

**THE FUTURE OF GATS ARTICLE XV:
SERVICE SUBSIDY REGULATIONS UNDER THE WTO**

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The General Agreement on Trades in Services (GATS) is a multilateral framework of principles and rules for trade in services under the World Trade Organization (WTO). This dissertation aims to provide regulatory structure for Article XV of the GATS. GATS Article XV targets subsidies in service trades, but does not stipulate any detailed rules. Currently, GATS Article XV only contains guidelines for Members in future negotiations. Little progress has been made in those negotiations.

I propose a service subsidy definition based on the Agreement on Subsidies and Countervailing Measures (SCM AGREEMENT), with some adjustments to adapt rules applicable to trade in goods to service trades. With respect to the subsidy categorization system, I propose a hybrid mechanism for Members to consider. Traffic-light categorization under the SCM AGREEMENT and the Amber/Blue/Green Box System under the Agreement on Agriculture (AoA) are two existing categorization systems under the WTO. The hybrid system of categorization I propose aims to associate the advantages of the two existing systems for trade in goods, taking into account the four modes by which services are supplied across borders.

In the end, I do not propose to solve all of the problems in determining the appropriateness of countervailing duty procedures. The lack of available data is a key obstacle. However, I do propose several collection procedures based on the VAT/RST tax systems. The

problem of collecting countervailing duties on service subsidies is not without a solution. I will identify the problems and suggest some models for a workable solution.

My research also indicates that WTO Members will need to give service subsidies greater attention as the Doha Round moves forward. I believe that effort can be successful and that WTO Members can create a more comprehensive legal system for the global market, including rules on service subsidies.

TABLE OF CONTENTS

I. OVERVIEW.....	1
A. HISTORICAL BACKGROUND.....	1
B. ORGANIZATION OF THE DISSERTATION.....	4
1. Introduction to Service Subsidies	5
2. The Relevant Agreements.....	5
3. Theory Development.....	8
a. Current Members’ Discussions on the Definition of Service Subsidies.....	10
b. Subsidy Definition in Services Trade under the WTO.....	12
c. The Starting Point for Subsidy Definition under the GATS.....	13
d. The SCM AGREEMENT or AoA Classification.....	13
e. The Appropriateness of Countervailing Measures in Services Trade	15
f. If It Is Inappropriate to Have Countervailing Measures, What’s Next?	25
g. Specific Dispute Resolution Mechanism under the GATS	26
C. CONCLUSIONS.....	26
II. THE CREATION OF THE WORLD TRADE ORGANIZATION.....	28
A. EVOLUTION OF THE GATT TO THE WTO.....	28
1. GATT Overview	28
a. History/Background.....	28
b. Provisional Application and Grandfathered Rights and Exceptions	31
c. Waiver Authority and Amendments	32
d. Discrepancies in the Dispute Settlement Procedures.....	32
2. WTO Overview.....	35
a. History/Background.....	35
b. Before the Uruguay Round.....	36
c. During the Uruguay Round.....	36

d. After the Uruguay Round	37
B. BASIC FRAMEWORK OF THE WTO	38
1. Why Does the World Need the WTO?	39
2. What Is the Scope of the WTO?	40
a. Multilateral Trade Agreements	41
b. Plurilateral Trade Agreements	41
3. Who Can Participate in the WTO?.....	42
a. Original Membership	42
b. Accession	43
4. What Does The WTO Do?.....	44
a. Implementation of Agreements.....	44
b. Dispute Settlement.....	44
c. Trade Policy Review.....	50
d. Co-operation with the IMF and World Bank.....	50
C. CURRENT STATUS OF THE WORLD TRADE ORGANIZATION.....	51
1. The Ministerial Conference and Other Bodies.....	52
a. Highest Authority: The Ministerial Conference	52
b. Second Level: The General Council, in Three Guises	53
c. Third Level: Special Councils (Councils for Each Broad Area of Trade, And More) and Committees	53
d. Fourth Level: Various Committees	54
2. Non-Discrimination Principles	56
a. Most-Favored-Nation (MFN) Treatment.....	56
b. The National Treatment (NT) Principle	58
3. Exceptions to Non-Discrimination Principles.....	60
a. GATT Article XX Exceptions	60
b. GATT Article XXIV Exceptions.....	61
D. THE WORLD TRADE ORGANIZATION IN THE FUTURE.....	62
III. AN OVERVIEW OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)	65
A. A GENERAL INTRODUCTION TO THE GENERAL AGREEMENT ON TRADES IN SERVICES (GATS).....	67
1. The Concept of “Modes” of Services	69

