaluate the effectiveness of the DSS decisions. The outcomes of the decision are beyond the WTO and members domestic system; at the same time, it has had impacts on the WTO rules (either in their interpretation or on their new negotiations in the Doha Round).

- Although the WTO/DSS decides only on the WTO agreements and it shall never analyse the fulfilment of other bilateral or plurilateral agreements commitments, establishing linkages among WTO and other arrangement easily becomes something of a grey area.

- The WTO/DSS has been used as a constant menace to those that are aircraft producers, being or not part of special agreements. This may favour other emerging producers to fully integrate the network of formal arrangements.
The costs for the new comers in the network are somehow high, as they depart from previous negotiations and advance on very detailed regulation on the financing of the sector (limiting their domestic politics). The emerging countries have to consider the impact that the possibility of negotiation may have to confront their competitors opposed to the costs to pay to get into the club.

In the case of Brazil, the country could integrate ASU after challenging one of the largest network’s actors (Canada). Being part of the ASU gave Brazil the necessary opportunities to participate in the policy and rule making on export credit regulation, specifically in what concerns the civil aircraft sector, and consequently to have more influence on the ASMC implementation and negotiation.

The experience in the WTO/DSS sustained Brazil’s capacity of negotiation and articulation of technical expertise from the private sector during ASU negotiations. The same articulation with the private sector was fundamental to support the diplomatic negotiations of the ASU.

The private sector in Brazil integrating the OECD/ASU Expert Group could increase its technical expertise and the comprehension of bargaining diplomacy.

The ASU has also increased Brazil’s capacity to control its main competing player of Embraer, that is Bombardier, assuring fairer access to consumer markets; and it also increases the negotiating space to solve the dispute with Canada in the DSS.

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