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A Cruel Trilemma: The Flawed Political Economy of Remedies to WTO Subsidies Disputes

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ABSTRACT

This Note examines the effectiveness of the World Trade Organization at remedying disputes involving trade subsidies. The WTO as created in the Uruguay Round was the first multilateral trade institution that included prohibitions against trade subsidies of a more-than-aspirational nature that were agreed to by most states in the world community. The WTO was thus envisioned as ushering in an era where subsidies had significantly less detrimental effects on the international economic community.

This Note seeks to evaluate the effectiveness of the WTO's subsidy provisions through analyses of decisions in early WTO jurisprudence. These decisions will be evaluated, in part, through recourse to economic and public choice theories. Ideally, remedies to government-granted subsidies should attempt to cure the sort of underlying rent-seeking behavior that causes subsidies without fostering the coalescence of anti-WTO constituencies that over the long term could meaningfully undermine principles of free trade. Following this discussion, several proposals for WTO reform will be evaluated in the light of this Note's underlying analysis.

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I. INTRODUCTION

This Note is intended to do two things. Foremost, it is intended to discuss remedies the World Trade Organization (WTO) has imposed in the first three disputes it has decided involving subsidies. It will also attempt to show, through recourse to economic and public choice theory, whether the remedy imposed caused the country to comply, and finally, why the remedy was or was not effective.

The prime goal of international trade law needs to be the avoidance of a "protectionist *summum malum*".[1] Such a situation would occur where domestic or social pressures in a particular country lead a state to increase or reinstate barriers to trade, thus triggering a reaction in other states that would end in a so-called "race to the bottom" leading to global economic disaster.[2] This Note, through an examination of WTO case law, concludes that the WTO has found no truly effective, theoretically justifiable way to remedy disputes involving subsidies and that the ways it has found are either

1. From the Latin, "the sum of all bads," e.g., the worst-case scenario. Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 94 (2002) (emphases in the original).
2. *Id.* at 94-95.

ineffective or run the risk of being counterproductive in the long-term. All things considered, this is not surprising: subsidies endemically are difficult to deter, and this difficulty is compounded by trying to do this in a supranational context where governments bring conflicting agendas to negotiations promising comprehensive solutions.

Prior to the 1994 Marrakesh Agreement, commentators stated that one of the major problems plaguing the General Agreement on Tariffs and Trade (GATT) did not deal effectively with subsidies.[3] Since the ratification of the WTO Agreement containing improvements to the GATT, this relative ineffectiveness has continued: subsidy cases have been among the most difficult to remedy.[4] When the WTO Agreement was signed in Marrakesh in 1994, its dispute settlement procedures were thought of as a "decisive improvement" over the procedures codified and practiced under the GATT.[5] Of the first 185 disputes that came before the WTO, only twenty-six reached the points where the Understanding on Rules and Procedures Governing the Settlement of Disputes apply.[6] "In fourteen of those, the offending member either fully implemented or agreed to implement in a manner acceptable to the winning party."[7] Six of the disputes led to non-compliance procedures, and six more are still either awaiting implementation or the establishment or expiration of their reasonable period to implement.[8] These procedures have been less effective regarding subsidies than with other issues: Three of these initial six are the basis of much of this Note. In addition, a "later" case, *United States–Foreign Sales Corporations*, will be discussed in detail.[9] This Note will attempt to explain why these disputes have been harder to remedy.

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3. The Marrakesh Declaration, announcing the end of the Uruguay Round of negotiations, sought to strengthen the world economy and increase income through "operating in a fair[er]" system where Members would not undertake measures that would "undermine or adversely affect the results of the Uruguay Round negotiations or their implementation." *See* Marrakesh Declaration of 15 April 1994, Declaration Section, ¶¶ 1-2, *in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS.

4. *See* Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement System Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 709-13 (2000).

5. *Id.* at 709.

6. *Id.* at 709-10.

7. *Id.* at 710

8. *Id.* at 710-11.

9. *Australia–Leather Goods* and *Brazil–Export Financing Program for Aircraft* and *Canada–Measures Affecting the Export of Civilian Aircraft*, will be discussed in Section III of this Note. *United States–Foreign Sales Corporations* will be also be discussed though it is described as a "later" case because the original dispute underlying it is currently more than twenty years old.

The structure of this Note is as follows: Section II generally outline the WTO system and discusses the basic history of the regulation of subsidies under the world trading system. Section III of this Note will attempt to outline a number of reasons why the two sections of the WTO Agreement that regulate subsidies are problematic to remedy. It will then seek to evaluate various proposals for reform of the WTO Agreement in light of the discussion included in this Note.

II. BACKGROUND

A. *The General WTO Framework*[10]

The WTO provides the institutional and legal foundation for the multilateral trading system that came into being on January 1, 1995.[11] It has become the major international body that deals with the rules of trade between nations.[12] The agreement that founded it and set out its role, structure, and powers, was also the first text in the package of Uruguay Round agreements signed in Marrakesh on April 15, 1994.[13]

These documents are basically contracts between countries that are intended to help facilitate private trade amongst them.[14] With the Marrakesh Declaration, the Ministers of the Member States of the WTO declared the Uruguay Round of trade negotiations formally concluded.[15] In the Uruguay Round, the Ministers believed that they had provided a "stronger and clearer legal framework . . . for the conduct of international trade, with a more effective and reliable dispute settlement mechanism," that would result in a forty percent reduction of tariffs and wider market-opening agreements on goods.[16] The Ministers believed "that the trade liberalization and strengthened rules achieved in the Uruguay Round would lead to a progressively more open trading environment" which would lead

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10. In the course of this Note, "WTO" will be used with both of its traditional two meanings: it stands for both the WTO Agreements and the organization established by them.

11. The WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 1 [hereinafter GUIDE TO THE URUGUAY ROUND AGREEMENTS].

12. WTO, TRADING INTO THE FUTURE 3 (2d ed. 2001).

13. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 11, at 1.

14. TRADING INTO THE FUTURE, *supra* note 12, at 3.

15. Marrakesh Declaration of 15 April 1994, contained in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 3, at iii-v.

16. *Id.* at iii.

toward a more balanced and integrated global trade partnership.[17] As part of the Uruguay Round of negotiations, the Member States of the WTO adopted a number of agreements that went far beyond the scope of the GATT that had been adopted in 1947.[18] The Agreement sought to perform a number of functions, among them to achieve greater coherence of trade policy with respect to agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial sanitation, food sanitation regulation, and intellectual property.[19]

The WTO Agreements are enforced through a WTO-specific dispute settlement system.[20] This system is outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[21] The judicial portions of the DSU consists of three, or possibly five, member Dispute Settlement Panels (Panels) and a standing Appellate Body.[22] To gain legal status, both the Board and Panel reports are referred to the Dispute Settlement Body (DSB) of the WTO, in which only a unanimous vote by all Members can stop such reports from becoming law.[23] Thus, the dispute resolution process in the WTO is in a sense automatic because rarely if ever will the "winning party" vote against having the remedy imposed.[24] In the event of a breach of the WTO rules, the DSB recommends that the Member concerned bring the breach into conformity with the WTO Agreement that has been violated.[25] Typically, "withdrawal" of the measure is required.[26] "In addition, both the Panel and the Appellate

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17. *Id.* at iv.

18. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 12, at 1-2. The GATT, a provisional agreement that governed international trade from 1948-1994, had been originally conceived as lasting only long enough until an organization called the International Trade Organization (ITO), in many respects similar to the WTO, could come into being. TRADING INTO THE FUTURE, *supra* note 12, at 9.

19. TRADING INTO THE FUTURE, *supra* note 12, at 5.

20. It has been postulated that the DSU Agreement resulted from the entrustment of trade law to a specialized policy elite insulated from the political system. Howse, *supra* note 1, at 98. This group of experts were neither particularly interested in, or sympathetic to, larger political struggles going on in the world, or to those that had resulted in the creation of the GATT-system itself. *Id.* As many of them were grounded in disciplines such as policy studies and economics, they were hesitant to allow the trading system to develop along the lines of a politically-driven body like the United Nations. *Id.*

21. The DSU is available through the WTO website at http://www.wto.org/wto/dispute/dsu.htm. It can also be found in THE LEGAL TEXTS, *supra* note 3, at 354.

22. *See* DSU art. 6.1. Members of the WTO, under Art. 23.1 of the DSU, recognize that the jurisdiction of the WTO dispute settlement system is compulsory and exclusive as far go violations of WTO rules. *Id.*

23. *Id.*

24. Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 336 (2000).

25. *Id.* (discussing DSU Art. 19.1).

26. *Id.*

Body may suggest methods in which the Member concerned could implement the recommendations."[27] Prompt compliance with the recommendations and the rulings of the DSB is explicitly dictated.[28] If it is impracticable to comply immediately Members are to be given reasonable periods of time to comply.[29] These are determined either through agreement or through binding arbitration.[30] If compliance is still not achieved, countermeasures are awarded to all WTO members.[31] These countermeasures entail the winning party raising trade barriers vis-à-vis the losing party, a move which is detrimental to free trade principles.[32] The "constitutional" case law of the WTO has deepened of late through disputes involving the United States and EU over bananas,[33] hormone-treated beef,[34] and regarding their disputes over U.S. tax structures, such that parties now are fully aware of procedures under the WTO.[35]

B. *An Introduction to the SCM and Its Role in the WTO System*

GATT 1947 allowed countries to use export subsidies on agricultural primary products, though it prohibited them in situations on industrial products.[36] The GATT prohibited export subsidies only when the result was an export price lower than comparable domestic price; the Subsidies Code, Reporters' Note 1, prohibited export subsidies without regard to differential effects on prices.[37] Neither the GATT nor the Subsidies Code accompanying it

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27. *Id.*
28. *Id.* (discussing DSU Art. 21.1).
29. *Id.* at 337 (discussing DSU Art. 21.3).
30. Pauwelyn, *supra* note 24, at 337.
31. *Id.* (discussing WTO Art. 22.1).
32. *Id.*
33. *See, e.g.*, Decision by the Arbitrators, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*–Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,WT/DS27/ARB, Apr. 9, 1999, ¶ 6.3.
34. *See, e.g.*, Decision by the Arbitrators, European Communities–Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS26/ARB, 12 July 1999.
35. Report of the Appellate Body, Recourse to Article 21.5 of the DSU by the European Communities, *United States—Tax Treatment for "Foreign Sales Corporations,"* Jan. 14, 2002, WT/DS108/AB/RW.
36. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 806 cmt. b (1987).
37. *Id.* The GATT (Article 6) allowed countries to take action against other countries for dumping, which, though similar and often discussed in tandem with subsidization, is not the same thing. TRADING INTO THE FUTURE, *supra* note 12, at 29. In the original GATT framework, subsidies were only required to be reported, thus acknowledging their role in contributing to inefficiencies in international trade.

prohibited domestic or production subsidies, though the Code recognized that such subsidies could cause or threaten injuries in other states.[38] The Code then admonished parties to "seek to avoid causing such effects."[39] As the failure to establish the International Trade Organization (ITO) in part resulted from fear current at the time of negotiation on the part of constituent nations of giving up such powers, the prospect was not good of finding success in the uphill charge necessary to get a coherent and strong agreement on subsidies at that time.[40]

One of the major priorities of parties entering into the Uruguay Round was to achieve a coherent remedy to subsidy disputes.[41] The resulting Subsidies and Countervailing Measures (SCM)[42] is simultaneously one among many of the agreements achieved in the Uruguay Round, but functionally somewhat different in practice and application from most of the other agreements involved in it.[43] Subsidies, thus, give rise to responses by the WTO at the behest of either a Member, where the dumping or subsidized exports end up, or through action brought by a country who has constituent industries

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General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, art. XVI.

38. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 806 cmt. b.

39. *Id.*

40. Originally, it was thought that that the GATT would become part of the ITO. SALVATORE, *infra* note 61, at 280. "The proposed ITO was ambitious undertaking, covering not only trade, but employment, commodity agreements, economic development, and restrictive business practices." David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444, 453 (2000). The ITO, perhaps because it was too ambitious proposal for the times, was unable to achieve ratification by the U.S. Senate and other nations. SALVATORE, *infra* note 61, at 280. Thus, the GATT, originally envisioned as a stand-in, had to function as the prime unit. *Id.* The Uruguay Round, beginning in September 1986, was scheduled to be completed by December 1990, but disagreements over agricultural subsidies caused the agreement to be delayed three additional years. *Id.* at 284. Thus, the Agreements on Agriculture and the SCM Agreement stop far short of where they may have. The Agreement on Agriculture is structurally weak in much the same fashion as is the SCM. The Agriculture Agreement also aims to promote market access and predictability by limiting the amount of domestic handouts by governments such as price supports on agricultural commodities, etc. TRADING INTO THE FUTURE, *supra* note 12, at 17. This is accomplished through forcing parties to use tariffs as opposed to less economically efficient and visible previous methods. *Id.* However, these agreements came with a cost: the Agreement, though implemented in 1995, did not come into full effect for six to ten years (depending on whether a country was developed) and even then with a "peace" provision that was intended to reduce the likelihood of challenges for an additional nine years. *Id.*

41. Shane Spradlin, *The Aircraft Subsidies Dispute in the GATT's Uruguay Round*, 60 J. AIR L. & COM. 1191, 1201-03 (1995) (discussing nations' bargaining positions regarding subsidies in the Uruguay Round).