a. Mode I - Cross-Border	70
b. Mode II - Consumption Abroad	70
c. Mode III - Commercial Presence	72
d. Mode IV - Movement of Natural Persons	73
2. The Scope of the GATS	74
3. GATS Article II— The Most-Favoured-Nation Principle	76
4. GATS Article XVII - National Treatment	78
B. THE GATS ANNEXES	80
1. The Movement of Natural Persons	81
2. Air Transportation.....	81
3. Financial Services	82
4. Telecommunications	83
C. THE GATS’S SCHEDULE OF COMMITMENTS	84
D. THE HISTORY OF PAST NEGOTIATIONS	86
1. The Post 1993 Uruguay Round Situation	87
2. The 1995 Working Party on GATS Rules	87
3. The 2001 Guidelines and Procedures for the Negotiations on Trade in Services	88
4. The Doha Round Mandates with Respect to GATS	89
5. The Cancun Meeting and the “July 2004 Package”	90
6. The Hong Kong Ministerial Declaration.....	91
IV. AN OVERVIEW OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (ASCM).....	94
A. GENERAL INTRODUCTION.....	94
1. Historical Background	94
a. The Tokyo Round Subsidy Codes	95
b. The Uruguay Round Subsidy Agreement.....	96
2. Elements of a Subsidy.....	98
a. A Financial Contribution	98
b. Provided by a Government or Any Public Body	99
c. Conferring a Benefit	99
d. The Specificity Test.....	101
3. The Traffic-Light System.....	103

a. Prohibited Subsidies.....	104
b. Actionable Subsidies	106
c. Non-Actionable Subsidies	111
B. COUNTERVAILING MEASURES	114
1. Historical Background	115
2. Preconditions to Collecting Countervailing Duties.....	116
a. The Existence of a Subsidy.....	116
b. The Material Injury Determination.....	117
c. The Causal Relationship	119
3. Three Types of Countervailing Measures	120
a. Provisional Countervailing Measures	120
b. Voluntary Undertakings.....	121
c. Definitive Countervailing Duties	122
C. THE SCM AGREEMENT AND SERVICE SUBSIDIES	124
V. THE AGREEMENT ON AGRICULTURE	125
A. GENERAL INTRODUCTION.....	128
B. SUBSIDIES UNDER THE AOA	130
1. Historical Background	131
2. Agricultural Export Subsidies	133
3. Agricultural Domestic Support – Amber/Blue/Green Box System	137
a. Amber-Box Subsidies	139
b. Blue-box Subsidies	142
c. Green-box Subsidies	145
d. Developmental Measures.....	151
VI. SUBSIDIES IN SERVICES TRADES	153
A. THE IMPORTANCE OF SUBSIDY RESTRICTIONS IN SERVICES	155
1. Trade-Distortive Effects of Subsidies	156
a. What Is Distortion?.....	157
b. Simple v. Sophisticated Definition of Distortion	158
2. Global Awareness of Subsidies in Services	160
a. International Agreements.....	161
b. Regional Regulations.....	164
B. CURRENT DISCUSSIONS UNDER THE WTO.....	165

