

## The Evolution of Subsidies Disciplines in GATT and the WTO

*Symposium on WTO Litigation: Issues and Reforms*  
*Law School, University of Sydney*  
*Sydney, Australia*  
*14 August 2009*

Andrew L. Stoler<sup>1</sup>  
Executive Director  
Institute for International Trade

### Introduction

The potential for subsidies to create important distortions in international trade was recognized at the inception of the post-WWII multilateral trading system and, over the years, member governments in the GATT and WTO have repeatedly returned to the negotiating table in efforts to improve disciplines governing the use of subsidies. The Havana Charter for the International Trade Organization incorporated subsidies disciplines and certain of these provisions were carried over into the GATT. GATT subsidy rules were reviewed and amended in 1955 and 1960. Major changes in the disciplines were negotiated in the Tokyo Round's "Subsidies Code" that later served as the jumping-off point for the Uruguay Round's subsidies-related negotiations. In the Uruguay Round, the dual-track approach followed through the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures further tightened the rules for subsidies to industrial producers and brought the first real effort to roll-back the use of subsidies in agricultural trade. The fact that the job was not yet done was reflected in the Agreement on Agriculture's "built-in agenda" provisions and the Doha Round's 2001 mandate to continue work on improving subsidies disciplines through both the generic "Rules" negotiations and a new round of negotiations on agriculture.

In the period up to WTO's December 2005 Sixth Ministerial Conference in Hong Kong, it seemed that considerable forward progress on agricultural subsidies disciplines would be realized in any eventual Doha Round package. A good example is the provisional agreement reached in Hong Kong to prohibit agricultural export subsidies from 2013. However, as this paper was drafted in July, 2009, the Doha Round of negotiations remains far from a conclusion and it is entirely possible that the current Round may prove to be the first GATT-WTO round that cannot be concluded successfully.

The story of the evolution of subsidies disciplines over sixty years of the GATT and WTO is an interesting one. We can track changes in member governments' attitudes toward the use of subsidies and how they are disciplined to prevent or minimize trade distortions. The actual and

---

<sup>1</sup> Executive Director, Institute for International Trade, the University of Adelaide, Australia. Former Deputy Director-General, World Trade Organization (1999-2002).

forecast changes to the disciplines applied to subsidies lead us (I believe) to two central conclusions. First, having experimented for many years with efforts to discipline the use of subsidies on the basis of their observed effects in the global marketplace, governments seem to have decided that effects-based disciplines are unreliable – in part because two independent persons will often come to two different conclusions on the basis of the same information. Instead, subsidies disciplines are now based increasingly on WTO Members' *a priori* decision that certain types of subsidies are deemed always to have negative impacts on international trade and that therefore these types of subsidies should be prohibited or reduced (which I refer to as the “proscriptive” approach). Second, if the Doha Round can eventually be concluded along the lines of what is on the table today, we will see subsidies to agriculture subjected overall to more rigorous disciplines than those applying in the case of subsidies to industrial products trade. Given that subsidies to agriculture were less disciplined than those to industry over nearly the entire history of the GATT and WTO, this is a somewhat surprising development.

### GATT Subsidies Disciplines: Market Observation-Based Effects Tests

In the GATT, subsidies disciplines are found in Article XVI. In the original GATT 1947 text, the subsidies disciplines were limited to what is now found in the first paragraph of Article XVI (so-called “Part A”). The language of this paragraph is not only very weak when compared to what developed in the GATT over time but also represented a substantial backwards step from the subsidies disciplines found in Articles 25-28 of the Havana Charter. The Havana Charter provisions dealt with “subsidies in general” (the object of XVI:1) and also with special provisions for export subsidies, detailed rules for primary commodities and an “undertaking” in Article 28 not to use subsidies on primary products in a way which led to a member gaining more than “an equitable share of world trade” in the product. It would be years before GATT Contracting Parties revisited the Havana Charter provisions left out of GATT Article XVI.

Article XVI:1 requires just two things of GATT Contracting Parties. They are required: (1) to make a written notification of the nature and extent of any subsidy “which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory”; and (2) where “it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization” the contracting party maintaining the subsidy has an obligation to discuss “the possibility of limiting the subsidization”. This rule is not as good as that of the Havana Charter's Article 25 from two standpoints: first, Article 25 also included as effects leading to notification obligations the notion of preventing increases in imports through subsidization<sup>2</sup>; and, second, in Article 25, consultations on limiting the subsidization were triggered by a Member considering that serious prejudice had been caused to its interests (a unilateral decision), whereas Article XVI:1 requires that serious prejudice must be “determined” – implying a finding by some GATT body.