42. The Agreement on Subsidies and Countervailing Measures.

43. *See* discussion *supra* note 11. The Agriculture Agreement is functionally similar to the SCM in that it deals not with a barrier, but with behavior that is bad for its market-skewing outcomes.

who are effected by a loss of sales.[44] Typically, however, this second action is the cause: actions are triggered by the initiation, through a written application, of a domestic industry for an investigation of subsidization.[45] The goal of such application is to achieve the imposition of anti-dumping or countervailing measures on the relevant imported goods, so as to offset the dumping or subsidy.[46] In principle, the WTO Agreements themselves outline how such an investigation would take place, with the intent to insure that the countervailing measures do not themselves cause material effects harmful to the interests of the world trading system.[47] Because of the existence of, and fairly constant recourse to, the use of "countervailing measures" the SCM differs in a second major respect to the rest of the WTO Agreements. This is compounded by the more diffuse problems that the SCM Agreement seeks to solve.[48]

The WTO Agreements are intended to settled trade disputes between parties and to promote principles of free trade.[49] Members of the WTO agree to use the multilateral mechanism instead of taking unilateral action upon encountering a trade conflict.[50] There is great emphasis in the process in getting parties to settle without having judgment thrust upon them through the full DSU process.[51] A dispute arises when a Member nation takes an action that one or more Members believe to be in violation of the WTO Agreements.[52] Unlike

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44. QURESHI, *infra* note 84, at 273; *see also* discussion *supra* note 40 (discussing how subsidies functionally lower costs for consumers at the expense of the exporting nation).

45. QURESHI, *infra* note 84. In the cases discussed in Section III of this Note, all of the actions were triggered by the second method. Though it is theoretically possible that an investigation would be triggered by a consumer complaint, it is unlikely. There is a constant tension between having a useful and functional SCM law, and fostering market protectionism on the part of "losing" industries. *See* William K. Wilcox, *GATT-Based Protectionism and the Definition of a Subsidy*, 16 B.U. INT'L L.J. 129, 162-63 (1998).

46. QURESHI, *infra* note 84, at 273.

47. *Id.*

48. A danger posed by the SCM Agreement, with its allowances of national 'countervailing measures' is that this sort of self-help seems to undercut the legitimacy of the WTO. It is somewhat logically inconsistent to allow parties to help themselves under the SCM Agreement but not to allow them in other areas. In regard to trade issues, self-help, as countries have historically realized does not work: it allows countries' protectionist impulses to come through. *See generally* TRADING INTO THE FUTURE, *supra* note 12, at 8 ("One of the objectives of the WTO is to prevent a self-destructive and defeating slide into protectionism.").

49. TRADING INTO THE FUTURE, *supra* note 12, at 38.

50. *Id.* Indeed, as the United States discovered in EU–Bananas, the system has historically not looked kindly upon those who engage in self-help.

51. Indeed, by March 2001, 38 of the 228 trade disputes that came before the WTO settled without going through the full panel process. TRADING INTO THE FUTURE, *supra* note 12, at 38-39.

52. *Id.*

under the GATT regime, fixed timetables exist, and an orderly process allows disputes to achieve resolution in a timely manner.[53] Conflicts pass through phases of consultation, through a Dispute Settlement Board (Board), and then, if the parties disagree as to how the law was applied, the rulings of that Board can be appealed.[54] The intent of agreeing to procedures specifying how disputes are to be settled is to avoid destructive trade wars.

Regarding dispute settlement, a second major change from dispute process under the GATT is although the final DSB and Appellate Rulings have to be adopted by vote of the membership, the "losing" party is no longer able to stop this from happening.[55] WTO jurisprudence is thus evolving at a rapid rate. With this occurring, and because of the novelty of the concept dealt with under the SCM Agreement,[56] in the disputes that have arisen under it, Appellate Boards have taken a number of different approaches to solving the problem, none of them completely satisfactory.

III. THE ECONOMICS OF SUBSIDIES AND REMEDIES IMPOSED BY THE WTO APPELLATE BODY IN EARLY CASES

During the Uruguay Round negotiations related to subsidies, negotiators had to balance three interrelated considerations.[57] First, countries needed to counteract unfair trade practices; second, they needed to find a way to keep parties from using measures aimed at ending unfair practices from being used to block "fair" trade; and third, the WTO needed to find a way to give some of its members a level of deference to avoid trampling their sovereignty.[58] This Note will argue either through the drafting of the SCM, or because of the nature of subsidies, these criteria are impossible to balance, and as such, any attempt at doing so would cause relatively uncertain law. One must be traded at the expense of the others: at least if the cases thus far are any indication.

Steve Charnovitz, in an essay investigating WTO trade sanctions, posed a number of questions necessary to appraise the

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53. *Id.* If a case runs the full course that the WTO provides—proceeding through the DSB through an appeals phase—the proceedings should not take more than 15 months. *Id.*

54. *Id.* at 39.

55. *Id.* at 38-39.

56. Many of the problems identified with the SCM Agreement are also applicable to the Agreement on Agriculture.

57. Paul C. Rosenthal & Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During the Uruguay Round*, 31 LAW & POL'Y INT'L BUS. 871, 871-72 (2000).

58. *Id.*

application of remedies in particular cases.[59] "Are [the involved] sanctions effective? Do they strengthen the WTO or weaken it? What is the impact of sanctions on target and sender nations? How do sanctions affect international law outside of the WTO?"[60] These questions allow for the effects of sanctions in particular instances to be weighed against their effects on the larger international system. The remainder of this Note will examine the involved sanctions applied in challenges brought under the SCM through these two perceptual lenses.

A. *Subsidies Are Different Than Other Trade "Barriers"*

It is appropriate at the outset to inquire into the nature of trade subsidies. Historically, tariffs were the most important kind of trade barrier.[61] Tariffs are visible to harmed parties.[62] They are, however, not the only kind of barrier: quotas, voluntary export restraints, and regulatory barriers also can function to keep goods out of countries.[63] The WTO, in regard to these kinds of restrictions, has been relatively effective, at least numerically, at settling disputes.[64] For these kinds of restrictions, both importing and exporting countries suffer.[65]

Subsidies are different than tariffs. Governments subsidize industries for numerous reasons, and governments that choose to subsidize have to choose not to put money spent on subsidies to other uses. For instance, subsidies are offered to firms to try to forestall unfavorable business trends (for example, U.S. subsidies to its domestic steel industry) and to remedy market imperfections (for

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59. Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 808 (2001).

60. *Id.*

61. DOMINICK SALVATORE, INTERNATIONAL ECONOMICS 257 (6th ed. 1998).

62. For instance, a party having to pay a tariff on steel it is trying to import into the United States would clearly know that the government is using a tariff to keep its goods out. They would have to pay a certain amount of money before the good would be allowed into the United States. In the case of a subsidy, a more detailed analysis is required before a party a) knows that subsidization is going on, and b) can determine whether such subsidization is legal or illegal.

63. *See id.* (stating that a quota is a *direct* quantitative restriction on the amount of a commodity allowed to be imported or exported) (emphasis added); *id.* at 260 (stating that voluntary export restrictions occur when an importing nation induces an exporting nation to reduce its exports voluntarily); *id.* at 263 (stating that regulatory barriers include, for example safety regulations for automobiles, health regulations for the packaging and production of food products, and labeling requirements showing origin and contents).

64. *See* Gleason & Walther, *supra* note 4, discussing relative settlement rate for different kinds of disputes.

65. *See generally* SALVATORE, *supra* note 61, at 227 (discussing effects on producer and consumer of tariffs). This analysis would largely also largely hold true for quotas and regulatory restrictions.

example, vocational retraining programs to help underemployed workers shift from one sector of the economy to a different one).[66] This utility requires the WTO to apply varying requirements to different types of subsidy. Countries believe that it can be useful to promote their economic development, though, the extent to which countries can succeed in doing so where another country is also subsidizing is somewhat dubious. Given their utility, the problem with having any strong prohibition on subsidies is that it causes a direct interference with a government's abilities to promote development inside of its borders in so far as they are legal unless precise definitions can be found to differentiate appropriate from inappropriate conduct. Prohibitions also dramatically fix the methods to which countries may act: whether something is a prohibited subsidy, or a legitimate action, hinges on characterization rather than substance if this is not properly done.[67]

Subsidies arguably are also economically more complex creatures than the other items prohibited in the WTO Agreements.[68] The reason that the SCM stops short of a flat prohibition is that subsidies, in many situations, are tremendously useful.[69] They also necessarily

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66. MIROSLAV N. JOVANOVIĆ, INTERNATIONAL ECONOMIC INTEGRATION 29 (1998); *see also* KRUGMAN, *infra* note 69, at 8-14.

67. *See* Spradlin, *supra* note 41, at 1198-99 (stating that the U.S.'s industrial policy involving its defense industry has the same practical effect of European subsidization of their aircraft industry); *see also* Trade and Competitiveness of U.S. Industry: Hearing before the Senate Comm. on Finance, 102d Cong., 2d Sess. 59, 63 (1992) (Senator Daniel Patrick Moynihan stated that "[i]f [anyone] wants to know whether we should have an industrial policy, in the name of God for the last 45 years, we have had the most explicit industrial policy in the world. And that is the Cold War.").

68. Subsidies are actually trade stimulators. *Id.* at 266 ("[S]ubsidies lead to huge . . . surpluses and subsidized exports.") Additionally, "strategic" trade policy states that, in fields subject to certain parameters, countries can use subsidies to gain comparative advantage, partially through investing in the development of goods that would not exist *sans* subsidy. *Id.* at 273-75. *See* Wilcox, *supra* note 45, at 131-32 ("[Strategic] trade theory characterizes the traditional view as simplistic and overly reliant on models based on false assumptions.").

69. Valid arguments exist that all subsidies do not pose a problem. Historically, subsidies were viewed as something useful in enhancing national wealth and power. Alexander Hamilton believed that American growth and development were contingent on having a diverse economy; creation of such an economy would necessitate the use of different forms of subsidization. *See* WILLIAM R. NESTER, A SHORT HISTORY OF AMERICAN INDUSTRIALIZATION 2-3 (1998). These policies have continued. For instance, the Clinton Administration in the U.S. saw valid reasons for "partnerships" between government and industry as regards technological development issues. *See* Michael L. Doane, *Green Light Subsidies: Technology Policy in International Trade*, 21 SYRACUSE J. INT'L L. & COM. 155, 163-70 (1995). The European giant Airbus exists in testament to the power of government subsidization of particular industries. *See generally* Daniel I. Fisher, Note, *"Super Jumbo" Problem: Boeing, Airbus, and the Battle for the Geopolitical Future*, 35 VAND. J. TRANSNAT'L L. 865, 867 (2002) ("Airbus was designed by . . . governments to play such a dominant role. . . . With government commitment to full employment, policymakers view the thousands of jobs Airbus creates . . . as well

lower prices of goods in importing countries: many underdeveloped countries benefit from lower prices or goods that developed countries subsidize.[70]

Subsidies are "barriers" because they fundamentally skew the market from its neoclassical equilibrium. Intervention of political actors causes prices and production to shift away from where they would naturally be. Developmental economists have long believed trade to be an instrument of growth. According to traditional trade theory, if each nation specializes in the production of the commodity of its comparative advantage, world output would be greater, and, through trade, all nations would share in the collective gain.[71] Given present development and allocation of resources, the theory of comparative advantage suggests that developing nations should continue to specialize in the production and export of raw materials, fuels, minerals and food in exchange for finished products produced by developed countries.[72] Allowing developed countries—the parties

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worth the costs of the support provided."). "Least" developed countries do not have to make a commitment to reducing tariffs or subsidies. TRADING INTO THE FUTURE, *supra* note 12, at 17 (implying that the consensus among nations is that some subsidies serve a useful purpose). Indeed, some commentators have stated that subsidies are just gifts from exporting nations to other countries' consumers. *See* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 45 (1980) ("[Other countries citizens] are the ones that pay for the subsidies. U.S. consumers benefit. They get cheap TV sets or automobiles."); Williams, discussed *infra*, at 242 ("Certain economists and free trade ideologues would be happy to see our unfair-trade laws gutted. Their view is that if foreign governments want to subsidize U.S. consumers . . . U.S. law should not interfere . . . . Modern trade theories suggest that under a set of given assumptions, subsidies can add wealth to both subsidizing, and importing countries. *See* PAUL R. KRUGMAN, STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 8-14 (1986). The major problem with such "strategic trade" is that it is near impossible *ex ante* to predict the long-term consequence of a particular subsidy. SALVATORE, *supra* note 61, at 277 (stating that this impossibility in predicting outcomes of a particular subsidy provides the reason most economists support "fair" trade).

70. Subsidies result in the exporting country paying the cost of goods bought in an importing company. Economists and lawyers believe they can be problematic when they distort trade from what it would be in a perfect world. Those who find subsidies the most troubling believe that they could be used to establish a "toehold" in a particular industry to which other countries could not catch up. This point is made with the supposition that "toehold" subsidies would be difficult to carry out in the real world. In a competitive industry including multinational companies where there were instances of rapid technological innovation, it is improbable that the effects of a subsidy would last much longer than the government would be willing to give them. In such a scenario, subsidies can be viewed more like factor resources than something insidious. In reality, when a country chooses to make airplanes (e.g. Bombadier or Airbus), steel, etc. it does so for a complex set of reasons. It might be attempting to promote development in a particular industry or section of the country, or it might do it just for status.

