



IIBE&L

Institute for International Business, Economics & Law  
The University of Adelaide, Australia

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

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## Evolution

- ❖ Early disciplines were vague and effects-based and were difficult to evaluate in dispute settlement due to subjectivity considerations
- ❖ Gradual move, first with industrial disciplines and then with agriculture to objective rules based on assumptions in regard to likely effects.



# Organization of Presentation

- ❖ GATT Approach to Subsidies Disciplines
- ❖ The Tokyo Round Code
- ❖ 1980's Subsidies Cases
- ❖ The Uruguay Round Agreements
- ❖ Recent Developments (Cotton)
- ❖ Prospects for the Doha Round



## Initial GATT Discipline: Art. XVI:1

- ❖ Less ambitious than Havana Charter articles 26 & 28
- ❖ Scope: subsidies operating directly or indirectly to increase exports or reduce imports
- ❖ Notification obligation
- ❖ Finding of “serious prejudice” triggers a discussion of “the possibility of limiting the subsidization”



## GATT Art. XVI:1

- ❖ No distinction between treatment of subsidies to agriculture or industry
- ❖ No clear guidance on interpretation to be given to “serious prejudice”
  - Much later, 1979 Sugar Panels suggested this arises largely from price suppression, no limitation on growth of market share through subsidies and uncertainty in markets.



## 1955 GATT Review Session

- ❖ New disciplines added to Article XVI
- ❖ Introduction of distinction between treatment of subsidies to “primary” v. “non-primary” products
  - “Primary product” 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.



## Article XVI:3 – Primary Products

- ❖ “Seek to avoid” use of export subsidies
- ❖ No subsidy to be used to gain “more than an equitable share of world export trade in that product”<sup>\*</sup>
  - Previous representative period
  - Special factors affecting trade in the product.

\* Vague and effects-based



## Australia-France 1958 Dispute

- ❖ Panel found subsidies had increased French wheat flour exports to levels “more than equitable”
- ❖ Overall French exports had risen and in three markets, Sri Lanka, Malaysia and Indonesia, French wheat flour displaced Australian suppliers.



## Article XVI:4 – Non-Primary Products

- ❖ Prohibition from 1958 on export subsidies for non-primary products – but only when the export subsidy leads to a lower price for export than to the domestic market.
- ❖ U.S. takes a reservation to prohibition



## U.S. Reservation to XVI:4

- ❖ Signed with the understanding that the obligation would not prevent the United States, as part of its subsidization of the exports of a primary product, from making a payment on an exported processed product provided the payment is limited to the amount of the subsidy that would have been payable on the quantity of incorporated primary product if exported in primary form.
- ❖ U.S. issue: Cotton and Cotton Textiles



## Tokyo Round Subsidies Code

- ❖ Tightened disciplines for industrial subsidies
- ❖ Marginal elaboration of rules for agriculture
- ❖ Some definition of “serious prejudice” and “nullification and impairment” in the subsidies context
  
- ❖ Trade-off: Important change in US practice re CVDs post Tokyo Round.



## Industrial Subsidies in the TR Code

- ❖ Outright prohibition on export subsidies (Art. 9)
  - No two-tier pricing requirement
  - Illustrative list of export subsidies
  - Minerals removed from “primary product” scope
  - S&D for developing countries
- ❖ Explicit recognition that “domestic” subsidies could have effects leading to dispute settlement action (Art. 11)



## TR Code Agricultural Subsidies Rules

- ❖ Art. 10:1 reiterated GATT Article XVI:3 (with substitution of “seek to avoid” by “agree not to grant”)
- ❖ Art 10:3 – New commitment not to grant export subsidies to a particular market in a manner that results in prices materially below those of other suppliers
- ❖ Elaboration of key terms.



## TR Code Art 10:2

- ❖ “More than an equitable share”: defined as including any case in which the effect of an export subsidy is to displace the exports of another country.
- ❖ Traditional global patterns of supply to be taken into account in determining “more than an equitable share” in new markets.
- ❖ “Previous representative period” - three most recent calendar years in which normal market conditions existed.



## TR Code Art. 8:3

- ❖ Adverse effects required to demonstrate nullification or serious prejudice to include:
  - Effect of subsidized imports in the domestic market of the importing country
  - Effect of the subsidy in displacing or impeding imports of like products into the market of the subsidizing country
  - Effect of the subsidized exports in displacing exports of like products from another country in third country markets



## Key Subsidy Cases of the 1980's

- ❖ US-EC Wheat Flour Case
- ❖ US-EC Pasta Case
- ❖ US-EC Oilseeds Case



## Wheat Flour

### ❖ US alleged:

- More than an equitable share
  - EC share from 29% (59-62) to 75% (79-81)
  - Saudi market US from 92% to 38% / EC from 2% to 61%
- Prices materially below those of other suppliers
  - EC subsidies as much as 75% of US f.o.b. price
- Nullification and impairment & serious prejudice



## Wheat Flour Panel “Result”

- ❖ Panel unable to conclude EC had more than an equitable share
  - Cited highly artificial levels and conditions of trade and interplay of a number of special factors
  
- ❖ Panel unable to reach conclusion on price undercutting
  - Cited insufficient grounds on which to reach conclusion
  
- ❖ Panel said “desirable” for EC to make greater efforts to limit the use of export subsidies on wheat flour



## Pasta

### ❖ US alleged:

- Export subsidies to pasta (non-primary product) in violation of Article 9 prohibition
- EC practice could not be characterised as a subsidy to the primary product component (durum wheat)
- Issue of US reservation on Article XVI:4 from 1958



## Pasta Panel “Result”

- ❖ Five-Member Panel split three to one\*
- ❖ Majority sided with US
  - Agreed export subsidy violated Article 9 prohibition
  - No need to find “injury / effect” – presumed in this case
- ❖ Dissenting member backed EC
  - Theory that longstanding practice of many members to subsidize primary components amounted to view that this was permitted (notwithstanding US reservation)

\*Original chairman, Amb. Nettel resigned.