What sort of discipline is this? A GATT Contracting Party maintaining a subsidy first has to determine unilaterally whether its own subsidies have the effect in the market of increasing exports or reducing imports. Where it comes to this conclusion, it is obliged to make a written notification. If (somebody) determines that the subsidy causes serious prejudice to the interests of another country, the subsidizer has the additional obligation of “discussing the possibility of limiting the subsidization”. Although the GATT Analytical Index does record one

---

<sup>2</sup> The language also differs in that Article XVI:1 does not refer to using subsidies to “maintain” exports; however, it was decided in 1948 that the phrase “increased exports” included the concept of maintaining exports. (Analytical Index of the GATT at page 448)

case<sup>3</sup> where consultations evidently led to some relief for the non-subsidizer, the record also shows that as late as 1980 when the GATT Council requested the EC to discuss the possibility of limiting EC subsidization of exports of sugar, the EC representative stated that if, following consultations, the parties did not reach agreement, there was no other possibility for redress under Article XVI:1.

Article XVI:1 of the GATT draws no distinction between subsidies to agriculture or subsidies to industry. It also gives us no guidance as to what constitutes “serious prejudice” – which is an obvious shortcoming in a discipline that relies upon a determination of serious prejudice (as a marketplace effect) before any remedial action can be triggered. It was not until 1979 that GATT Contracting Parties first got some real guidance on this question when the Brazilian and Australian Sugar panels suggested that “serious prejudice” arose largely from price suppression, no limitation on growth of market share through subsidies and uncertainty in global markets. Overall, GATT’s initial effort to provide discipline on subsidies through a kind of auto-determined effects test proved early on to be largely ineffectual.

Things began to get a bit more serious in the GATT in 1955 when a Review Session reexamined the GATT approach to subsidies regulation. GATT Contracting Parties returned to where they left off in the Havana Charter and brought back certain of the concepts found in the earlier treaty. Part B to Article XVI (paragraphs 2-5) was added to the original text, introducing a distinction between subsidies to primary products<sup>4</sup> and subsidies to products “other than primary products” with the latter subjected to what appeared to be more strict disciplines. Paragraph 3 of the revised Article XVI is addressed to the rules for primary product subsidies, with the non-primary product rules in paragraph 4.

For primary products, GATT Contracting Parties were obliged to “seek to avoid” using export subsidies and not to apply any form of subsidy in a manner that would result in the country’s exporters gaining “more than an equitable share of world export trade in that product”. Assessments of what would be more than equitable were to be qualified by (1) shares during a previous representative period and (2) any “special factors” that could be affecting country shares in world markets. This rather imprecise rule tied to a determination that the use of subsidies led to a “more than equitable share”, combined with the “serious prejudice” notion of Article XVI:1 would be the only discipline recognized for primary product subsidies until the entry into force of the Uruguay Round agreements – forty years later in 1995. The rule’s lack of clarity, combined with its inconsistent application over time, went a long way toward undermining governments’ confidence in effects-based disciplines for subsidies.

A quite different approach was applied to non-primary products subsidies in Article XVI:4. The text attempted to prohibit export subsidies on this class of goods as from 1 January 1958, complemented by a standstill on existing export subsidies until the end of 1957. The rule was qualified by the fact that, in order for the export subsidy to be prohibited, its effect had to be one of reducing the price of exported products lower than prices realized for the same goods in the domestic market – a kind of subsidy-induced dumping. A major flaw in the rule was that compliance with it at the start of 1958 was not mandatory and nearly all GATT contracting parties declined to comply. Recognizing that this was an unsatisfactory situation, a Working

---

<sup>3</sup> In 1957, in response to a request from Denmark, the United Kingdom took measures to prevent exports of subsidized eggs from the United Kingdom to traditional markets of Denmark and the Netherlands.