71. SALVATORE, *supra* note 61, at 330.

72. *Id.* Through their "industrial policies," some nations have managed to go from being "undeveloped" to "developed" by changing those products that they had a comparative advantage in. For instance, in the twentieth century, Japan switched from

with the largest amount of resources to spend on subsidies—to provide them thus contributes to a more static, less efficient world economy even though it is an economy from which some benefit.

B. *The Composition of the SCM Shows the Political Compromises Necessary to Secure Its Ratification*

The political process that brought about the WTO (and the SCM particularly) deserves much of the blame for the inadequacies that will be discussed later in this Note. Parties negotiating the WTO accords had dramatically different takes on the relative merits of different kinds of industrial policy.[73] Regarding subsidies, for instance, the rules established in the present SCM Agreement revise those set in the Tokyo Round that were not signed by all members because they did not agree with them. Some of this leeriness has persisted.[74]

The WTO Agreement divided subsidies into categories with three different levels of prohibition. Because the WTO provides a rules-based system, the definition of "subsidy" in the SCM Agreement is problematic if it is unclear.[75] The tripartite framework put forward in the SCM Agreement resulted from both the beneficial uses of subsidies, and from the different perceptions of the utility of activist industrial policy held by WTO Members. Rules-based systems use precise definitions in order to segregate permissible from impermissible conduct.[76] Such systems do so on the assumption that such minimum preconditions ensure that the use of remedial sanctions will be confined within sensible limits.[77] A defined limit to

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having a comparative advantage in the production of low-quality knock-offs of Western products to having an economy invested in producing high-technology items. *Id.*

73. One of the reasons for the inclusion of subsidies into the WTO Agreements was that under the original GATT-bargain, parties were free to manage their economies so long as they did so in a fashion that did not harm others. The validity of this "bargain" was undercut by the belief that some parties were shirking it due to such an absolute indifference to this norm that they avoided subsidizing where it would lead to negative effects. *See* Howse, *supra* note 1, at 101. This notion was compounded by an ideological shift in the United States and United Kingdom toward anti-interventionist economic policies. *Id.* Stopping interventionism (e.g., subsidization) in other countries would give U.S. and U.K. industries the ability to compete in industries that without subsidization of their own, they would be at a competitive disadvantage. *Id.*

74. TRADING INTO THE FUTURE, *supra* note 12, at 30. Indeed, the Tokyo Round Subsidy Code never contained a definition of the word "subsidy." *Id.*

75. Howse, *supra* note 1, at 95 (describing the WTO as a "rules-based negotiated" system). "Subsidy" has had a number of distinct definitions in the parlance of U.S. trade law. *See generally* Wilcox, *supra* note 45 (discussing the variety of different definitions that 'subsidy' has had in the history of United States trade law).

76. *See* Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1053-54 (1987).

77. *Id.* at 1054. Such minimum preconditions for punishment are built into U.S. legal culture. *Id.* at n.145.

the scope of permissible and impermissible conduct provides a guarantee that a party violating the rule deserves punishment.[78] A party punished for violating a clearly defined rule would deserve to be punished for both retributive and preventative reasons.[79] A clear definition of the impermissible act also preserves a sphere of autonomy for the relevant actor.[80] Functional, clear rules thus both prevent illegitimate action and improper punishment.[81] The SCM Agreement, insofar as it does not provide clear rules, serves to restrain state actions from neither "legal" subsidization, nor from improper use of the DSU system to harass trading competitors.[82] However, unclear rules often result from bargaining situations.

The SCM introduced a number of modifications to the provisions established following the Tokyo Round: it included more detailed rules for calculating the amount of damages, more detailed procedures for instigating and conducting subsidy and dumping investigations, rules on the implementation and duration of anti-dumping measures, and particular standards for DSBs to apply in SCM disputes.[83] A subsidy, as defined by the SCM, is a financial contribution made directly or indirectly by a government or public body within the territory of a Member to some other party.[84] The SCM divides subsidies into three categories: "prohibited," "actionable," and "non-actionable" subsidies.[85] Prohibited subsidies include those which are tied directly to exports and would necessarily have an effect on foreign economies.[86] Actionable subsides loosely

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78. *Id.* at 1054.
79. *Id.*
80. *Id.* at 1055.
81. *Id.*
82. However, it does *not* stop states from acting duplicitously regarding implementing both rulings and violating the intent of the agreement. *See* discussion *infra* note 265 and accompanying text.
83. *See generally id.*
84. *See* AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, April 15, 1994, GATT URUGUAY ROUND AGREEMENTS, Annex 1A, Multilateral Agreements on Trade in Goods (1994) [hereinafter SCM]; ASIF H. QURESHI, INTERNATIONAL ECONOMIC LAW 271 (1999).
85. JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 61-62 (1999).
86. *See* SCM, *supra* note 84, at Part II. Prohibited subsidies are those which require parties to meet particular export targets, or to use domestic rather than imported goods. TRADING INTO THE FUTURE, *supra* note 12, at 31. They are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries' trade. *Id.* When challenged under the WTO framework, these subsidies can also be handled under an accelerated timetable. *Id.* If the dispute settlement procedure finds that a subsidy is "prohibited" it must then be withdrawn. *Id.* One country's subsidies can hurt a domestic industry in an importing country. *Id.* They can also hurt parties trying to export goods into the market of the subsidizing government. *Id.*

correspond to existing GATT practice in that they are regarded as possibly useful tools that also to have the potential to be that damaging.[87] Parties can only seek remediation on "actionable" subsidies upon the occurrence, or threat, of either material injury.[88] The third category of non-actionable subsidies includes those unlikely to harm third parties (such as local public transport) and structural adjustment measures "which need to be tolerated for the sake of cure and must not be countervailed even in case of injury".[89]

The danger of being overzealous in pursuing actions in regard to one of these categories when actions do not clearly fit into it are numerous. First, there is the danger that parties, fearing sanction, will not subsidize in situations where those subsidies would benefit their countries. Subsidies, unlike most of the other areas covered by the WTO Agreements, have uses that result in both positive and negative effects.[90] In fashioning rules regarding subsidies, perhaps more so than in any other area, there is a need for precision: gaps and ambiguities in the system leave countries either with a choice not to give out "legal" subsidies out of fear of subsequent legal recourse, or to face tremendous penalties for subsidies that they had deemed legal.[91]

Even attempting to remedy a dispute requires a highly political calculation. A choice by a "harmed" country to sanction another country's behavior in instances where they have "illegally" subsidized requires two decisions to be made. First, a country must decide either that the structural gains to the market diffusely are important enough to force consumers to pay a higher price for the particular subsidized commodity, or, more probably, that an industry in the charging country is being faced with "unfair" competition.[92] At a second level, the country also must decide that the transaction costs encountered in dealing with the subsidy are worth adding in to

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87. *See* SCM, *supra* note 84, art. 5(b); *see also* CROOME, *supra* note 85, at 61-62. In the case of actionable subsidies, the complaining country has to show that the subsidy has an adverse effect on its interests. TRADING INTO THE FUTURE, *supra* note 12, at 31. If a country can show this, the subsidy is prohibited. *Id.* If it cannot, it is permitted. *Id.*

88. CROOME, *supra* note 85, at 62.

89. *Id.* These can either be non-specific subsidies, or specific subsidies for industrial research and pre-competitive activity, assistance to disadvantaged regions, or assistance granted in certain types of situations where facilities need to be upgraded to comply with new environmental regulations. TRADING INTO THE FUTURE, *supra* note 12, at 31.

90. *Id.* (discussing possible benefits to world caused by subsidies).

91. *See* CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 7 (2001) (stating that the WTO panel and appellate body decisions are producing dire political conflicts and that the underlying texts of the WTO lack the attributes necessary for a rules-based system).

92. In part, this decision is made in the tripartite division of subsidies into "prohibited" "actionable" and "permitted" categories.

prosecute the claim.[93] These transaction costs might also need to figure in the risk that the country charged with subsidization will also file a counter-claim found to be meritorious with the WTO asserting that the charging-country is also subsidizing.[94] Such charge-and-countercharge situations have been fairly frequent in the early case law.[95]

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93. *Id.* For instance, legislators in a country seeking to promote fairness (while also maintaining its "fair" subsidies) would have a payoff matrix modeled as such, if the other party were not using techniques of gamesmanship (i.e., not reacting to the charge of subsidization by filing a counter-charge):

COUNTRY A

COUNTRY B

	Do Not Pursue	File Action
Do Not Pursue	4, 4	5, 1

94. For instance, in such a situation where the "bad" country was using gamesmanship, in most situations, the payoffs could be hypothetically modeled as such:

COUNTRY A

COUNTRY B

	Do Not Pursue	File Action
Do Not Pursue	4, 4	5, 1
File Counter-Action	-NA-	1, 1

For instance, though the European aerospace giant exists largely as a result of governmental largess, it is unlikely that the United States would file counter-charges out of fear that Europe would respond by questioning the practices of the U.S. aerospace industry. *See* Fisher, *supra* note 69, *passim* (discussing various ramifications European aid for Airbus super-jumbo jets).

95. *Id. See also* the discussion of the Brazil-Canada dispute contained in Section III.3.

C. *Problematic Decision Making in Subsidy Remedy Decisions*

1. *United States–Foreign Sales Corporations* and the Myth of the Persistently Dumb Legislature

The saga that became *United States–Foreign Sales Corporations* began with a provision of the Deficit Reduction Act of 1984, replacing the Domestic International Sales Corporation (DISC) legislation as the United States' major tax incentive for exporters.[96] The change followed a controversy between the United States and its trading partners, who claimed that the DISC constituted an export subsidy violating the GATT.[97] Though the United States never conceded that the DISC legislation violated the GATT, the Reagan Administration proposed the replacement of the DISC with the Foreign Sales Corporations (FSC) to soothe other GATT signatories, most notably the European Economic Union.[98]

As of 1986, the original FSC legislation had not accomplished the goal of placating the EU.[99] In *United States–Foreign Sales Corporations* (*U.S.–FSC*), the Panel was established to consider a complaint by the European Communities concerning the consistency of the U.S.–FSC Replacement and Extraterritorial Income Exclusion Act (ETI Act) with the SCM Agreement and the GATT 1994.[100] This was, to paraphrase terminology in a recent article, the United States' "third strike" at the legislation.[101] The ETI Act was a measure taken by the United States with a view to complying with the recommendations and rulings of the DSB in *U.S.–FSC*.[102] The European Union did not think that the ETI Act functionally withdrew the preferential treatment and

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96. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) (codified throughout sections of 26 U.S.C.). Division A of the Act is the Tax Reform Act of 1984; Division B is the Spending Reduction Act of 1984. Title VII of the Tax Reform Act of 1984 includes the Foreign Sales Corporation legislation. Pub. L. No. 98-369, §§ 801-05, 98 Stat. 985-1103 (1984) (codified at I.R.C. §§ 921-927 (Supp. III 1985)); *see also* Ronald D. Sernau, *The Foreign Sales Corporation Legislation: A $10 Billion Boondoggle*, 71 CORNELL L. REV. 1181, 1181 n.1 (1986).

97. *See* Sernau, *supra* note 96, at 1181.

98. *Id.*

99. *Id.*

100. Report of the Appellate Body, Recourse to Article 21.5 of the DSU by the European Communities, *United States–Tax Treatment for "Foreign Sales Corporations,"* Jan. 14, 2002, WT/DS108/AB/RW; *see also*, ETI Act, Pub. L. No. 106-519, 114 Stat. 2423 (2000).

101. *See* Sarah Ostergaard, Note, *The Third Strike: United States' Attempts at Achieving Tax Parity Between its Income Tax and the European Value-Added Tax*, 27 J. LEGIS. 421, 421 (2001).

102. Report of the Appellate Body, *supra* note 100, ¶ 2. The recommendations and rulings of the DSB resulted from the adoption, by the DSB, of the Appellate Body Report in *US–FSC*, WT/DS108/AB/R, adopted March 20, 2000 (the "original Appellate Body Report").

subsidies complained of in the earlier case.[103] The Appellate Body agreed that the U.S. government's acts were in violation of Articles 3.1 and 3.2 of the SCM Agreement, Article 3.3 and 10.1 of the Agriculture Agreement, and provisions of the GATT 1994 treaty.[104] Thus, the process of remedying one particular "subsidy" was to continue ad infinitum.[105]

The arbitrator assigned to find remedies for the dispute followed the European Union's approach, and ordered that the United States be penalized at the value of the subsidy and allowed them to suspend concessions and other obligations up to this amount.[106] Of the rationales discussed in the three cases that were in issue in this case, the reasoning put forth in the arbitrator's opinion was the most sophisticated, and arguably the most agreeable. The level of sanction in *United States–Foreign Sales Corporations* case is troublesome, but not nearly as troublesome as the remedies encountered in the other two cases, when one views it through a number of angles with the Charnovitz lens.[107]

Were the involved sanctions effective? The threat of sanctions certainly was effective: the United States was revising its laws in order to get into compliance with the WTO. However, in one sense the actions of the WTO may have been too effective in that they imposed a tremendous sanction on the United States in an instance where the behavior was not particularly egregious.[108] The level of sanction was tremendously high.[109] The fashion in which the sanction is to be imposed is something commentators have viewed with measured disdain.[110]

It is problematic that the United States' third attempt at remedying a twenty-year old subsidy dispute still resulted in a huge

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103. Report of the Appellate Body, *supra* note 100, ¶ 4.

