The Regulation of Subsidies within the General Agreement on Trade in Services of the WTO

Problems and Prospects

Pietro Poretti
## Table of Contents

**List of Abbreviations** xiii

**Preface** xv

**Acknowledgements** xvii

**Introduction** xix
1. Foundations xix
2. Legal Analysis xx
3. Sectoral Studies xxi

**Part I**

**Foundations** 1

### Chapter 1
**International Trade in Services and the Multilateral Trading System** 3
1.1. International Trade in Services: Some Figures 3
1.2. Barriers to International Trade in Services 5
1.3. The Multilateral Regulatory Framework for Trade in Services 7
1.4. Goods and Services: Some Fundamental Differences 9

### Chapter 2
**Completing the GATS Framework and the Case for Services Subsidies Disciplines** 13
2.1. GATS Article VI(4) (Domestic Regulation) 15
2.2. The Working Party on GATS Rules 17
  2.2.1. GATS Article X (ESM) 18
2.2.2. GATS Article XIII (Government Procurement) 20
2.2.3. GATS Article XV (Subsidies) 22
  2.2.3.1. Demandeurs and the Costs of Failure of the Negotiations under GATS Article XV 22

Chapter 3
Trade Distortion and Supranational Regulation of Services Subsidies 27
3.1. The Effects of Subsidies in the Light of Classic Free Trade Theory 27
3.2. Subsidies and International Trade 29
3.3. The Concept of Trade Distortion in the Existing Subsidies Regimes 30
3.4. Trade Distortion and GATS Article XV 32

Chapter 4
Positive Externalities and Public Policy Objectives 37
4.1. Subsidies and Positive Externalities 38
4.2. Positive Externalities in Existing Subsidies Regimes 39
4.3. Positive Externalities and GATS Article XV 42
4.4. The Scope of the GATS: 'What Is In and What Is Out'
  4.4.1. The GATS' Encompassing Coverage 43
    4.4.1.1. GATS Article I(3)(b) and (c) 44
4.5. The ASCM Concepts of 'Specificity' and 'General Infrastructure' 47
4.6. Preserving Policy Space in Future Disciplines 48

Chapter 5
Analysis of the Currently (Un)Available Data on Services Subsidies 51
5.1. The Opacity of Governmental Support and GATS Article XV 51
  5.1.1. Collecting Information on Services and Services Subsidies 52
  5.1.2. Difficulties in Collecting Data on Services 53
  5.1.3. The Information-Exchange Mandate of GATS Article XV 55
    5.1.3.1. The (Non-)Fulfilment of the Information-Exchange Request of GATS Article XV 57
    5.1.3.2. Increasing Participation in the Information-Exchange Request 59
5.2. Available Information on Services Subsidies 61
  5.2.1. The WTO Secretariat's Questionnaire 61
  5.2.2. TPR Reports and Other WTO Publications 62
  5.2.3. The Members' Schedules of Specific Commitments and Lists of MFN Exemptions 65
  5.2.4. Studies on Services Subsidies Conducted in Other International Fora 67
5.3. Is There a Need for Subsidies Disciplines in the Services Context? 68
# Table of Contents

**Part II**

**Legal Analysis**

61

## Chapter 6

**Classifying Trade-Distorting Services Subsidies**

6.1. Distortion in Foreign Markets: Export-Enhancing Subsidies

- 6.1.1. Export-Enhancing Subsidies and Modes of Supply
- 6.1.2. Export-Enhancing Subsidies and the Mandate of GATS Article XV

6.2. Distortion in the Market of the Subsidizing Country: Import-Displacing Subsidies

- 6.2.1. Import-Displacing Subsidies and Modes of Supply
- 6.2.2. Import-Displacing Subsidies and Market Access Rights and Obligations
- 6.2.3. Consumers’ Subsidies as Import-Displacing Subsidies