<sup>4</sup> For the purposes of Article XVI, “primary product” is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Party on “Provisions of Article XVI:4” was convened in an effort to give effect to the paragraph and in 1960, it produced a “Declaration Giving Effect to the Provisions of Article XVI:4”. For signatories to this Declaration, the qualified prohibition on export subsidies entered into force in November, 1962; however, only 17<sup>5</sup> Contracting Parties accepted the Declaration and the United States signed with a unilateral reservation<sup>6</sup> that would come back to haunt American policy-makers twenty years later.

Perhaps in part due to the limited number of countries bound by the obligation, Article XVI:4 was only ever successfully used to discipline export subsidies through dispute settlement action in the related cases of the United States Domestic International Sales Corporation (DISC) subsidies and the tax practices followed by France, Belgium and the Netherlands. Even in these cases, the original 1976 Panel reports languished un-adopted until a kind of truce following the end of the Tokyo Round allowed the US and EC to permit GATT Council action on the disputes. The provisions of Article XVI:4 were revisited in the Tokyo Round Subsidies Code (see below) but because of the plurilateral nature of the Code, generalized disciplines over export subsidies for non-primary products – like those for primary products – would not really come about until the end of the Uruguay Round.

Meanwhile, the fact that it was possible – under the right circumstances - to make the effects-based test of Article XVI:3 work in practice was demonstrated in a 1958 Panel Report<sup>7</sup> resulting from a complaint brought by Australia against French export subsidies benefiting wheat and wheat flour exports. While noting that there was little guidance as to how to interpret “equitable”, the Panel identified a number of facts that it relied on in making its determination:

- Exports of French wheat and wheat flour began to rise in 1954 in absolute quantity to levels very substantially higher than in any year since 1934 and remained higher than in pre- or post-war years, representing an increase in France’s share of world exports;
- French exporters benefiting from the subsidies were quoting prices for wheat flour below those of other traders in the market;
- The French price for wheat flour barely exceeded the price charged for wheat; and,
- In three markets – Sri Lanka, Malaysia and Indonesia – French exports had displaced Australian suppliers.

Under these circumstances, the Panel concluded that the French share of world export trade was more than equitable. Twenty-five years later, following the “enhancements” to the effects-based rules in the Tokyo Round Subsidies Code, determining a “more than equitable share” would – curiously – prove to be more problematic.

---

<sup>5</sup> Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, United States and Zimbabwe.

<sup>6</sup> The U.S reservation was necessitated by American subsidy policies related to cotton and cotton textiles and read: “...with the understanding that this Declaration shall not prevent the United States, as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not itself a primary product), which has been produced from such primary product, if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary product, if exported in primary form, consumed in the production of the processed product.”

<sup>7</sup> French Assistance to Exports of Wheat and Wheat Flour, document L/924, adopted on 21 November 1958.

## Tokyo Round Subsidies Code – Tinkering with the GATT Rules

The Tokyo Round Subsidies Code, officially the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, was a significant outcome of the negotiations in 1979, not only because of the changes it introduced in the rules regulating subsidies but also because of the modifications it engendered in American countervailing duty law and practice. In a perverse way, American implementation of the new agreement contributed to increased global discipline on subsidies because it encouraged a number of developed and developing countries to sign on to Code disciplines when they had not even been bound earlier by provisions like Article XVI:4 (and had shown no enthusiasm for the Code in the course of the Tokyo Round).

Today, it seems only normal that countries would impose countervailing duties on subsidized imports only after a finding of threatened or actual material injury to a domestic industry in the importing country. However, at the start of the Tokyo Round, the United States – operating under GATT’s grandfather clause cover – countervailed subsidized imports of dutiable goods without a finding of injury<sup>8</sup> caused by the effects of the subsidy. Duty-free subsidized imports were countervailed only after an injury determination because these goods only became subject to the CVD statute with the enactment of the Trade Act of 1974 and were not therefore covered by the grandfather clause.

The new Subsidies Code required an injury test prior to countervailing in all cases, but the United States chose to implement the Code on a conditional MFN basis – affording the injury test only to Subsidies Code signatories. While India and others challenged the legality of the American approach, they did not follow through to a final Panel determination and the conditional MFN implementation by the USA continued until the end of the Uruguay Round. A series of high-profile CVD cases in the early 1980’s led to bilateral negotiations between the USA and a number of countries wherein the Americans committed to provisionally apply the Subsidies Code and its injury test requirement to trade with those countries in exchange for their accession to the Subsidies Code and commitment to reduce certain identified subsidy practices. Among the countries “encouraged” to join the Subsidies Code through this route were: Australia, New Zealand, Brazil, India, Korea, Pakistan, Spain and Uruguay. A “substantially equivalent” arrangement was also concluded between the United States and a non-GATT member, Taiwan.