104. *Id.* ¶¶ 5, 256-57.

105. *See generally* Ostergaard, *supra* note 101.

106. Decision of the Arbitrator, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, *United States—Tax Treatment for "Foreign Sales Corporations"*, August 30, 2002, WT/DS108/ARB ¶¶ 7.1-8.1. The WTO authorized the EU to impose $4.043 billion in trade sanctions. *See* Article, *infra* note 254, *passim* (discussing the status of 2003 trade negotiations).

107. Part of the reason for this might be that the SCM is profoundly unclear as to what is, and what is not, a prohibited subsidy. Another explanation might be that Congress believed that there was an 'acceptable' alternative to adopting the VAT when, in reality, there was not. A third might be that Congress just did not know what they were doing.

108. When one is evaluating incentives, the U.S. was trying to fulfill its international obligations. For a variety of reasons, it failed.

109. The WTO originally authorized the EU to impose four billion dollars of trade sanctions on the US. *See America's Taxing Trade Troubles*, ECONOMIST GLOBAL AGENDA, Aug. 21, 2001.

110. *See, e.g.*, Charnovitz, *supra* note 59, at 827.

fine.[111] Why? Obviously, one of two things happened: either the Members of Congress passing the resolution were not aware of the categorization, or, more troublingly, they did not care that the particular provision they were adopting could result in a charge of subsidization.[112] For the purposes of this section, I will assume that the former is the cause.

The WTO's dispute resolution system was premised on the notion that legislatures are capable of making rational decisions. As troubling as it may be, much literature in the social sciences disagrees with this assumption. "Policymaking is not about rationally debating, choosing and implementing solutions to problems; it is about narrow political, bureaucratic, and other interest asserting themselves—policy results from the subsequent multi-stranded tug of war."[113] "What happens is not chosen as a solution to a problem but rather results from compromise, conflict, and confusion among officials with diverse interests an unequal influence."[114] As such, remedying disputes may be more difficult.

Public choice scholarship attempts to understand legislative behavior. The belief that interest groups control much of what comes out of a legislative branch is a proposition widely agreed with.[115] A method through which individuals seek utility, often by using interest groups is "rent seeking."[116] Concentrated interests with small

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111. *See* discussion *supra* notes 89 and 94.

112. Most assuredly, the members of Congress worried about the reaction of the EU and the WTO in this case. After all, they were changing the legislation in order to correct problems noted in a previous trade dispute.

113. NESTER, *supra* note 69, at 15.

114. GRAHAM ALLISON, ESSENCE OF DECISION: EXPLANATION OF THE CUBAN MISSILE CRISIS 162 (1971). "[T]he best way to understand American government is not as a government but as a set of governments; it is government by nonconsensual directions." Peters, *infra* note 240, at 61.

115. For analyses reflecting the dominance of interest groups generally, see Easterbrook, *Foreward: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-18, 51 (1984) ("One of the implications of modern economic thought is that many laws are designed to serve private rather than public interests."); Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 713-15 (1984) ("The interest group theory of legislation provides powerful evidence of the persistence and extent of legislative abuse."); Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224, 229-36, 245 (1986) ("special interests tend to dominate"); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-26, 769-73 (1986).

116. Rent seeking was first discussed systematically by Gordon Tullock in 1967. DENNIS MUELLER, PUBLIC CHOICE II 229 (1989) (discussing Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224-32 (1967)). Rent seeking causes social waste in three senses: first, resulting from the efforts and expenses of the potential recipients of the monopoly; second, as regards the efforts of government officials to obtain or react to the efforts of the potential recipients; and third, as a result of distortions to the market, or to the government, as a result of the rent-seeking activity. *Id.* at 230 (discussing James Buchanan, *Rent Seeking and Profit Seeking*, *in* JAMES BUCHANAN, ET AL. (eds.), TOWARD A THEORY OF THE RENT-SEEKING

constituencies generally triumph over diffuse interests with more narrow support.[117] "Groups such as consumers, tax-payers, the unemployed, and the poor either do not have the selective incentives or the small numbers needed to organize, so they [are] left out of the bargaining."[118] With groups left out of bargaining, one could suppose neither that the results were "fair" nor that they had the support of a high percentage of social members: this is arguably what happens in many cases involving trade subsidies: parties seek "help" from legislatures not because they need it, but instead because they can.

Politicians and business interests often have goals that conflict with the principle of treaty adherence.[119] Subsidies typically result from the successful bargaining of concentrated interests to a government body. Corporations and industries go to the government and plead poverty, and seek to make their goods more competitive through government action.[120] The long-term prosperity of a country cannot be promoted by subsidies to rent-seeking inefficient firms even though it could be enhanced if subsidies were given as a part of a functional industrial policy.[121] By rewarding rent-seekers, an extra tax is imposed on the prosperous.[122] Although one can see merit in participating in a broader community in which individuals and groups sell what they can produce with the greatest comparative efficiency, people can secure a far greater quantity of goods than they could produce for themselves, but they can also see a greater benefit for themselves as individuals by profiting off of governmental largess.[123] Indeed, in making this decision, a rational subsidy-seeker

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SOCIETY 3-15 (1980). For this discussion of subsidies under the WTO, it is the third derivative criteria that is of concern. *See* discussion *supra* at note 12 and accompanying text.

117. *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 143 (1972) ("The high degree of organization of business interests, and the power of these business interests, must be due to . . . the business community . . . "industries" . . . which contain only a fairly small number of firms."). Special interest presence in trade politics has long been noted. *See* E. E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFFS 283 (1935) ("The history of the American tariff is the story of a dubious economic policy turned into a great political success . . . . The very tendencies that have made the legislation bad, however, have made it politically invincible."); *see also* Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 403 (1992) (discussing subsides with their narrowly distributed benefits and their widely distributed costs as classic "pork barrel" legislation procured by special interests).

118. MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 37 (1982).

119. Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 199 (1999).

120. *Id.*

121. JOVANOVIĆ, *supra* note 66, at 29. *See also* discussion *supra* note 69 and accompanying text.

122. *Id.*

123. I. M. DESTLER, AMERICAN TRADE POLITICS 4 (1992).

will now just factor in the likelihood, and the magnitude, of the WTO intervening in her individual dispute, and calculate the benefit to themselves.[124] The irony of the necessary remedy in a WTO dispute is that it punishes the country but cannot get to the party actually behaving badly. The group of legislators that provide those benefits, in turn, face a secondary function, in which a WTO intervention would have a similarly lessened effect.[125]

Public choice scholarship would not support the traditional assumption that the state is the prime mover in trade disputes.[126] While under the traditional approach states are seen as well-defined actors seeking to pursue some economically rational objective, public choice would argue that states function as devices that aggregate preferences of their politically connected members regardless of any damage their behavior would cause.[127] Economic analysis assumes that this objective is to pursue maximization of national welfare.[128] However, taking into account public choice learning, some trade commentators believe that a more realistic notion is to model interstate economic activity as a two-stage process: in the first stage political competition between different interests determine governmental policy preferences, and in the second stage, there is an international give-and-take that determines international equilibrium.[129] International political interdependence sets the stage for the first conflict, while the domestic political environment constrains actions that a government can take internationally.[130] In this setting, a country's political stance ends up representing the organized political power of particular special interests versus the governments concern for the plight of the average voter.[131]

Thus, to enter into any trade agreement, the government involved needs to believe either that the involved trade would be relatively equal, or that other benefits of free trade would offset any imbalance.[132] In the second step, politically powerful sectors would

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124. Hypothetically, one of the goals of the sanction would to be equal, and remove the benefit from the party originally seeking the subsidy. One of the problems with the SCM agreement is that it is unable to get to the parties who are the real cause of the subsidies.

125. That is, the utility of the legislator (UL) where c is the chance of retaliation, P is the level of the penalty, and v is the amount that the average citizen would be able to see and cognate that their representative caused the particular penalty an equation such that $UL = f(cPv)$.

126. Gene M. Grossman & Elhanan Helpman, *The Politics of Free-Trade Agreements*, 85 AM. ECON. REV. 667, 667 (1995).

127. *Id.*

128. *Id.*

129. *Id.* at 667-68.

130. *Id.* at 668.

131. *Id.*

132. Grossman & Helpman, *supra* note 126, at 676. The only chance of a trade agreement in a situation where there were imbalances between countries would occur

generate exclusions, whereas smaller sectors would have to face "pure" competition.[133] Parties unable to block a free trade pact entirely might still be able to interfere with the post-ratification functioning of the treaty.

Assuming that the particular class receiving benefits of a subsidized good is small relative to the total number of voters, there is a high probability that that class would be able to function as an effective interest group.[134] Thus, those actors would take political action to maximize their collective welfare.[135] Even though a country in a situation like this would suffer from a welfare loss,[136] for the political actor, even if he were seeking to maximize contributions, it would be rational to deviate from a policy of free trade.[137] Rent seeking impacts the economy in two ways: first, indirectly by the rent seeking expenditures leading to political decisions which distort supply and demand of policies in markets, and second, by the expenditures reducing productivity as far as society would have been better off without them.[138]

One strong possibility for the reason that the U.S. government has been unable to provide legislation that pleased the European Union is that the costs (for the interest group) of skewing the legislative process involving the FSC were less than the costs that it would have incurred in getting an exclusion from the WTO Agreement entirely. "Foreign sales corporations" have neither the psychological resonance,[139] nor the collective lobbying abilities[140] of the groups that received negligibly more lenient treatment in seeking to make them to comply with their problems meeting obligations under the WTO Agreements. Apparently, Europe also probably does not have a group similarly situated, as was the case with Airbus and Boeing.[141] A second possibility would be that U.S. legislators, or Congressmen, have a taste for either sovereignty, or the FSC taxing

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when it was welfare-enhancing and the opposing special interests were unable to coordinate their interests or to muster enough opposition to block the agreement.

133. *Id.* at 680 ("Governments that are attempting to secure ratification of a free-trade agreement can do so by providing long periods of adjustment to [large] opposing sectors and by excluding others from the agreement entirely.").

134. *Id.* at 669. *See generally* OLSON, *supra* note 117.

135. *See* Grossman & Helpman, *supra* note 126, at 669.

136. *Id.* at 670.

137. *Id.* at 670.

138. BRIAN GOFF, REGULATION AND MACROECONOMIC PERFORMANCE 14-15 (1996).

139. For instance, U.S. citizens might be able to identify with injured farmers, or out-or-work steelworkers. Legislators, thus, might be moved to help them more readily as constituents could identify with them. Identifying with an "FSC" when described as such seems fairly improbable.

140. *See* discussion *infra* note 244 and accompanying text.

141. *See* Fisher, *supra* note 69, *passim*.

structure, that exceeds the social benefit that they perceive emanates from changes that would make the FSC legislation agreeable.[142] Either answer presupposes that the solution to the involved problem is tremendously problematic and difficult to resolve.

2. *Australia–Leather Goods* and Problems with Traditional Notions of Due Process

"Due process" notions are not foreign to WTO case law. There are mentions of it in early disputes.[143] In *Australia–Subsidies Provided to Producers and Exporters of Automotive Leather* (hereafter *Australia–Leather*), the Appellate Body was again faced with the proper way to address a violation to the SCM Agreement.[144] In 1995, Howe, a wholly-owned subsidiary of Australian Leather Upholstery Pty. Ltd., which in turn was owned by another Australian company called Australian Leather Holdings, Limited (ALH), won a contract with General Motors to supply automobile upholstery.[145] Howe was the only dedicated producer and exporter of automotive leather in Australia.[146] On March 9, 1997, the Australian government signed two loan contracts with Howe and ALH providing funding for an assistance package.[147] Under this assistance package, a grant of A$30 million was paid out, and a subsidized loan of A$25 million was given.[148] This assistance package resulted from the excision of automotive leather from the Australian Textiles, Clothing and Footwear Scheme and the Export Facilitation Scheme for Automotive Products pursuant to a settlement agreement with the United States reached in November 1996.[149] On May 4, 1998, the United States, spurred on by Howe's U.S. competitors, contested the newer assistance program to ALH and Howe, alleging that the

142. This is a problem that has arisen for the first time with the Uruguay Round-type Agreements. *See* Howse, *supra* note 1, at 102 ("[T]he issue of who gains and who loses *within* a given society rears its head and cannot be avoided or suppressed by any idea tractable to technocratic management of the trading system.").

143. *See, e.g.*, Decision by the Arbitrators under Article 22.6 of the DSU and Article 4.11 of the SCM, *Brazil–Export Financing Programme for Aircraft*, August 28, 2000, WT/DS46/ARB, § 2.1.

144. Report of the Panel, *Australia–Subsidies Provided to Producers and Exporters of Automotive Leather*, May 25, 1999, WT/DS126/R, ¶¶ 10.1-10.3.