6.3. Distortion of Investments Flows: Investment-Diverting Subsidies

## Chapter 7

**Defining Services Subsidies**

7.1. Definitional Issues and the Scope of Future Disciplines

7.2. General Perceptions on Subsidies

7.3. A Possible Model: The ASCM Definition of a Subsidy

- 7.3.1. Financial Contribution by a Government or Any Public Body (ASCM Article 1(1)(a)(1))
  - 7.3.1.1. Direct Transfer of Funds and Government Revenue Otherwise Due Foregone or Not Collected (ASCM Article 1(1)(a)(1)(i) and (ii))
  - 7.3.1.2. Government Provision of Goods or Services Other Than General Infrastructure (ASCM Article 1(1)(a)(1)(iii) *ab initio*)
  - 7.3.1.3. Government Purchase of Goods (ASCM Article 1(1)(a)(1)(iii) *in fine*)
  - 7.3.1.4. The Fourth Form of Financial Contribution of the Definition of a Subsidy (ASCM Article 1(1)(a)(1)(iv))
    - 7.3.1.4.1. Payments to Funds (ASCM Article 1(1)(a)(1)(iv) *ab initio*)
    - 7.3.1.4.2. Entrustment and Direction of Private Bodies (ASCM Article 1(1)(a)(1)(iv) *in fine*)
    - 7.3.1.4.3. Entrustment and Direction in EU State Aid Regime
### Table of Contents

7.3.1.4.4. Transposing ASCM Article 1(1)(a)(1)(iv) *in fine* into the GATS Framework 103

7.3.2. Income or Price Support 105

7.3.3. The Concept of Benefit of ASCM Article 1(1)(b) 106

7.3.3.1. Benchmarks for the Calculation of Benefit to the Recipient (ASCM Article 14) 106

7.3.3.2. The Concept of Benefit in the ASCM Case Law 107

7.3.3.3. Subsidies, Benefits and Privatized Companies 108

7.3.3.4. The Atypical Role of the Territory in the ‘Production’ of Services 110

7.4. Complementary Definitional Issues 111

7.4.1. Subsidies, Public Purchase of Services and GATS Article XIII 112

7.4.1.1. The Economic Significance of Public Procurement of Services 112

7.4.1.2. The ECJ and CFI Case Law and the EU Commission’s Practice on State Aid and Public Procurement 113

7.4.1.2.1. Openness and Transparency of Awarding Procedures and Presumption of State Aid 114

7.4.1.3. Government Procurement of Services in the WTO Framework 115

7.4.2. Domestic Regulatory Measures and ‘Implicit Subsidies’ 118

7.5. The Concept of Specificity 119

7.5.1. The Rationale Behind the Concept of Specificity 121

7.5.2. The ASCM Specificity Provision 121

7.5.3. Specificity and Modes of Supply 124

### Chapter 8

Existing GATS Subsidies Disciplines and Remedies 127

8.1. Subsidies in the Current GATS Framework 127

8.2. ‘Like Services’ and ‘Like Service Suppliers’ 128

8.2.1. Applying the GATT and WTO ‘Like Products’ Test in the Services Context 129

8.2.1.1. Properties, Nature and Quality of Services 130

8.2.1.2. Services Classification 130

8.2.1.3. Services End-Use and Consumers’ Habits 132

8.2.2. ‘Likeness’ of Services and Service Suppliers 133

8.2.3. ‘Likeness’ Across Modes and Means of Supply 135

8.3. Existing Services Subsidies Disciplines 136

8.3.1. Most-Favoured Nation (GATS Article II) 136

8.3.2. National Treatment (GATS Article XVII) 139
8.3.2.1. The Limited Efficacy of the GATS National Treatment Obligation 140
8.3.2.2. Strengthening National Treatment for Trade-Distorting Subsidies 143
8.3.3. GATS Article VIII and Cross-Subsidization 144
8.3.3.1. Cross-Subsidization and GATS Article XV 146
8.3.3.2. The Regulatory Features of GATS Article VIII 147
8.3.3.3. Strengthening the Provision of GATS Article VIII(2) 151

8.4. Existing Remedies on Services Subsidies 152
8.4.1. Non-violation Complaints (GATS Article XXIII(3)) 152
8.4.1.1. The Raison d'etre of the Non-violation Complaints Instrument 153
8.4.1.2. Comparing the GATT and the GATS Non-violation Complaints Provisions 154
8.4.1.3. Applying the GATT Non-violation Complaints Test to Services 155
8.4.1.3.1. 'A Measure by a Member' 156
8.4.1.3.2. 'A Benefit Accruing Under a Relevant Agreement' 156
8.4.1.3.3. 'Nullification and Impairment of the Benefit as the Result of the Application of the Measure' 159
8.4.2. Consultations (GATS Article XV(2)) 161
8.4.3. Domestic Regulation (GATS Article VI(5)) 162