In terms of revised subsidies disciplines, the Subsidies Code saw an updating of the rules for both primary products and non-primary product subsidies. Although the improvements for non-primary product subsidies appeared fairly robust, those for primary products were clearly largely cosmetic. The Code also supplemented the GATT’s provisions on the notification of

---

<sup>8</sup> There is another historically important aspect to this situation that might be lost to readers who were not around during the Tokyo Round. Two years ago, much was made of whether or not the United States Congress would agree to extend American trade promotion authority beyond its scheduled expiry in mid-2007 in order to permit a conclusion to the stalled Doha Round. A similar situation arose in the course of the Uruguay Round and, in that case, Congress approved the necessary extension of what was then called “fast track authority”. In the Tokyo Round, there was a different issue that posed a similar problem. In order to gain the agreement of the Europeans (who were the object of a number of CVD actions where duties would have been imposed with no injury test) to negotiate on subsidy issues in the Tokyo Round, the Trade Act of 1974 permitted the Secretary of the Treasury (then the administrator of the CVD law) to waive the application of CVDs to imported subsidized goods for a limited time provided that (a) steps were taken by the exporting country to reduce the adverse effects of the subsidy and (b) failure to waive would jeopardize efforts to negotiate an international agreement disciplining the use of subsidies. This waiver authority expired prior to the completion of the Tokyo Round and it was only possible to conclude the Tokyo Round with an extension of the waiver authority, which was approved.

subsidies and introduced in its Article 8 additional elaborations on the negative effects of subsidies that Code signatories were to “seek to avoid causing” through the use of subsidies. Whereas Article XVI speaks only of “serious prejudice”, the new Code specifically obliged its members to seek to avoid causing (a) injury to the domestic industry of another signatory; (b) nullification or impairment of benefits; and (c) serious prejudice. In addition, although this might seem rather obvious, the Code specified the adverse effects required to demonstrate the existence of serious prejudice or nullification or impairment.

The specified effects are listed as:

(a) effects in the domestic market of the importing country [injury]; (b) effects leading to displacement or impeding imports into the market of the subsidizing country [nullification or impairment of tariff concessions]; and (c) effects leading to displacing a signatory’s exports to a third country market [serious prejudice]. Article 8 of the Code clearly represented an effort to make the effects-based subsidies disciplines more workable.

The same effects-based approach was carried over into the Code’s Article 10 addressed to export subsidies on primary products. Essentially, this article reiterated the existing disciplines found in Article XVI:3’s “more than equitable share” approach, but – again in an effort to make the effects-based approach more workable – elaborated slightly on certain concepts. Specifically, Article 10:2 clarified that “more than an equitable share” included displacing the exports of another signatory; that any analysis of new markets and equitable share should take into account traditional patterns of supply as manifested globally, regionally or nationally; and, that “previous representative period” should normally be the three most recent years in which normal market conditions existed. A new provision in Article 10:3 obliged signatories to the Code not to grant export subsidies in ways that resulted in prices for the product concerned that were “materially below” those of other suppliers to the same market. One can readily see the influence of the 1958 Australia French Wheat and Wheat Flour Panel in the drafting of the new Code’s Article 10.

But would the effects-based discipline that proved operational in 1958 work as well twenty-five years later? Despite the positive tinkering described above, the answer is “no” – even where (ironically) trade in the very same products was at issue. In a case where the United States challenged EC export subsidies on wheat flour, the Panel<sup>9</sup> failed to find EC violations of its obligations notwithstanding the Americans’ demonstration of:

- An EC share of the world market that increased from 29 percent in 1959-1962 to 75 percent in 1979-1981<sup>10</sup> while the American share fell from 24 percent to 9 percent;
- A fairly evident displacement effect in the Saudi market which saw the American share fall from 92 percent to 38 percent while the EC share rose from 2 percent to 61 percent; and
- Evidence of material price undercutting where EC subsidies often accounted for as much as 75 percent of American FOB prices.

---

<sup>9</sup> The Report of the Panel, “European Economic Community – Subsidies on Export of Wheat Flour” in document SCM/42 (21 March 1983) was never adopted by the Committee on Subsidies and Countervailing Measures.