145. *Id.* ¶ 2.1; *see also* Geoff Strong, *Taking on the Tough Traders*, THE AGE (Melbourne), Aug. 18, 2001, News Extra, at 5.

146. Report of the Panel, *supra* note 144, ¶ 2.1.

147. *Id.* ¶ 2.2.

148. *Id.* ¶¶ 2.3–2.4.

149. *Id.* ¶ 2.5; *see also id.* ¶ 9.2; Settlement between United States and Australia, WT/DS57/1, G/SCM/D7/1, Oct. 9, 1996.

program violated Article 3 of the SCM Agreement.[150] On June 22, 1998, a Panel was established with standard terms of reference.[151]

In the end, both the Panel and the Appellate Body concluded that the assistance was improper under the SCM Agreement.[152] As such, the Panel recommended that the prohibited subsidies be "withdrawn" pursuant to Article 4.7 of the SCM agreement.[153] In pursuit of this objective, Howe repaid the Australian government A$8.065 million, "an amount which covered any remaining inconsistent portion of the grants made under the grant contract."[154] Australia believed that this conclusion implemented the recommendations and rulings in the dispute to withdraw the measures within ninety days.[155] The United States disputed this contention: it claimed that Australia's withdrawal of only A$8.065 million of the original A$30 million grant, and the provision of a new A$13.65 million loan on non-commercial terms to ALH were inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement.[156] Because of this disagreement, in accordance with DSU Article 21.5, the matter was referred back to the original Panel to make such findings as were necessary to remedy the dispute.[157]

After a grueling but inconclusive textual and contextual analysis of Article 4.7 of the SCM, the Panel concluded that the remedy for prohibited subsidies "withdrawal, · encompass[ed] repayment."[158] "Repayment is a means of 'withdrawing' a subsidy by which the possibility of an importing Member imposing countervailing measure on imported subsidized goods can be avoided."[159] This finding would thus not allow parties to transform "prohibited" export subsidies paid in the past into quasi-legal ones by removing the continuing export contingency.[160] Article 4.7 of the SCM, which calls for withdrawal of a subsidy, requires action dramatically different than Article 19.1 of the DSU, which requires parties to "bring the measure into conformity."[161] Thus Article 4.7 of the SCM permits "retrospective"

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150. Report of the Panel, *supra* note 144, ¶ 9.7; *see also* Strong, *supra* note 145 (discussing the origination of the Australia dispute).

151. Report of the Panel, *supra* note 144, ¶ 9.7.

152. *Id.* ¶ 10.1.

153. *Id.* ¶ 10.3.

154. Report of the Panel, Recourse to Article 21.5 of the DSU by the United States, *Australia–Subsidies Provided to Producers and Exporters of Automotive Leather*, Jan. 21, 2000, WT/DS126/RW ¶ 1.3.

155. *Id.*

156. *Id.* ¶ 1.4.

157. *Id.* ¶ 1.5.

158. *Id.* ¶¶ 6.24–6.34.

159. *Id.* ¶ 6.34.

160. *Id.* ¶ 6.35.

161. *Id.* ¶ 6.40.

remedies, whereas the remainder of the agreements under the WTO seem to favor "prospective" remedies.[162] The Court then concluded that only repayment "in full" of the prohibited subsidy was necessary to meet the definition of "withdrawal" in this case.[163] Australia's loan and payback did not encompass this withdrawal, and as such, some additional action on the part of Australia was necessary to prevent the United States from seeking additional sanctions against Australia.

The "fines" imposed in *Australia–Leather* were the result of a process that was both lengthy and costly. The sums of subsidy involved were low, and a developed country filed the complaint. The idea of some kind of reparation is a not novel development in trade laws. Under the GATT, countries were asked to reimburse anti-dumping duties paid.[164] In *New Zealand–Imports of Electrical Transformers from Finland,* the GATT Dispute Settlement system required that improperly collected anti-dumping measures be returned. On September 21, 1984, Finland requested the establishment under Article XXIII:2 of a GATT Panel to examine the GATT-consistency of anti-dumping proceedings.[165] As the communication indicated that the two parties had engaged in consultations under Article XXIII:1 which had not led to a satisfactory solution, the Panel was established in October 1984 and its report was adopted by the GATT contracting parties on July 18, 1985.[166] The anti-dumping case against a Finnish exporter arose out of a call for tenders by an electrical power board in New Zealand for the supply of two transformers.[167] Following the acceptance of a bid from a Finnish concern, a New Zealand company that had also bid for the contract requested that the New Zealand Customs Department initiate dumping proceedings against the Finnish exporter.[168] Duties were imposed after a finding of prima facie dumping; recalled, and then reinstated: in the end, the Finnish importer was forced to pay NZ$49,543.[169] In evaluating this claim, the GATT panel came to the conclusion that these charges had no basis, and that New Zealand

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162. *Id.* ¶ 6.46.
163. *Id.* ¶ 6.48.
164. New Zealand–Imports of Electrical Transformers from Finland, July 18, 1985, GATT B.I.S.D. (32nd Supp.) at 55-70 (1986). This and other reports recommending reimbursement are discussed in Ernst-Ulrich Petersmann in *GATT Dispute Settlement Proceedings in the Field of Antidumping Law,* 28 COMMON MKT. L. REV. 69, 74 (1991).
165. Petersmann, *supra* note 164, at 74.
166. *Id.*
167. *New Zealand–Imports of Electrical Transformers*, supra note 164 ¶ 2.1.
168. *Id.* ¶ 2.2.
169. *Id.* ¶ 2.4.

had not demonstrated material injury.[170] Thus, the Panel recommended to New Zealand that it revoke the anti-dumping determination and reimburse the anti-dumping duties paid.[171]

This is obviously the correct decision under the criteria put forward by Charnovitz.[172] The involved sanction was at least facially effective. Money wrongfully collected by New Zealand was returned to the importer. Returning the money made the system appear more legitimate. The "sanction"—if you can honestly call it that—was not at odds with other norms of international law. In addition, the sanction took back—at least symbolically—gains gotten by New Zealand from an "illegal" policy that contravened international law. However, such did not happen in this case. The principles of international law are not universally transitive.

However, once a subsidy had been given to a corporation, the lack of precedent proved to be a problem. The GATT contained no agreement regarding subsidies.[173] Public international law has historically recognized the duty of governments to repair or remedy the damage that they have caused.[174] The Permanent Court of International Justice stated this principle in the *Factory at Chorzów* case: "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[175] Though GATT and WTO practices have differed significantly from this norm, this provides a logical jumping-off point through which to analyze how the case law develops.[176]

In all of the SCM cases thus far, parties have argued about whether measures could be forced to apply retroactively—that is, whether a nation charged with a violation of the SCM would have to recall subsidies already granted.[177] There is not the same dearth of commentary about the two cases discussed in this Note where subsidies were granted to broader groups than Howe in *Australia–Leather*.[178] Because *Australia–Leather* involves an individual

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170. *Id.* ¶ 4.9.

171. *Id.* ¶ 4.11.

172. Charnovitz, *supra* note 59, at 808.

173. See discussion *supra* notes 36-40.

174. DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 161 (1999).

175. *Id.* (citing P.C.I.J. (ser. A) No. 17, at 47-48).

176. *Id.*

177. *See, e.g.*, *Brazil–Aircraft*, *supra* note 143, ¶ 86 (discussing the European Community's objection to "withdrawing" a subsidy because WTO jurisprudence was not supposed to function retroactively).

178. *See, e.g.*, Carrie Anne Von Hoff, *Avoiding a Nuclear Trade War: Strategies for Retaining Tax Incentives for U.S. Corporations in a Post-FSC World*, 35 VAND. J. TRANSNAT'L L. 1349, 1349 (2002); Nicholas J. Minella, *Motives and Consequences of the FSC Dispute: Recent Salvo in a Long Standing Trade War or Fashioning a Bargaining*

corporation, the WTO's order for the Australian government to secure the return of the subsidy resulted in Howe having their due process rights infringed. It logically poses somewhat different problems than the other categories of disputes.

This said, one positive out of the *Australia–Leather* decision is that some of the parties involved appear to have learned.[179] Howe, though almost bankrupted by having to pay back a substantial portion of the subsidy, had used the money to invest in technology and staff training, and built a factory in Mexico to take advantage of the NAFTA accords.[180] This is a mixed message for the viability of the SCM over the long term. In the first instance, it is good: the party that sought subsidies did in fact learn from the experience and stop seeking subsidies. The capital it presumably spent seeking rent was consumed when the WTO ordered Howe to give the money back. In another sense, because of the lack of due process, it is terrible: Howe had sums of money that it had "earned" (albeit through a means prohibited under the WTO Agreements) taken away from them without the ability to defend themselves. At least as a matter of principle, the Australian government would have had no real desire to fight its case with the same vehemence as Howe would have done.[181]

3. *Brazil–Aircraft*: Of Political Economy and the Possibility of Punitives

A third area where the WTO has investigated subsidies relates to small commuter aircraft. In regard to trade in aircraft, "[t]here is no such thing as a level playing field."[182] Because of the size and strategic importance of the industry, because of its importance to the

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Chip?, 27 BROOK. J. INT'L L. 1065, 1065 (2002); Sarah Ostergaard, *The Third Strike: United States' Attempts at Achieving Tax Parity Between its Income Tax and the European Value-Added Tax*, 27 J. LEGIS. 421, 421 (2001).

179. An Australian trade specialist advised caution for future export development: "The Americans took us on over Howe Leather, so the Government has to consider its WTO obligations in any future decisionmaking." Jason Koutsoukis, *Steering a Clear Path for Auto Industry*, AUSTRALIAN FINANCIAL REVIEW, March 22, 2002, NEWS, at 18, 18 (quoting Daniel Moulis, an Australian trade expert).

180. *See* Strong, *supra* note 145, *passim*.

181. Perhaps, a better method for this case to be adjudicated would be for some party to bring a domestic action seeking an injunction against the Australian government giving out this subsidy having gotten Howe in through an impleader, claiming the Australian action was inconsistent with treaty obligations. Such actions have historically not been favored. *See generally* Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) (rejecting claim that repatriation of Haitian refugees at sea violated the U.N. Convention on Refugees); United States v. Alvarez-Machain, 504 U.S. 655 (1992) (finding the U.S. government's forced abduction of a Mexican citizen to be compatible with the U.S.-Mexican extradition treaty).

182. J.A. Donoghue, *Playing Fields; Influence of Government Subsidies on Aircraft Industry Competition*, AIR TRANSPORT WORLD, August 1991, at 2, 2.

military, and because of the number of people it employs, countries often provide massive subsidies in this area.[183] Theoretically, all members of the WTO should benefit from the binding system established through the DSU in the WTO regarding aircraft.[184] The market for regional jet aircraft has been strong in the last decades: between 1970 and 1998, the number of passengers on regional jet aircraft grew at an average annual rate of 11.5 percent.[185] Airlines have been replacing turboprop aircraft with regional jets to the extent that such aircraft now comprise more than eighty percent of the orders for new aircraft.[186] Competition between Canadian and Brazilian interests are strong, and Brazil, through its lower labor costs, was taking over Bombadier's customer base.[187] After InterCanadian Airlines ordered six Empresa Brasileira de Aeronáutica S.A. (Embraer) ERJ-145 jets, Onex, a merger partner, claimed that InterCanadian had only made the purchase after being offered very generous terms through Brazil's Programa de Financiamento às Exportações (PROEX).[188]

Canada, a Member of the WTO,[189] paid attention, and in *Brazil–Export Financing Programme for Aircraft*, a Panel was established to consider a complaint by Canada regarding with respect to certain export subsidies granted under the Brazilian PROEX program on sales of aircraft to foreign purchasers of, Embraer, a Brazilian manufacturer of regional aircraft.[190] PROEX sought to provide interest rate equalization subsidies amount to 3.8 percentage points of the actual interest rate on any particular transaction.[191] "The lending bank charges its normal interest rate for the transaction, and

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183. *See* Fisher, *supra* note 69, *passim*.

184. Helena D. Sullivan, *Regional Jet Trade Wars: Politics and Compliance in WTO Dispute Resolution*, 12 MINN. J. GLOBAL TRADE 71, 71 (2003).

185. *Id.* at 74 (citing Bombadier Aerospace Regional Market Outlook 1999, SpeedNews Aircraft Fleet and Statistics, *available at* http://www.speednews.com/lists/lists.shtml).

186. *Id.*

187. *Id.* at 76 (discussing Mark MacKinnon, *Brazil Has Much at Stake in Jet Dogfight*, GLOBE & MAIL (Toronto), Feb. 3, 2001, at B1).

188. *Id.* (citing *Onex Would Push to Scrap Canada Deal*, MONEY, Nov. 2, 1999, *available at* http://allpop.com/AirMergers/nov2_aircanonexe.mbr.html).