8.5. Transparency (GATS Article III) 164
8.5.1. The Importance of Transparency in the Context of Services Subsidies 164
8.5.2. The Structure and Intrinsic Weaknesses of the Current Transparency Requirement of GATS Article III 165
8.5.3. Notification under ASCM Articles 25 and 8(3) 167
8.5.4. Notification under the EU State Aid Regime 169
8.5.5. Strengthening the Transparency Obligation of GATS Article III 172
8.5.5.1. Ex-ante Notification 172
8.5.5.2. Standstill Requirement 173
8.5.5.3. Inducing Compliance: Recovery of Non-notified Aids 173

8.6. The Overall Disciplining Effect of Existing GATS Provisions 175

Chapter 9
Services Subsidies and Countervailing Measures 177
9.1. Desirability 178
9.2. Technical Feasibility 182
9.2.1. Investigation Phase 182
Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.2.2. Enforcing Countervailing Measures</td>
<td>184</td>
</tr>
<tr>
<td>9.2.2.1. Rules of Origin for Services</td>
<td>186</td>
</tr>
<tr>
<td>9.3. EEC Regulation 4057/86 and EC Regulation 868/2004</td>
<td>188</td>
</tr>
<tr>
<td>9.3.1. The Hyundai Merchant Marine Case</td>
<td>189</td>
</tr>
<tr>
<td>9.4. Countervailing Measures under the Current GATS Framework</td>
<td>192</td>
</tr>
<tr>
<td>9.5. Unilateral versus Multilateral Remedies</td>
<td>194</td>
</tr>
</tbody>
</table>

Chapter 10

Services Subsidies Disciplines in PTAs

10.1. The EU State Aid Regime                                           197
10.2. Services Subsidies Disciplines in Other PTAs
   10.2.1. Australia-New Zealand Closer Economic Relations Trade Agreement 198
   10.2.2. The CARICOM                                                  199
   10.2.3. Other PTAs                                                   200
10.3. The Absence of Comprehensive Services Subsidies Disciplines in PTAs 201

Chapter 11

Services Subsidies and Development

11.1. The Development-Friendly Nature of the GATS                        205
11.2. The Rationale Behind Special and Differential Treatment for Developing Countries' Subsidies 206
11.3. Conciliating Trade Distortion and Development Needs                207
11.4. The Impact of Existing GATS Disciplines on Services Subsidies on Developing Countries 208
11.5. Models for Special and Differential Treatment in Existing Subsidies Regimes 209
   11.5.1. The ASCM and AoA Approaches to Special and Differential Treatment 210
   11.5.2. Transposing the ASCM and AoA Approaches to Special and Differential Treatment into the Services Context 211

Part III

Sectoral Studies

Chapter 12

Investment-Diverting Subsidies

12.1. International Investment and the Multilateral Trading System       217
12.2. Investment, Services, and the GATS                                  218
12.3. Rationales for Investment Incentives                                 221
12.4. Different Forms of Investment Incentives                           222
**Table of Contents**

12.5. Investment-Diverting Subsidies and the Negotiating Mandate of GATS Article XV 226  
12.6. The Inefficacy of the Existing Disciplines on Services Subsidies 228

**Chapter 13**  
Subsidies to the Audiovisual Services Sector 231  
13.1. Defining Audiovisual Services 231  
13.2. The Dual Nature of Audiovisuals: Business and Culture 232  
13.3. Subsidies to the Audiovisual Services Sector 235  
  13.3.1. The Case of the EU and France 236  
13.4. The Impact of the Current GATS framework on Subsidies to Audiovisual Services 237  
13.5. The Members’ Proposals on Subsidies and Audiovisual Services 239  
13.6. Future Scenarios and Possible Disciplines on Subsidies 241  
  13.6.1. Expanding GATS Article XIV 242  
  13.6.2. Quantitative Criteria for Determining Cultural Subsidies to Audiovisual Services 243  
  13.6.3. A Reference Paper on Audiovisual Services 246  

**Chapter 14**  
Conclusions 251

Epilogue 259

Annex 261

Bibliography 263

Tables of WTO and GATT Documents 291

Tables of WTO and GATT Cases 301

Table of Other Cases 311

Index 313