<sup>10</sup> The use of the pre-CAP reference period was challenged by the EC; however, even if a more recent three year period were used (1978-1980) the EC world market share expanded from 70 percent to 80 percent while the shares of the USA and Canada each declined from 13 percent to 9 percent.

When this evidence is compared to that brought forward in the 1958 case, most reasonable people would conclude that the EC had used export subsidies to gain more than an equitable share of world export markets for wheat flour; however, the Panel said it was unable to conclude whether the EC's increased share was more than equitable – in part due to the interplay of a “number of special factors, the relative importance of which it was impossible to assess, and, most importantly, the difficulties inherent in the concept of “more than equitable share”.<sup>11</sup> Adding insult to injury, the Panel stated in paragraph 5.8 of its conclusions that “it found it anomalous, for instance, that the EEC which without the application of export subsidies would generally not be in a position to export substantial quantities of wheat flour, had over time increased its share of the world market to become by far the largest exporter”.<sup>12</sup> Here's the Panel telling us that without subsidies the EC share would be insignificant and with export subsidies its share is three-quarters of the world market but it cannot conclude through the application of the effects-based test that this is an inequitable situation!

The 1983 Wheat Flour Panel pretty much put the nail in the coffin of the “more than equitable share” rule for agricultural export subsidies. When they gathered around the table years later, Uruguay Round agricultural trade negotiators did not even try to build a reform regime around an effects-based text. But while Article 10 of the Subsidies Code represented an unsuccessful attempt to build on the effects-based approach of the past, Subsidies Code negotiators had already decided in the Tokyo Round to abandon that tack in favor of a proscriptive approach for non-primary product<sup>13</sup> export subsidies embodied in the Code's Article 9.

Article 9 is the essence of simplicity. It combines an outright prohibition on export subsidies for this class of products with an illustrative list that helps to make clear exactly what the negotiators meant by their reference to export subsidies. Gone as well in the Code was the notion that export subsidies were only to be condemned if they led to lower prices for exports than those on the domestic market. For export subsidies affecting trade in these products, the effects test was junked completely.

The Subsidies Code also took a first step in the direction of disciplining “subsidies other than export subsidies” (hereinafter, “domestic subsidies”). Recognizing that every government employed a wide range of domestic subsidies – often for perfectly good reasons – the negotiators of the Code did not try to apply the proscriptive approach to disciplining these practices. Instead, once again, they started with an effects-based approach. The obligation in Article 11 sounds familiar: signatories shall seek to avoid causing adverse effects on the conditions of normal competition.

We have to conclude that the proscriptive approach taken to export subsidies in Article 9 of the Subsidies Code must have worked well and been widely observed. Throughout the life of the Subsidies Code, the implementation of Article 9's prohibition on the use of export subsidies was tested in dispute settlement only once – and that case turned out to have so many flaws and unusual aspects that it should not be taken as an indication of whether or not the disciplines in the Code worked.

---

<sup>11</sup> SCM/42 at page 36

<sup>12</sup> *Ibid.*

<sup>13</sup> The Subsidies Code also altered the treatment of minerals, moving them out of the “primary products” category into a new category of “products other than certain primary products” subjected to the disciplines of the Code's Article 9. It is not clear what discipline would have applied in the case of primary forest products (logs, for example) during this period, however, the coverage of the “industrial v. non-industrial” categories of products was made clear later at the end of the Uruguay Round when the Agriculture Agreement specified the harmonised system chapters to which it applied.

The unfortunate case involved an American challenge to the EC's use of export subsidies on pasta products<sup>14</sup> – products that both the United States and the EC agreed fell into the category of “products other than certain primary products”. There was also no dispute over whether the EC paid export subsidies for pasta products. But the EC argued that the subsidized pasta had no adverse economic effect on American interests and that there was no precedent in the GATT for bringing a case without demonstrable economic interests at stake. The EC also had a legal defense that it put on the table. Here is where the American “reservation” to the Declaration on GATT Article XVI:4 came back to haunt Washington. The EC argued that the subsidy paid on exports on pasta was exactly the subsidy that would be paid on the durum wheat content of the product if durum were exported in its unprocessed form. Although no other country had taken a reservation like that involved by the United States and not even the United States had taken such a reservation with respect to the Code's Article 9, the EC argued that a common practice had evolved whereby it and many other GATT Contracting Parties assumed over time that paying export subsidies on the incorporated primary product components of non-primary products was perfectly legitimate.