## Oilseeds

### ❖ US alleged:

- EC introduction of production subsidies following grant of tariff concession and subsequent fall-off in US oilseeds and oilcake exports created nullification and impairment situation
- “Non-violation nullification and impairment”
- “Reasonable expectations” doctrine
- “Upsetting the competitive relationship”



## Oilseeds Panel Result

- ❖ Panel upheld US on non-violation nullification and impairment, however:
  - EC cannot be made to remove “legal” subsidies at the root of the impairment;
  - US has option of redressing situation through suspension of concessions
  - EC said it would change system but subsequent follow-up panel found continuing nullification and impairment



## Panels Set the Stage for the Uruguay Round Outcome

- ❖ Although economically defensible, effects-based disciplines were seen as too subjective and increasingly problematic
- ❖ UR saw movement in Agreement on Agriculture, revised Subsidies Code and DSU toward more objective approach.



## Uruguay Round Agriculture Agreement

- ❖ “Types” of subsidies described, as opposed to disciplines based on effects
- ❖ “Per se” trade-distorting subsidies (export subsidies and those with a production-stimulating effect) subjected to reduction commitments
- ❖ Non-distorting subsidies given a “green light”
- ❖ Peace clause



## Problems with the Uruguay Round Agreement

- ❖ Reduction commitments written too broadly (e.g. terms like “current total AMS”)
- ❖ Base for reduction commitments often far above actual levels of support: lots of “headroom”
- ❖ Too much flexibility in shifting payments within overall reduction commitment envelope
- ❖ Export subsidies still permitted, but reduced overall



## Peace Clause

- ❖ During implementation period:
  - Conforming domestic support measures exempted from CVDs, and dispute settlement-based actions;
  - Conforming measures exempted from claims of non-violation nullification and impairment
  - Export subsidies (that conform with commitments made under Agreement on Agriculture) for agriculture exempted from actions based on GATT Article XVI or Subsidies Code



# Uruguay Round Subsidies Agreement

- ❖ Pushed approach to subsidies disciplines further by:
  - Obligation to avoid causing adverse effects
  - More detailed definitions of “serious prejudice” including several circumstances where it (effects) are deemed to exist
  - But obligations linked to operation of Article 13 of the Agriculture Agreement (Peace Clause)



## Dispute Settlement Understanding

- ❖ Pre-UR period suffered as a result of positive consensus for panel report adoption
- ❖ Post UR period: Need negative consensus to prevent adoption of panel and appellate body reports.



## Current Developments

- ❖ Export v. Domestic Subsidies
- ❖ The Cotton Case
- ❖ Doha Round Negotiations



## Export Subsidies

- ❖ Increasing acceptance that direct export subsidies, export credits and other measures with similar export-inducing effect will always have trade effects that are undesirable.
- ❖ Evolution from “effects-based” to “reduction commitments” to “prohibition”



# Evolving Dispute Settlement: The Cotton Case

- ❖ Protection of “weaker” agricultural rules and peace clause protections shown to be ineffectual
- ❖ US measures found to be inconsistent with
  - Undertakings under the Agreement on Agriculture and
  - Consequently with the provisions of the Subsidies Agreement (which kick-in when agriculture commitments not observed)



## Peace Clause Applicability

- ❖ USA production flexibility contracts and direct payments for cotton found to be related to the type of production undertaken after the base period and thus are not green box measures conforming fully to paragraph 6(b) of Annex 2
- ❖ USA payments found to be in excess of that decided in the 1992 benchmark period (consequently subject to Part III Subsidies Code disciplines)



## Cotton – Serious Prejudice

### ❖ Panel found:

- Price suppression and agreed that “same market” could be the “world market”
- Price-contingent subsidies led to causal link with price suppression in major cotton markets
- Export subsidy violations with US export credit guarantee programs (GSM-102 and GSM103)



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## WTO Doha Round

- ❖ Export Subsidies
- ❖ Domestic Subsidies



## Doha Round Negotiations

- ❖ Effects tests all but abandoned in agreements binding major traders.
- ❖ Trend to objective rules for:
  - Agricultural export subsidies
  - Domestic supports



## Export Subsidies

- ❖ Commitment to elimination of all forms of export subsidies by the end of 2013.
  - Progressive and parallel approach to implementation
  - Coverage of 180 day + export credit packages
  - STE practices where monopoly powers lead to subsidy-type market distortions



# Doha Round and Domestic Subsidy Disciplines in Agriculture

## ❖ Agriculture Domestic Subsidies

- Continuation of Uruguay Round approach in terms of segregation of type of program and presumed effect.
  - Market effects presumed
- Break-down into “boxes” for commitments



## Agriculture - Post Doha Round

- ❖ No export subsidies
- ❖ Domestic subsidies defined as trade-distorting subject to reduction commitments
- ❖ Tightened “Blue Box” disciplines
- ❖ Possibly tightened “Green Box” disciplines



## Industry – Post Doha Round

- ❖ No export subsidies
- ❖ Domestic subsidies regulated according to effect in marketplace test
- ❖ No domestic subsidy reduction commitments



## Conclusion:

- ❖ Sixty years into the GATT-WTO system, the end of the Doha Round is likely to see a situation where the evolution in subsidies disciplines leads to subsidies to agriculture being subjected to more rigorous disciplines than those applying to industrial products!



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