189. Or, more probably, Bombadier, a Canadian manufacturer of aircraft.

190. Report of the Appellate Body, *Brazil–Export Financing Programme For Aircraft*, Aug. 2, 1999, WT/DS46/AB/R, ¶ 1. Note that as in many other cases, industries within the harmed country reacted to perceived slights. Seeing that there had been no cases coming up before, it is possible that Brazil had taken solace in Airbus not having been charged with doing the same thing. *See* Cong. Res. Serv. For the Subcomm. On Technology and Competitiveness of the House Comm. on Science, Space and Technology, 102d Cong., 2d Sess., Airbus Industrie: An Economic and Trade Perspective, at 24-36 (Comm. Print 1992) (stating that European subsidies to Airbus include, among other things, unpaid "loans" and exchange rate guarantees.)

191. *Id.* ¶ 4.

receives payment from two sources: the purchaser, and the Government of Brazil. Of the total interest rate payments, the Government of Brazil pays 3.8 percentage points, and the purchaser pays the rest. In this way, PROEX reduces the financing costs of the purchaser and, thus, reduces the overall cost to the purchaser of purchasing an Embraer aircraft."[192]

The Panel reached the conclusion that PROEX interest rate equalization payments are subsidies within the meaning of Article 1 of the SCM Agreement, and are contingent upon export under Article 3.1(a) of that Agreement.[193] In reaching this conclusion, the Panel found that the PROEX interest rate equalization payments were not "permitted" under the first paragraph of item (k) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement (the Illustrative List).[194] The Panel also finally found that Brazil had failed to comply with certain of the conditions of Article 27.4 of the SCM Agreement, and that, therefore, the prohibition in Article 3.1(a) of the SCM Agreement applied to Brazil.[195] Having found that PROEX payments are inconsistent with Article 3.1(a), the Panel recommended that Brazil withdraw the subsidies within ninety days pursuant to Article 4.7 of the SCM Agreement.[196]

The Appellate Body was forced to grapple with the substance of Article 4.7 of the SCM agreement.[197] Brazil argued that the Panel had erred in establishing the ninety-day timeframe for withdrawal of illegal subsidies, to which the Appellate Body responded in determining that this was consistent with the language of Article 4.7 of the SCM, calling for a withdrawal of a prohibited subsidy "without delay."[198] This was in addition to a finding by the Panel that Brazil's actions also constituted a case of prima facie nullification or impairment of benefits under Article 3.8 of the DSU accruing to Canada under the SCM Agreement.[199] In the end, this resulted in Canada being allowed to violate the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures covering a trade of $344.2 million per year until some other method of remedying the violation was agreed to.[200]

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192. *Id.*
193. *Id.* ¶ 7.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* ¶¶ 188-94.
198. *Id.* ¶ 191.
199. Report of the Panel, *Brazil–Export Financing Programme for Aircraft*, Apr. 17, 1999, WT/DS46/R, ¶ 8.3.
200. Decision by the Arbitrators under Article 22.6 of the DSU and Article 4.11 of the SCM, *Brazil–Export Financing Programme for Aircraft*, Aug. 28, 2000, WT/DS46/ARB, ¶ 4.1.

In reaching this end, the board of arbitrators was forced to grapple with difficult questions. Was the "subsidy" the entire amount of money spent through PROEX or was it this total amount minus the amount permissible?[201] The remedies the board imposed following from the *Brazil–Aircraft* decision does not fair well when evaluated under the other Charnovitz criteria.[202] Were the involved sanctions effective? There is no simple answer to this question. Upon Canada filing an action against Brazil, Brazil began to file a similar action against Canada.[203] Such reciprocal actions under the WTO, as before under the GATT, have been endemic given their effectiveness is a difficult point to reach.[204] Should the industry have been distributed in a similar fashion, it is possible that such actions would not have been brought.[205] At present, bilateral discussions are proceeding between Brazil and Canada upon the WTO's findings that each were able to proceed with sanctions against the other. As of January 2003, Investissiment Quebec, the investment arm of the Canadian province of Quebec's government, was talking about significantly increasing its loan guarantee program for exported regional jets.[206] Embraer (and Brazil) believed that such an increase went completely against the Canadian stance in ongoing bilateral talks to resolve their claims discussed in this section.[207] Indeed, an Embraer vice president, Henrique Rzesinski, said not just that such further guarantees provided by Quebec would derail the then-current bilateral negotiations, but also that any new guarantee would result in Embraer requesting that the government of Brazil "investigate very deeply" and "go back to the WTO if necessary."[208] In response to the Brazilian charge, the Bombadier spokesperson replied that the

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201. *Id.* ¶ 3.39.

202. *See* discussion *supra*, notes 59-60 and accompanying text.

203. WTO Panel Report, *Canada–Measures Affecting the Export of Civilian Aircraft*, Apr. 14, 1999, WT/DS70/R. A second stage of this dispute was finally resolved in *Canada–Export Credits and Loan Guarantees for Regional Aircraft*, Recourse to Arbitration by Canada, Feb. 17, 2003.

204. *Id.*; *see also EU–Bananas*, *supra* note 33.

205. *See* discussion in Fisher, *supra* note 69 of the "bargaining game" going on between the United States and Europe in regard to their major participants in the aerospace industry.

206. Aaron Karp, *Quebec May Increase Loan Guarantees for Bombadier Jets*, AIR TRANSPORT INTELLIGENCE, Jan. 23, 2003. The arm of the government has given $976 million (CAD) worth of loan guarantees to foreign buyers of Bombadier aircraft since 1996. *Id.* In 2002, Bombadier, suffering from air travel declines in the wake of American terrorist attacks, a three-week long strike, and problems with Bombadier produced Amtrak Acela's trains, issued its first profit warning ever, and came in with revenues 65 percent lower than in 2001. *See* Rasha Mourtada, *Buckle Your Seat Belts*, CANADIAN BUS., Sept. 16, 2002, at 57 (discussing Bombadier's recent business performance).

207. Karp, *supra* note 206.

208. *Id.*

Quebec loan guarantee program had been found to be "perfectly legal" in 1999.[209]

The second difficult question faced by the Panel in regard to the same issue was whether the level of countermeasures should correspond to the amount of the subsidy granted by Brazil or be equivalent to the level of nullification or impairment suffered by Canada.[210] Canada, in *Brazil–Aircraft* was allowed to suspend concessions and obligations under the Textiles Agreement covering a maximum amount of C$344.2 million per year.[211] In and of itself, this is not problematic: it closely mirrors the amount that Canada, itself, was fined for its retaliatory subsidies.[212]

In a second respect, the arbitrator's assignment of a remedy is problematic. The decision includes a discussion of "multipliers" "caused" by the subsidy.[213] In discussing these "multipliers" the arbitrator considers neither that these multipliers would probably result in greater and not lesser trade (in terms of the subsidy), nor the possibility that any remedy would also have "multiplied" effects.[214] Neither noting these multipliers on only one side of the equation nor noting them without exploring their ramifications in makes either economic or judicial sense if one were attempting to deter others from seeking subsidies.[215] None of the mistakes made by the Board advance the appearance or the legitimacy of the WTO's place in the world economic system. Indeed, assuming that the parties to the WTO were rational contractors,[216] they should have

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209. *Id.* Whether the loan guarantees were, or were not legal, Brazil succeeded in getting steeper penalties assessed against Canada, than it had against itself. *See* Mario Osava, *Politics–Brazil: Lula Likely to Take Tough Stance on FTAA*, INTER PRESS SERVICE, Jan. 2, 2003.

210. Decision by the Arbitrators, *supra* note 143, ¶ 3.40.

211. *Id.* ¶ 4.1

212. *See* discussion *infra*, note 233 and accompanying text.

213. *See* portion of opinion quoted *infra* at note 227.

214. "Trade multipliers" stem from macroeconomic theory. In essence, because any sum of money introduced into any economy is spent more than once (before it is "consumed" via saving or by being expended outside of the closed system) any amount of money eliminated from an economy has effects at a multiple of its typical function. *See, e.g,* Kenichi Miyazawa, *Foreign Trade Multiplier, Input-Output Analysis and the Consumption Function*, 74 Q.J. ECON. 53, 53-64 (1960) (discussing foreign trade multipliers as a function of the consumption function); Douglas Dosser, *National-Income and Domestic-Income Multipliers and Their Application to Foreign Aid Transfers*, 30 ECONOMICA 74, 74-82 (1963) (providing further modification and clarification of the concept of trade multipliers).

215. Charnovitz, *supra* note 59, suggests that it is important to note whether the particular sanction would advance or detract from the prestige and legitimacy of the WTO.

216. E.g., they chose a particular formation in the documents based on a calculated likelihood that an Appellate Body or DSB reviewing them would choose the most logical reading of the Agreement in dispute.

been infuriated.[217] With these considerations in mind, the arbitrators' response (in paragraph 3.55) to Brazil's allegation that the level of damages were "punitive" is also not logically compelling.[218]

However, it might make economic sense if the Board were attempting to deter parties from seeking to subsidize in the future. Assuming that these errors were intentional, *Brazil–Aircraft*'s embrace of "punitive" damages might actually work toward halting subsidization.[219] Though punitive damages were not included in the final version of the WTO Agreements, they were considered in the Draft Articles.[220] Because of the infrequency of actions being brought under the SCM, there may be reason for damages to be assessed at levels that are higher than one-to-one. The arbitrators' willingness to use the more extreme measure of damages and their improper (or at least careless) calculation of the "subsidy" might be an attempt to get to an "effective" level of damages without changing the agreement.[221]

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217. E.g., because their expectations would be thwarted, and thus, they would be losing more value than they would be getting. Alternatively, the parties could have viewed *ex ante* the likelihood of actions being brought against them under particular formations of documents. In such situations, the parties would be participating in gamesmanship, as opposed to "rationally" contracting. They should only be infuriated because they bet wrong.

218. Indeed, if the intent were just to remove he bad from the good, they would have had to begin doing this several steps earlier. Paragraph 3.55 of the Panel opinion reads as follows:

> Brazil also claimed that countermeasures based on the full amount of the subsidy would be highly punitive. We understand the term "punitive" within the meaning given to it in the Draft Articles. A countermeasure becomes punitive when it is not only intended to ensure that the State in breach of its obligations bring its conduct into conformity with its international obligations, but contains an additional dimension meant to sanction the action of that State. Since we do not find a calculation of the appropriate countermeasures based on the amount of the subsidy granted to be disproportionate, we conclude that, a fortiori, it cannot be punitive.

Decision by the Arbitrators, *supra* note 143, ¶ 3.55.

219. In common-law tort actions, punitive or exemplary damages are allowed where a defendant was reckless, wanton, grossly negligent or acted with malice, in contrast to ordinary compensatory damages that could be awarded upon a showing of negligence. JASON SCOTT JOHNSON, IMPERFECT INFORMATION AND THE LEGAL PROCESS: TOWARD A GENERAL ECONOMIC THEORY OF TORT LIABILITY 118 (1989). "Compensatory damages which are systematically lower than actual harm provide an independent rationale for punitive damages." *Id.* at 130. Johnson discusses that in situations where there is not a one-to-one correlation between a prohibited act and a remedial action, one needs to discount the effect of any "damage" assessed against any actor by their perception of the probability of that action. *Id.*

220. ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 45 (2001).

221. *See* discussion *supra* note 106 (discussing calculation of the amount of subsidy) and notes 107-08 (discussing the level of damage caused through multiplier effects).

Such an attempt, though, would be in violation of the express wording of the SCM.[222] The SCM barred the use of punitive damages for a number of reasons. The danger posed by over-prevention in the context appears to exceed any benefit that could be realized from using "punitive" sanctions. In contrast with dumping matters, subsidies by definition result from government action as opposed to some action by private actors. If the remainder of the opinion did not appear so sloppy, it could serve as a low valence way to get to such damages while forestalling effective opposition.[223] Though punitive damages could provide the appropriate incentives to legislative bodies in Member States to stop subsidizing, allowing the award of punitives would functionally undermine the logic that underlies the tripartite division of subsidies into categories with different levels of appropriate action. For this reason alone, it appears that the various components of the WTO should be more careful with their measurements.

As such, the answers that this board of arbitrators found are troublesome. To answer the first question, the board, relying on Article 4.7 of the SCM, stated:

> We are therefore of the view that the subsidy to be withdrawn within the meaning of Article 4 of the SCM Agreement, and consequently the one on which we must base our calculations, is the full amount of the PROEX interest rate equalisation payments on exports of Brazilian regional aircraft, not the portion of those payments which goes beyond the CIRR rate or any other appropriate benchmark rate under item (k) of the Illustrative List.[224]

Its answers to this question are unsatisfactory in their phrasing alone, even before one gets to the included substance. First, boards of arbitrators must work to have a clear command of the language they are in which speaking.[225] Second, given that the subsidy section of the WTO was established with an intent to divide 'beneficial' subsidies from bad ones, it would have been logical to subtract the amount permissible from the total subsidy. Unfortunately, the logical gaps and inconsistencies of the board do not end there. Paragraph 3.51 of the opinion, uses an overly textual reading of draft articles to confound the possibility that the countermeasures applied may make

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222. *See* discussion *infra* at note 226 (regarding the proper characterization of damages under the SCM).

223. As discussed *supra*, notes 93-95, in particular situations, parties will not bring claims against other countries under the WTO system.