Four out of five members of the Pasta Panel eventually sided with the United States and agreed that the export subsidies to pasta were a violation of the EC obligations under Article 9 of the Code. They also rejected the EC claim that a finding of some adverse effect was necessary in a case brought under Article 9 because the Code made clear that a signatory's failure to carry out

its obligations in respect of the proscriptive rule for export subsidies led to a presumption of adverse effect. The fifth member of the Panel dissented from this view and sided with the EC. The dissenting opinion made it impossible to resolve the case or adopt the Panel's report. (There was considerable evidence at the time that the EC had pressured the fifth panelist's government in this case). Notwithstanding the non-adoption of the report, the findings and conclusions of the Pasta Panel majority should be seen as an early triumph of the proscriptive approach to disciplining subsidies.

The Tokyo Round Subsidies Code was a step forward in disciplining subsidies but its ineffective approach to dealing with agricultural subsidies and limited plurilateral membership meant that there was more to do when the Uruguay Round negotiators started their work on subsidy disciplines.

### Uruguay Round Subsidies Disciplines – Moving Away from Effects Tests

The results of the Uruguay Round represented an important evolution in the multilateral system's approach to disciplining the use of subsidies. New rules to discipline the use of subsidies were negotiated both for agricultural and industrial products<sup>15</sup> through a combination of a new Agreement on Agriculture (AoA) and a revised Agreement on Subsidies and Countervailing Measures (SCM Agreement). Both Agreements have contributed to more effective discipline over the use of subsidies but the more dramatic and significant changes are those found in the AoA.

---

<sup>14</sup> “European Economic Community – Subsidies on Export of Pasta Products”, document SCM/43 (19 May 1983). The report was never adopted by the Committee on Subsidies and Countervailing Measures.

<sup>15</sup> For the remainder of this chapter, we will distinguish products as either agricultural or industrial rather than using the primary v. non-primary classifications of the pre-WTO period.

In the post-Uruguay Round period of the WTO, Members have totally abandoned the discredited effects based approach to disciplining subsidies to agriculture in favor of a proscriptive approach in which subsidies (both export and domestic subsidies) are classed according to their presumed degree of trade-distorting effect and then subjected to an appropriate discipline. Those subsidies deemed to distort trade (export subsidies and “amber box” domestic supports) are the subject of reduction commitments by Members with the commitments recorded in national schedules analogous to tariff schedules.

Article 8 of the AoA prohibits the use of export subsidies in agriculture where such subsidies are not in conformity with the AoA and commitments made by Members. This is backed up by Article 9 which lists the *types* of export subsidies (not their *effects*) subject to budgetary outlay and export quantity reduction commitments. Generally speaking, developed WTO Members were expected to cut budgetary outlays to export subsidies by 36 percent relative to the base period and reduce quantities of subsidized exports by 21 percent. Comparable figures for developing countries are 24 and 14 percent. Article 10 attempts to reduce the threat of possible circumvention by addressing the need to develop disciplines over types of export measures (such as export credits) not addressed in Article 9 and in the meantime not to use such measures in a way that undercuts the effectiveness of export subsidy commitments.

The AoA also imposed reduction commitments on “amber box” domestic support (subsidy) programs. Like export subsidies, these programs are effectively deemed to be trade-distorting because of their role in stimulating production of agricultural products. Other forms of domestic support must meet certain criteria in order to be classed outside the “amber box” in either the blue or green boxes – but again, the distinction is drawn on the basis of the characteristics of the subsidy and its presumed effect.

The important thing in all of this is that it is not necessary under AoA rules to demonstrate any particular effect in a market in order to obtain redress through WTO dispute settlement in cases of suspected violations. All that matters is whether the particular subsidy practice fits the definition of the subsidy category subject to reduction commitments and whether the commitments have been respected.

