



UPDATE ON SUBSIDIES AND SUBSIDY DISCIPLINE

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Presented to
Georgetown University Law Center
2010 International Trade Update
Panel on “Key Subsidies Developments”

**Washington, DC
February 26, 2010**

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-- SPEAKING NOTES --

Thanks to the Trade Update organizers, Amy Porges especially, for including me in today's panel. My remarks today are personal ones, not reflective of anything believed by anyone's clients including my own. I have material for you under two headings -- what has happened in the last several years, and what's happening right now.

I. A Jumping-Off Point

In preparing today's presentation, I started by looking back at a piece I published in the *Journal of World Trade* just over five years ago. Its title -- which managed to be at once pretentious and alarmist -- was *WTO Subsidy Discipline: Is This the "Retrenchment Round"?*¹ This article was kind of an EKG of multilateral subsidy discipline. It (1) assessed the Uruguay Round subsidy regime as it existed on paper, finding that regime to be decent though nowhere near as robust as trade officials had claimed at the time; (2) detailed how the agreed disciplines had been eroded during the WTO's first decade through dispute settlement and through practice; and finally (3) analyzed ASCM reform proposals that had been tabled in the Doha Round, observing that the negotiating dynamic strongly favored relaxing rather than advancing discipline. At the very end I indulged in some speculation about how (little) we'd enjoy living in a lower-discipline world.

I will not assume you have seen (much less recently reviewed) that monster's 17 pages of text and 46-page annex. Nor, though tempted, will I repeat its details here today. Rather, what I would like to do is provide an epilogue -- summarizing how the tale has evolved in the ensuing half-decade.

II. WHAT HAS HAPPENED SINCE 2004?

Several things, as a result of which the health of the patient (subsidy discipline) has neither improved nor deteriorated to any great degree.

- Within the Doha Round Rules Negotiating Group ("RNG"), Members' proposals have given way to Chair's drafts which, on subsidy discipline, omit many of the most serious strengthening and weakening proposals. The EU, apparently worried about

¹ *Journal of World Trade* 38(6): 985-1047 (December 2004), available at <http://www.tradewinsllc.net/publi/Subsidies-JWT-12-04.pdf>.)

China, has edged past the United States as the RNG's leading proponent of tighter disciplines. And the Round itself has, of course, languished.

- We have, without obvious impairment of our quality of life, outlived the Peace Clause which previously exempted many agricultural subsidies from the ASCM's disciplinary framework.
- The United States has applied anti-subsidy tools in some circumstances where it had trade problems. Regarding China, this has included both CVD cases and WTO cases focusing on the foreign-invested enterprise (FIE) sector and on "famous brands."
- Bad WTO jurisprudence on indirect subsidies (the "entrust or directs" standard) has been moderated somewhat in cases reviewing CVD measures on semiconductors.
- The notification regime (supposedly) established by the ASCM has continued to add very little to effective discipline.
- The WTO's Permanent Group of Experts on subsidies has been restocked, costing us Gary Horlick's valuable service in that area but making room for Jeff May.
- Young associates working on steel subsidy cases have continued to wrestle with benchmarks, specificity and subsidy attribution. (For any in the room today -- I feel your pain.)
- And then there's the news on subsidization itself. In some sectors, such as autos, aid has spiked. (I won't get into the bailouts more generally, as Gary does that much more colorfully.) In other sectors, aid levels may have stabilized or declined, but the adverse trade effects of already-bestowed subsidies have nonetheless grown. A new update I just worked on, of the trade effects arising from UK subsidies in the aero-engines sector, has climbed past \$5B annually, even though the last dose of engine launch aid in that country occurred many years ago.

III. AND WHAT'S HAPPENING RIGHT NOW?

We here in the United States are, in no particular order:

- *Experiencing* the CVD process as a respondent, for example in Europe (in a case focusing on biodiesel) and China (in cases focusing on autos and specialty steel).
- *Contemplating*, in a seemingly serious way, new anti-subsidy remedies. One of these, prompted by the Air Force refueling tanker competition, would relate to military procurement, while the other, proposed in the pending review of the "model" Bilateral Investment Treaty (BIT) text, would involve screening of inbound investment.

- *Observing* that the “aircraft sector understanding” did not bring peace in our time on export credits -- as we argue at the OECD over the permissible treatment of a new Canadian plane called the “C Series.”
- *Litigating* two monster ASCM disputes, one offensive and one defensive, involving alleged subsidies on the production and export of large civil aircraft.
- *Still traumatized* by the outcome of the Foreign Sales Corporation dispute, suffering from PTFD (Post Traumatic FSC Disorder), and accordingly terrified by the idea of rules that would make it more possible to reach subsidies provided through countries’ tax regimes.
- *Facing* Brazilian retaliation as a result of our incomplete reform of WTO-inconsistent cotton-sector subsidies.
- And having digested the basic decision to extend the tender embrace of our CVD law to at least some nonmarket economies (NMEs), we are now *working through* some second-generation issues of which two are particularly important:
 - what to do in the scenario of parallel AD-CVD cases (double counting); and
 - what to do when a currency subsidy is properly pleaded by a petitioner.

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I hope this listing has helped to set the stage for an interesting discussion, and I apologize for the amount of jargon it necessarily contained. Many thanks for your attention. I look forward to the other presentations, and especially to your questions.