224. Decision by the Arbitrators, *supra* note 143, ¶ 3.40.

225. For instance, the quoted sentence has somewhere around seventy words, and several alternative and subordinate clauses. Lawyerly language is good when it clarifies; it is not good when it murders the eloquence upon which clear thoughts can be passed from one person to another. Charnovitz, *supra* note 59, discusses a variety of notions that would help the WTO to develop legitimacy.

some sort of economic or analytical sense.[226] Paragraph 3.54 applies the notion that subsidies have "multiplier effects" to justify using one measure of the subsidy over another without then applying those same effects when dealing with the involved remedy. (Canada's proposed suspension of concessions and other obligations would also have effects that exceeded their monetary amount.)[227]

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226. Section 3.51 reads:

> We agree that, as those footnotes are drafted, it seems difficult to clearly identify how the second part of the sentence ("in light of the fact that the subsidies dealt with under these provisions are prohibited") relates to the first part of the sentence ("This expression is not meant to allow countermeasures that are disproportionate"). This is probably due to the use of the words "in light of the fact that." However, since the text of the treaty is supposed to be the most achieved expression of the intent of the parties, we should refrain from second guessing the negotiators at this point. We can nonetheless note that the reference to the fact that the subsidies dealt with are prohibited can most probably be considered more as an aggravating factor than as a mitigating factor. We also find the use of the word "disproportionate" to be interesting in light of the term "out of proportion" used in Article 49 of the Draft Articles. We do not draw any firm conclusions as to the meaning of footnotes 9 and 10. However, we note that footnotes 9 and 10 at least confirm that the term "appropriate" in Articles 4.10 and 4.11 of the SCM Agreement should not be given the same meaning as the term "equivalent" in Article 22 of the DSU.

227. Paragraph 3.54 reads as follows:

> Our interpretation of the scope of the term "appropriate countermeasures" in Article 4 of the SCM Agreement above shows that this would not be the case. Indeed, the level of countermeasures simply corresponds to the amount of subsidy which has to be withdrawn. Actually, given that export subsidies usually operate with a multiplying effect (a given amount allows a company to make a number of sales, thus gaining a foothold in a given market with the possibility to expand and gain market shares), we are of the view that a calculation based on the level of nullification or impairment would, as suggested by the calculation of Canada based on the harm caused to its industry, produce higher figures than one based exclusively on the amount of the subsidy. On the other hand, if the actual level of nullification or impairment is substantially lower than the subsidy, a countermeasure based on the actual level of nullification or impairment will have less or no inducement effect and the subsidizing country may not withdraw the measure at issue.

Id. ¶ 3.54. This is another confusion that stems from the nature of the involved subsidy. Given the plausible possibility of beneficial effects of a subsidy, this method of calculation is troublesome. *See generally* discussion Section III.A., particularly at note 68. Subsidies *do not* cause "barriers" to trade. *Id.* They are problematic only so far as they cause markets to become skewed from their optimal function. Indeed as far goes multiplier effects, if one wants to discuss them, the Suspension of Concessions and Other Obligations offered to Canada also would logically have similar effects. The implicit assumption that the market is dynamic before *ex ante* the subsidy, but not after it, is not compelling. *Id.*

Setting aside the legal question (as "punitive" damages are certainly improper under the law of the WTO) "deterrence" is a basic legal concept.[228] Choosing a particular sentence in a criminal context has multiple rationales under it. "Courts have generally seen their task as one of fitting the penalty to the particular degree of iniquity and dangerousness of the offender's conduct on this particular occasion."[229] A sentence is viewed as both punishment and a public denunciation of the harm done.[230] Punishment is ostensibly designed to satisfy the demand for retaliation by the public which serious crimes often arouse.[231] Richard Posner states that a rational firm would aggregate the expected punishments and discount them by the probability of their imposition to determine the expected punishment cost for engaging in a prohibited behavior, in accordance with the formula $E(c) = pf$, where c is cost, p probability of sanction, and f fine (or some form of criminal sanction.)[232]

Deterring "illegal" subsidies like those discussed in Section III can only be successful under one of two premises: first, some method could be found to keep parties from bargaining for benefits conferred by the government; or two, some method could be found to develop a concentrated interest at the governmental or social level to counterbalance pressure from concentrated groups. In the Brazil–Canada dispute over aircraft, though Brazil was claiming over three billion dollars of damages,[233] Bombadier (the Canadian producer of aircraft) cheerfully described the outcome as "an issue that is being discussed and dealt with between the governments of Canada and Brazil" and at the end of the day "probably would not have anything to do with aircraft."[234] If they did have something to do with aircraft, perhaps then aircraft companies would stop behaving so badly.

D. *The Continued Dumping & Subsidy Offset Act of 2000 and the Byrd Bill: Subsidies as Politically Necessary Trade-offs*

Warren Schwartz and Alan Sykes, in a recent article, indicate that with time, it is likely that pro-WTO constituencies will develop

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228. BLACK'S LEGAL DICTIONARY (7th ed. 1999) defines "deterrence" as "the process of discouraging certain behavior, particularly by fear."

229. J. C. SMITH & BRIAN HOGAN, CRIMINAL LAW 4 (1992).

230. *Id.*

231. *Id.*

232. RICHARD A. POSNER, ANTITRUST LAW 47 (2d ed. 2001).

233. They were eventually allowed to impose $250 million in retaliatory sanctions against Canada. *Bloomberg News & Wire Reports*, SUN-SENTINEL (Fort Lauderdale, FL), Dec. 25, 2002, at 3D.

234. *The WTO Dispute*, BUSINESS & COM. AVIATION, Jan. 2003, at 78.

in most signatory nations.[235] They argue that this is likely because with time, no competitive rates of return will be able to be achieved on capital, and also, that sunk costs in particular industries will diminish.[236] In this Section, I will suggest that, this might not be the case with subsidies, and in fact, the suggestion itself borders on the ridiculous.

Countries' stances on "industrial policy" issues are more complex than scholars let on. Generally, such issues are viewed in isolation: problems facing specific firms or industries are identified, and governmental actions follows in an attempt to solve them.[237] Issues of subsidization tend, then, to be discrete and numerous.[238] Though commentators have noted that U.S. bargaining posture in the latest round in WTO negotiations favored U.S. financial interests at the expense of U.S. interests in manufacturing,[239] of late, the United States has become much more willing to favor an activist industrial policy.[240] Though the United States has favored a *lassiez faire* approach to the marketplace since at least the 1960s,[241] the growing sense of crisis and strain brought on by economic competition by other countries has led many to call for changes in this policy.[242]

Such activist policy is illustrated by George W. Bush's treatment of the steel industry. Recently authors have suggested that insofar as governments work to give subsidies to discourage factor-exit from a distressed industry, domestic welfare gains can be achieved without the typical beggar-thy-neighbor problems associated with typical

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235. *See* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S194 (2002).

236. *Id.*

237. RICHARD D. BINGHAM, INDUSTRIAL POLICY AMERICAN STYLE 43 (1998).

238. *Id.*

239. *See The WTO: A Train Wreck in Progress*, 24 FORDHAM INT'L L.J. 410, 419 (2000).

240. B. Guy Peters, *The Politics of Industrial Policy in the United States*, *in* ECONOMICS AND POLITICS OF INDUSTRIAL POLICY 47 (Steven A. Shull & Jeffrey C. Cohen eds. 1986)

241. William A. Lovett, *Bargaining Challenges and Conflicting Interests: Implementing the Doha Round*, 17 AM. U. INT'L L. REV. 951, 960 (2002). *See generally* JAMES SHOCH, TRADING BLOWS: PARTY COMPETITION AND U.S. TRADE POLICY IN A GLOBALIZING ERA (2001) (discussing trade policies in the Reagan, Bush I, and Clinton Administrations).

242. Lovett, *supra* note 241, at 960; *see also Steel Unemployment Continues to Rise*, METAL CENTER NEWS, Mar. 1, 2002, at 56 (discussing calls by the United Steelworkers of America for increases in tariffs on steel imports); Lynn R. Williams, *No GATT Deal Better than an Unfair One*, PLAIN DEALER (Cleveland), Dec. 8, 1993, at 9B (stating that countries such as Japan and China were pushing for biases in trade laws causing United States antidumping laws to be more difficult to use).

government protection.[243] Other studies show that industries that are highly organized and employ unskilled, low-wage workers frequently try to acquire, and frequently receive, trade protection.[244] Other commentators note that countries tend to subsidize more during economic downturns, and less during times of plenty.[245] They tend to subsidize large industries with high fixed costs and relatively immobile, hard-to-retrain workers.[246] When choosing to subsidize, countries often cite national security reasons.[247] Such rationales largely provide the "public interest" cover that public choice theorists discuss.[248] Finally, parties often provide industrial subsidies to interests that are being "protected" from "unfair" foreign competition.[249]

Given this, choosing to follow the WTO SCM guidelines regarding subsidies could become increasingly problematic over time. Countries are aware that the definitions provide large gray areas. However, they are also aware that other countries are reluctant to bring claims before the WTO.[250] In many cases, legislators, in seeking subsidies are also aware that providing them is a veritable political gold mine. Combining with the classical economic notion of the business cycle,[251] which, though disliked by Keynes,[252] has some applicability in discussing at least sector-specific industries (like steel), something that could be disruptive to the fabric of the WTO comes into view.[253]

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243. Theresa M. Greaney, *Strategic Trade and Competition Policies to Assist Distressed Industries*, 32 CANADIAN J. ECON. 767, 767 (1999). In this situation, "deadweight" loss distortions caused by government intervention are compared against the effects caused by exit of firm assets: (1) consumers lose due to reduction in product variety; and (2) they lose pro-competitive effects that each additional firm brings to an imperfectly competitive market. *Id.* at 768.

244. *See* SALVATORE, *supra* note 61, at 272.

245. *See, e.g.*, BINGHAM *supra* note 237, at 11-12.

246. *See generally* Peters, *supra* note 240, at 50 (discussing the high amount of pressure in the "Rust Belt" to bail out declining, especially heavy, industries). For instance, auto workers who *do* find jobs after being laid off have had to accept 30 percent less money in wages and many fewer fringe benefits. *Id.* Peters also claims that newer industries—who, most probably could best benefit from subsidies, as discussed *supra* note 69—receive them in smaller amounts due to their smaller political base. *Id.* at 52.

247. *Id.* at 50.

248. *Id.* (discussing THE POLITICS OF REGULATION *passim* (James Q. Wilson ed., 1980)).

249. *Id.* at 51.

250. *See* discussion *supra* notes 93-94.

251. Discussed by economists like Adam Smith and David Ricardo; in describing it, Warren Harding stated, "[T]here has been vast unemployment before, and there will be again. There will be inflation and depression just as surely as tides ebb and flow." *See* NESTER, *supra* note 69, at 6.

252. *Id.* at 6-7.

253. "[B]oth the steel and automobile industry have experienced similar cycles of catch-up to foreign rivals, global dominance, decline and renaissance." *Id.* at 15.

Enter a distressed steel industry and agricultural interests that have been subsidized for generations. The U.S. Congress has been angry in its perceived belief that the U.S. was being treated unfairly at the WTO, and also that it has not been able continue effectively to use its antidumping laws.[254] Both the Byrd Amendment[255] (seeking to protect the steel industry) and the *US–FSC* disputes were major upsets for the United States. Trade issues already have a degree of valance: President Bush has instituted tariffs in order to give the U.S. domestic steel industry time to modernize.[256] A negative result in regard to this third tariff-related matter, could prove exponentially problematic if parties who wanted subsidies could efficiently organize against free-trade principles generally.[257]

Bush's actions have some basis in that the steel industry is one of the most "distorted" industries in the world.[258] Prior to the last decade of privatizations worldwide, governments owned seventy-five percent of worldwide capacity.[259] Currently, governments still control twenty-five percent.[260] As noted above, the foremost goal of the WTO dispute settlement system is for the parties to reach a mutually agreed settlement, or, failing that, to secure the withdrawal of measures found inconsistent with a WTO agreement.[261] Because of the pressures on domestic governments to subsidize, and because of the pressures imposed by the world-system, there are many pitfalls that can stymie the WTO's subsidy regimes. If countries fail to bring subsidies actions in a regular fashion,[262] or if damages cannot

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254. *Stupid, Stupid, Stupid!*, FINANCIAL EXPRESS, Feb. 2, 2003 (discussing status of WTO negotiations occurring in 2003).

255. The Continued Dumping and Subsidy Offset Act of 2000. The Byrd Amendment, named for its sponsor, Senator Robert Byrd, transfers antidumping and countervailing duties to U.S. companies that petitioned the U.S. Government for protection. *AIIS Applauds WTO Decision Declaring 'Byrd Amendment' Illegal*, Jan. 22, 2003. On Jan. 16, the WTO Appellate Body declared the law illegal. *Id.* The United States, acting through USTR officials, though calling the decision "disappointing," said that they would comply with the decision. *Id.*

256. Article, *U.S.–European Union Trade Spats Will Stall WTO Trade Talks*, KIPLINGER LETTER, Jan. 24, 2003.

257. Assuming that during the course of the previous actions, some solution for the "steel crisis" has not been found (i.e. industry integration, removal of pension obligations, etc.) and that the industry's political capital does not decrease in the interim.

258. *Lost Jobs, More Imports: Unintended Consequences of Higher Steel Tariffs (Part II): Hearing Before Committee on House Small Business*, 107th Cong. (2002) (Statement of Grant D. Aldonas Undersecretary of Commerce for International Trade, Department of Commerce).