The effectiveness of the new rules in disciplining agricultural subsidies was demonstrated in the case of the upland cotton subsidies dispute brought by Brazil against the United States<sup>16</sup> and in a dispute brought against the EC’s use of export subsidies for sugar<sup>17</sup>. In the Cotton case, a number of American subsidy programs operating to the benefit of upland cotton producers and exporters were condemned as violations of both the AoA and the SCM Agreement without reference to their effects because they did not conform to U.S. commitments under the AoA. Certain programs (for example, production flexibility contract payments) were found not to conform with “green box” criteria. Others were found to be amber box subsidies with subsidy payments in excess of those permitted in the American schedule of reduction commitments. American export credit guarantee programs were found to run afoul of both the AoA’s Article 10 and the SCM Agreement’s export subsidy prohibition. While one finding in the case related to effects (price suppression) and serious prejudice, it seems extremely doubtful that most of these subsidies could have been successfully challenged under the GATT’s “more than equitable share” rule.

---

<sup>16</sup> United States – Subsidies on Upland Cotton (WT/DS267)

<sup>17</sup> EC – Export Subsidies on Sugar (DS 265, 266 and 283)

In the other case, involving EC export subsidies on sugar, there were no effects-based determinations: the finding was that the EC had violated its commitments by exporting quantities of subsidized sugar in excess of its commitment level under the AoA.

There are, unfortunately, other problems with the way in which subsidies have been disciplined in the AoA. Reduction commitments are specified too broadly (e.g. terms like “current total aggregate measure of support”). The base for reduction commitments was often far above the actual levels of support at the time reductions were scheduled – leading to lots of “headroom”. There was also frequently too much flexibility in the ability to shift payments within the overall reduction commitment envelope. These are not necessarily problems with the architecture of the approach to disciplines but instead reflect a certain sloppiness in implementation modalities.

Apart from its greatly expanded membership, the Uruguay Round SCM Agreement also improves somewhat on the disciplines of the Tokyo Round Code’s treatment of subsidies to industrial products. In Article 3, the original prohibition on the use of export subsidies continues with the additional clarification that its scope is subsidies contingent *in law* or *in fact* upon export performance. The Article also makes explicit that subsidies contingent on the use of domestic over imported goods are prohibited (although this is already covered by GATT Article III:4).

The SCM Agreement attempted to make it easier to challenge certain kinds of domestic subsidies by virtue of the fact that Article 6 of the Agreement deemed serious prejudice to exist in certain circumstances (i.e., if the total ad valorem subsidization of a product exceeds five percent). Unfortunately, this deemed serious prejudice was in all cases a rebuttable presumption and would not have led to condemnation of the practice at issue if the accused party could have successfully demonstrated that the subsidy did not have adverse effects in the marketplace. Even this attempt at discipline has lapsed as the provision’s applicability expired at the end of 1999.

WTO Members at the entry into force of the new Organization found themselves in the somewhat curious situation where, although export subsidies were prohibited for industrial goods and permitted for agricultural goods, generally ineffective effects-based disciplines were still being employed for trade distorting domestic subsidies to industry while for agriculture, effects-based disciplines had been abandoned in favor of a more practically workable proscriptive approach.

### The Doha Round and Beyond – Subsidy Disciplines for the Future

As noted earlier, at the time this paper was written it was impossible to know if the Doha Round negotiations will ever produce a result. What problems there are, however, do not appear to relate materially to the architecture of what is on the table in respect of subsidies as part of a possible package. This allows us to draw some conclusions about the potential subsidies disciplines of the future.

The Rules Group negotiations appear unlikely to produce any material changes to the subsidy rules of the SCM Agreement both because only a very small number of “horizontal” subsidy rule proposals have been tabled and also because the chances of subsidy discipline proponents like the United States getting what they may want in that forum will likely be undercut by their reluctance to make concessions on antidumping practices. A punter would

wager that the SCM Agreement will come out of the Doha Round virtually unchanged. The Democratic majority in the American Congress probably makes changes to antidumping legislation even less likely.

In agriculture, on the other hand, any imaginable Doha Round result will see a proscriptive prohibition on the use of export subsidies and similar export competition measures bringing the export subsidy rules for agriculture (after a transition period) fully up to speed with those for industry. But in agriculture, the expected continued reductions in amber box subsidies and tighter disciplines over "blue box" supports will surpass the impact of what the SCM Agreement requires for industrial products.

For any observer of the GATT – WTO system over the years the conclusion is a bit startling. Sixty two years into the system, the projected end of the Doha Round is likely to see a situation where the evolution of subsidy disciplines brings us to the point where subsidies to agriculture are subjected to disciplines more effective and rigorous than those applying to industrial products.

Adelaide, July 2009

[5,293 words]