

No Permission Slips Needed in Trade Policy

September 16, 2009

William R. Hawkins

It was reported September 4th that a World Trade Organization dispute settlement panel had made a preliminary finding in a U.S. complaint against Airbus, the commercial aircraft manufacturing subsidiary of European Aeronautic Defense & Space. EADS is a partnership of Germany, France and Spain, from which the British withdrew in 2006. Airbus builds about half of the world's commercial airliners, while EADS is continental Europe's largest defense firm. The other half of the global airliner market is held by American firm Boeing, also a major defense contractor. The U.S. brought the suit against Airbus in October 2004, alleging "illegal" government subsidies to the company that gave it a competitive advantage over Boeing.

The alleged subsidies included: the provision of financing for design and development (called "launch aid"); the provision of grants and government-provided goods and services to develop, expand, and upgrade Airbus manufacturing sites for the Airbus A380; the provision of loans on preferential terms; the assumption and forgiveness of debt; and the provision of equity capital and R&D funds.

The subsidies in question include those relating to the entire family of Airbus aircraft, including the A330 which is the basis for the Airbus bid against Boeing for 179 U.S. Air Force refueling tankers worth \$35 billion. The WTO ruling should mean that Airbus will be disqualified from the bidding.

Reports are that the U.S. won a broad judgment that may require Airbus to repay billions to European governments, but may not have won all the points it raised. In a case of this magnitude, it would not be surprising for the WTO to split the difference in an attempt to appease both sides. Airbus and Boeing have about six weeks to review the finding and comment on it. The WTO is expected to issue a formal ruling by the end of the year. Both sides can appeal that ruling, meaning a final outcome is not likely before next spring.

For those who favor the use of international law and multilateral bodies over unilateral actions by governments seeking to protect their own national interests, a favorable WTO ruling will be used to persuade the American

public to choose this legalistic route in economic disputes. The United States is heavily involved in the WTO process. Washington has filed complaints in 88 cases and has had 128 cases brought against it. Most of these disputes are over much smaller matters than the Airbus case, with its strategic links to technological advancement and national security.

When the WTO was approved by a lame duck session of Congress in 1994, the argument was made that it would strengthen the U.S. position in disputes. By seeking WTO rulings, America would gain legitimacy for its claims in world opinion. This is the same argument that is advanced for why Washington should seek approval from the UN Security Council before taking any action. But this is true only if the U.S. wins the case or the vote. Whether at the WTO or the UN, America is asking permission from foreigners who may not have any interest in seeing the U.S. advance its interests, or may even be hostile. As President George W. Bush said in his 2004 State of the Union message after the UNSC refused to approve U.S. military action in Iraq, "America will never seek a permission slip to defend the security of our country." This statement was met with thunderous applause from the assembled members of Congress and from the galleries. Yet, President Bush had gone to the UN initially in an unwise and futile attempt to appease liberal critics who do not feel comfortable acting without foreign approval.

The WTO was not an American idea. It was pushed by the European Union during the long Uruguay Round (1986-1994) negotiations. The Reagan and first Bush administrations had no interest in setting up a binding arbitration system. President Bill Clinton, however, accepted the idea of sacrificing a key element of sovereignty in economic policy to the idol of global governance. The purpose of the WTO in foreign eyes was to constrain the power of the United States, the world's largest national economy. There are plenty of American liberals, both then and now, who also favor bringing U.S. power to heel.

One of the leading proponents of the WTO was John H. Jackson, now Director of the Institute of International Economic Law at Georgetown University. He is known for analyzing what he calls the competing regimes of "Power-oriented" and "Rules-oriented" diplomacy. He favors the use of rules. Here is how he has described the conflict:

"Power oriented techniques suggest a diplomat asserting, subtly or otherwise, the power of the nation he represents. In general, such a

diplomat prefers negotiation as a method of settling matters, because he can bring to bear the power of his nation to win advantage in particular negotiations, whether the power be manifested as promised aid, movement or an aircraft carrier, trade concessions, exchange rate changes or the like. Needless to say, often large countries tend to favor this technique more than small countries; the latter being more inclined to institutionalized or 'rule oriented' structures of international activity."

Prior to the creation of the WTO, trade policy was purely a matter of negotiation and national policy. As the largest and most powerful nation, the United States should have wanted that system to continue. But under Clinton, it agreed to let other powers have the right to question, block and even overturn American law. The U.S. has lost several cases at the WTO. Two of the most important in terms of their negative impact on the economy, jobs and the trade balance concerned the Foreign Sales Corporation and the Byrd Amendment.

In the FSC case, the EU charged that excluding exports made by overseas subsidiaries of U.S. corporations from taxable income was an illegal subsidy to those exports. The actual purpose of the law was to offset the use by EU (and other) countries of the Value Added Tax as a form of tariff to block American exports and subsidize European exports. The VAT is applied to U.S. exports just like a tariff, but are reimbursed to European firms when their products are exported, so as to remove the cost of taxation from their pricing. The FSCo would have done something similar for U.S. exporters. The WTO accepts the legitimacy of VAT, but not of any action to offset it. The result is about an 18 percent pricing advantage in trade between American producers and their rivals in VAT countries.

The Byrd Amendment (Continued Dumping and Subsidy Offset Act) awards to U.S. firms the revenue collected from duties imposed on foreign rivals for unfair practices, helping them recover from the damage inflicted upon them by overseas predators. Without the Byrd amendment, anti-dumping duties would go to the Treasury. Foreign interests adopt dumping tactics in order to run American firms out of business. The Byrd amendment defends against this tactic, so foreign rivals wanted it removed and the WTO accommodated them.

America is better off when pursuing its own interests in its own ways. Even if it wins a WTO case, enforcement of the decision still rests on the U.S. to impose sanctions to compel compliance. Rather than go through a lengthy and uncertain process to get to the same end, U.S. trade law should be invoked to protect American firms, jobs, production capacity and the national economy from predatory rivals who seek to transfer wealth from America to locations overseas.

To that end, President Barack Obama made a surprising decision, given his globalist outlook, to accept the recommendation of the U.S. International Trade Commission to impose safeguard duties on Chinese passenger and light truck tires to offset a surge in imports that have cost thousands of American jobs. This is a decision for which the president deserves to be commended. With markets down around the world, China has resorted to dumping products in order to export unemployment from Chinese factories to U.S. factories. Beijing immediately claimed that the U.S. action was a violation of WTO rules, even though during its WTO accession negotiations with Washington, Beijing agreed to allow such safeguard actions.

With the United States suffering trade deficits that have transferred over \$1.5 trillion to China since 2001 (\$268 billion last year), more such actions at both the USITC and the WTO will be needed to turn the dangerous situation around. But the primary effort must be done under American law if American national interests are to be protected in a timely, certain and comprehensive manner. As a sovereign people, decisions affecting the country's prosperity and security cannot be properly surrendered to foreign "authority." The United States has an inherent right to act in its self defense.