259. *Id.*

260. *Id.*

261. *See generally* DSU *supra* note 21, art. 3.

262. Because bringing such actions in a regular fashion raises the "cost" of a subsidization in particular instances.

successfully take into account that countries do not bring subsidy actions in similar proportions to other areas, the probability that a WTO-based subsidy regime would tend toward preventing countries from subsidizing exports in a prohibited fashion is low.[263] By the same logic, countries will be discouraged from bringing subsidization actions if it is likely that (a) the other country will respond by bringing counter-charged of subsidization, or (b) the other country will not respond to a decision made by the WTO.

For political actors, providing help to "suffering" industries has a tremendous payoff.[264] Ideology often takes a second place to practical political considerations.[265] Keeping industries competitive is a key to keeping both legislatures and members of the executive in possession of their jobs.[266] The danger in having the WTO act as the world's preventer of trade subsidies is that it increases the probability that the WTO will fail and take principles of free trade with it.[267] This would not be positive: it would probably result in the protectionist "*summum malum*" with which the Note opened.[268] It is probable that the parties angry with subsidization would push for leaving the WTO entirely rather than for the more narrow goal of modifying the SCM if only because "the WTO," broadly construed, provides a more tangible political issue.[269]

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263. One of the major arguments of this Note is that subsidy regimes under the WTO are especially problematic because of the likelihood that the constituencies favoring subsidization will prevail over those opposed to it without an acknowledgement of this, the WTO risks becoming self-defeating.

264. *See* discussion *supra* notes 119-25 and accompanying text.

265. *See, e.g.*, Shane Wright, *Analysis—Is Bush a Free Trade Sailor or a Protectionist Pirate*, AAP NEWSFEED, Mar. 6, 2002, Financial News (discussing the apparent hypocrisy of U.S. trade policy, specifically its willingness to impose steel tariffs while bringing actions against Howe, discussed *supra*); *see also* Shane Wright, *Fed: Bush's Trade Credentials on Line over Lamb Decision*, AAP NEWSFEED, May 30, 2001, General News (discussing the apparent hypocrisy of U.S. trade policy, specifically its unwillingness to abide by the WTO decision regarding Australian lamb while forcing compliance by Howe).

266. Indeed, in addition to fighting for subsidization, to attempt to be competitive in the world market, U.S. steel companies have, of late, had to have government bailouts of pre-existing pension obligations. *See, e.g.*, *Barely Standing*, PITTSBURGH POST-GAZETTE, Mar. 9, 2003, § BUSINESS, at C-1 (discussing possible bailout by the U.S. Pension Benefit Guarantee Corporation (PBGC) of Wheeling-Pittsburgh Steel Corporation); Paul M. Krawzak, *Steel Makes Strides After Tariffs Imposed*, COPLEY NEWS SERVICE, Mar. 7, 2003, § ILLINOIS SPOTLIGHT (discussing, in part, PBGC bailouts at LTV and Republic Steel Corporations).

267. *See* discussion *supra* note 1 and accompanying text; *see also* Robert J. Samuelson, *War's Economic Side Effects*, THE WASHINGTON POST, Feb. 19, 2003, at A29 (discussing economic problems exacerbated by major powers' mutual lack of trust).

268. *Id.*

269. *See, e.g.*, Krawzak, *supra* note 266 (discussing how penalties imposed on foreign steel helped the U.S. steel industry consolidate toward becoming competitive). If the United States had been able to directly subsidize its "failing" industry, tariffs—arguably more attributable and less efficient than subsidies—would not have been used. The tariffs imposed by the Bush Administration have resulted in a significant

IV. CONCLUSION

Thus, at the end of this Note, the same problems remain. Avoiding a protectionist *summum malum* is a problem. Remedying subsidy disputes poses a unique problem that could contribute to a worldwide resurgence in protectionism. Subsidies are both intrinsically difficult to remedy, and especially difficult given the world-system of which they are a part. Public choice suggests that there may be no easy answer for the problems posed by subsidies. Minor tinkerings such as changes in the sorts of remedies allowed,[270] changes in the time frames for states to counter charges, changes in the DSU,[271] and changes in the SCM itself could have some benefit; none of them singularly or in combination seem to provide any clear answer. This said, finding good answers to these problems will require continued political support for the WTO, for prohibiting subsidies generally and a *summum malum* in particular.

As it stands, at the very least, the SCM Agreement is not faring well currently. The SCM has resulted in the WTO trampling over national sovereignty, the SCM Agreement has not resulted in fairer trade in the cases discussed in this Note, Member States are not bringing as many subsidy actions as they could bring, and it seems that the WTO's problems regarding the SCM might represent more than just some minor institutional or doctrinal growing pains. The SCM has caused the Appellate Body to write at least one nonsensical opinion. The notion that state-based remedies are appropriate means for dealing with rent-seeking behavior is somewhat dated, and leads to a fair amount of incoherence in possible remedy-outcomes.[272] Indeed, punishing the United States for subsidies granted to the steel industry might be counterproductive so far as the monies for those subsidies actually resulted in gains to Japanese manufacturers or European consumers; it would be hard for the WTO to punish the steel companies and labor unions that fought the subsidies initially.

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response by other WTO members. *See, e.g., China to Renew Plea for Panel on Steel Tariffs*, XINHUA ECONOMIC NEWS SERVICE, June 20, 2002, WORLD NEWS.

270. Charnovitz, *supra* note 59, at 826.

271. For the purposes of the argument contained in this Note, this option will not be discussed.

272. The WTO system, in focusing on state-based remedies, generally is not deferential to non-state based actors. *See* Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. 979, 986-87 (2001) (discussing whether NGOs have an ability to have their positions considered in WTO trade disputes). However, so far as one accepts the proposition that subsidies are caused by political pressure by interest groups letting interest groups contribute to WTO decision making does not seem to be entirely helpful.

So far as parties could foist punishment on citizens of other countries for conduct that benefited them, public choice analysis would suggest that subsidization would not stop. For the good of the world trading system, it is imperative that we not just remain in a state of omnipresent befuddlement, but instead think harder.

Public choice analysis would suggest that the goal of the WTO in regard to the SCM and Agricultural subsidies must be to find a way to build constituencies in those countries that fight special interest's push for money while not alienating parties to the point that they either leave the WTO, or force a renegotiation and a carve-out that allows the government to subsidize. A simple way to do this is not readily apparent. The beginnings of an approach would be for Appellate Panels and Dispute Bodies to not be as glib about their calculation as they were in *Brazil–Aircraft*. More collaborative approaches—as suggested in the DSU and by the Panel in *Australia–Leather*—might not be as appropriate in the context of subsidization because of the likelihood that they would be perceived as an international government directly interfering with a sovereign nation.[273] However, they would allow for parties themselves to defend the positions they had bargained for.

Perhaps fines might provide a more valid approach to assure compliance to violations of the WTO agreements.[274] There is precedent for this action in the form of actions by the European Court of Justice in which the court agreed to a penalty of 20,000 euros per day against Greece for failure to implement waste disposal directives,[275] and of a subsequent instance in which the French government changed a labor law in response to an action by the Commission to seek a penalty payment against them.[276] Logically, fines should theoretically assure compliance by parties with the norms intermeshed in the WTO Agreement.[277] The advantages of using fines, as opposed to the current set-up as far as remedies, would be numerous. Fines are visible. Compared to other results of WTO hearings, they can be seen and noted. Fines could be used by little

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273. It is noted that one possibility of malformed remedies would be for countries to not allow disputes to advance clear through the dispute settlement process. However, given the problems involved in characterization of subsidies and remedy of subsidies, both discussed *supra*, this does not appear tremendously likely. More probably, countries would choose a second option, e.g., not bringing disputes (because of the likelihood that any dispute largely brought at the behest of a domestic producer would result in an investigation of the governmental largess that that producer had previously benefited from).

274. Charnovitz, *supra* note 59, at 825-27.

275. *Greece Hit for Waste Dumping as ECJ Sets First Fine for Law Compliance Failure*, 23 INT'L ENV'T REP. (BNA) 558 (July 19, 2000). Greece made its first payment in December 2000. Charnovitz, *supra* note 59, at 826 n.280.

276. *See* Charnovitz, *supra* note 59, at 826-27; *see also France Scraps Ban on Women in Night Jobs*, CHICAGO TRIBUNE, Dec. 13, 2000, at 2.

277. *See* Charnovitz, *supra* note 59, at 826.

countries against big ones, and by big against small.[278] With this, it would be hypothetically possible for citizens in a democratic state to then elect representatives who would not result in continuing market sanctions. Fines would also be less market-skewing. It does not make sense to impose costly inefficiencies in order to remedy inefficiencies. They might also provide more direct punishment for bad parties: especially if there were some method through which countries could pass through costs to the parties who had caused them to be. Finally, fines have a great deal more support in the academy than other remedies under the WTO.

However, fines would probably suffer from the same sort of problems as were discussed in this Note: they could be punitive, they would be nearly impossible fairly to calculate, and they might also be dramatically incommensurate with any actual harm done to the trading system. Additionally, rent seekers would continue rationally to spend resources to resist reform and protect the transfers that benefited them.[279] Indeed, the current form of remedy provides no constituency with an *ex ante* incentive to resist subsidization.[280] In addition to this, the tripartite breakdown of subsidies into three categories only exacerbates the situation: the bargaining game that led to this division did not account for problems caused by no clear answers at the end. Even with an acknowledgment of possible benefits, fines probably would not have any effect on subsidization differing from the current system. They could also result in a general loss of support for the WTO generally. The constant tension between fulfilling the promise of the post-SCM world exists alongside tension that an overzealous application of the SCM could result in a long-term weakening of the WTO.

A third set of options—that the WTO should be abandoned, or the subsidies accords removed—does not appear worthy of serious consideration because, at present, it does not appear to command elite-level political support. As unappealing and problematic as the first two options are, it is quite possible that this third method would be worse if the goal of the WTO system is to avoid the protectionist *summum malum* discussed at this Note's outset. Entirely giving up on the WTO now would likely cause a new round of protectionist behavior. However, neither the notion that the United States should leave the WTO,[281] nor that the WTO as it currently stands is

278. However, fines would still suffer from strategic gamesmanship.

279. Ralph D. Tollison, *Rent Seeking, in* DENNIS C. MUELLER (ed.), PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 524 (1997).

280. E.g., in so far as parties are rent seeking, there is nothing to get parties motivated to work against them.

281. *See, e.g.*, Article, *Thomas Warns of Pending Trade Challenges with Europe*, NATIONAL JOURNAL'S CONGRESSDAILY, Feb. 13, 2003, § Trade (stating that many

unsubstainable are entirely novel.[282] William Lovett points out that during the Seattle Round of negotiations, trade policy "consensus" did not exist: there were breakdowns within the United States, between the United States and the European Union, and between "rich" nations and most developing nations.[283] It often seems that those members of the general public who think about trade often are not in favor of what is on the WTO's agenda.[284] At present, with the current war on terrorism, and with note that the current administration's skepticism of international institutions, it is not beyond the realm of possibility that it, given another serious decision against the United States, the WTO's relevance might come into question.[285]

The fallacy implicit in a system that punishes a state for the conduct of actors that lobby governments will continue to exist because it appears to be the only way to remedy the problem.[286] Most students of free trade are adamant opponents of most subsidies. Removing the SCM from the WTO would be "disastrous psychologically and . . . [lead] to unrestrained proliferation of trade restrictions and destructive trade wars."[287] The domestic political process—aided by a renewed emphasis on consultations between countries regarding remedies—*must* provide a check on subsidization if one is to exist.[288] The bargains that have to be struck regarding U.S. taxation structures, Australian grants to leather manufacturers, or Brazilian or Canadian subsidies to aircraft manufacturers belong in the hands of those respective governments particularly because they cannot be addressed by an international body at any other level. Though the bodies that have tried to remedy them have not come up with compelling explanations of their methodology, they have not respected the sovereignty of governments, and nothing—given the reasons for the framework under which they work—suggests that their decision making will somehow soon improve, in time, somehow,

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members of Congress from agricultural districts would currently vote to leave the WTO); Michael Zielenziger, *Trade Battle in Seattle Could Launch Damaging Trade War*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, Dec. 5, 1999 (discussing the corporate lobbyists' trepidation at having to justify continued U.S. presence in the WTO); Patrick Buchanan, Remarks on Isolationism (Nov. 22, 1999), *in* FDCH POLITICAL TRANSCRIPTS ("I would leave the WTO.").

282. *See* BARFIELD, *supra* note 91, at 7.

283. Lovett, *supra* note 241, at 415.

284. Some commentators predict that as the U.S. economy sags, the dollar slides, and an economic slump resumes, globalization protests in the United States will increase substantially. Lovett, *supra* note 283, at 417.

285. *See generally* discussion *supra* note 281 (discussing backers of leaving the WTO).

286. *See id.* (stating that GATT equilibriums were stable because outcomes were motivated by self-interested behavior of involved parties).

287. *See* SALVATORE, *supra* note 61, at 285 (discussing possible consequences of a failure of the Uruguay Round).

288. *Id.*

they must. The only alternative is that the framework outlined in the WTO Agreements will lose its broad base of support.

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