1. Information Exchange Required By GATS	165
a. Hong Kong.....	167
b. Poland	168
c. Switzerland	171
d. New Zealand.....	176
e. Norway.....	179
2. Members’ Opinions in Relevant Meetings	183
C. THE NEED TO HAVE A SPECIFIC SYSTEM FOR SUBSIDIES IN SERVICES.....	199
1. Why Not Just Apply the SCM Agreement to Regulate Subsidies In Services?	200
a. Differences between Goods and Services.....	200
b. Differences between the GATT and the GATS.....	202
2. Are Existing Rules Enough to Restrict Subsidies?	207
a. Most-Favoured-Nation Principle	207
b. National Treatment Principle.....	209
c. Market Access.....	211
d. Monopoly Provisions.....	211
e. Non-violation Provisions	211
VII. A PROPOSED FRAMEWORK FOR SUBSIDY REGULATION IN GATS	213
A. DEFINING “SUBSIDY” IN THE GATS.....	213
1. “Subsidy” Defined in the SCM Agreement as A Start	213
a. Do We Really Need A Different Definition?	214
b. Cyber Laws Development as an Example	217
2. Are “Financial Contributions” Listed In The SCM Agreement Exhaustive In Service Trades?.....	219
3. The Notion of Territory in Service Subsidies	220
4. The Application of <i>Specificity</i> to Service Subsidies	222
B. THE SCM AGREEMENT FRAMEWORK V. THE AOA FRAMEWORK.....	226
1. Differences between Two Frameworks	226
2. Advantages and Disadvantages of Each Framework	227
3. Other Proposed Approaches /Frameworks.....	229
a. Sector-Specific Disciplines.....	229

b. Partial Disciplines Approach	230
c. The European Union Approach	232
C. IS IT APPROPRIATE TO APPLY THE SCM AGREEMENT TRAFFIC-LIGHT FRAMEWORK TO SERVICE SUBSIDIES?.....	233
1. The SCM Agreement Rationale for a Traffic-Light Framework	234
2. Current Discussions	235
3. Sub-conclusion.....	236
D. IS IT APPROPRIATE TO APPLY THE AOA FRAMEWORK TO SERVICE SUBSIDIES?.....	237
1. The Rationale for the AOA System	237
2. Current Discussions	238
3. Sub-conclusion.....	240
E. IS IT APPROPRIATE TO APPLY A “HYBRID” APPROACH TO SERVICE SUBSIDIES?.....	241
1. The Rationale for a Hybrid System for GATS.....	241
2. Future Development.....	242
a. Traffic-light Classification.....	242
b. Stand-still Commitments and Progressive Phase-out in the Semi-Red light Subsidy	243
c. Categories and Time Duration for Green-light Subsidies.....	244
d. Semi-Actionable Service Subsidies	247
e. The Inclusion of a Peace Clause	249
F. SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES	251
G. RECOMMENDATIONS	253
VIII. COUNTERVAILING MEASURES IN SERVICE TRADES	258
A. DIFFERENCES BETWEEN GOODS AND SERVICES IN THE APPLICATION OF COUNTERVAILING MEASURES	258
1. The Purpose of Countervailing Measures	259
2. Current Discussions	262
3. Sub-conclusion.....	264
B. THE PROBABILITY THAT EXPORT SUBSIDIES WILL EXIST IN ALL FOUR MODES OF SERVICE SUPPLY	265
1. Mode I Examples	265
2. Mode II Examples.....	269

3. Mode III Examples.....	274
4. Mode IV Examples	278
C. RECOMMENDATIONS ON THE PROBABILITY QUESTION	281
IX. THE POSSIBLE APPLICATION OF COUNTERVAILING MEASURES IN SERVICES TRADE	284
A. CONDITIONS FOR THE IMPOSITION OF COUNTERVAILING DUTIES IN THE SCM AGREEMENT	284
1. Recommendations on the Existence of a Service Subsidy.....	285
2. Recommendations on the Material Injury Determination.....	287
3. Recommendations on the Question of Causation between the Subsidized Imports and the Injury	292
B. SUGGESTIONS ON THE COLLECTION OF COUNTERVAILING DUTIES	295
1. Some Ideas from the Value-Added Tax (VAT) System	296
a. Registration of Taxable Service Suppliers and Exemption	296
b. Reverse-Charging Rule.....	298
2. Some Ideas from the U.S. Online-Shopping Tax Methods.....	300
C. WHAT IS THE APPROPRIATE ROAD FORWARD?.....	304
X. CONCLUSIONS AND FUTURE WORK	308
A. CONCLUSIONS ON GATS ARTICLE XV	308
1. Subsidy Definition	309
2. Countervailing Measures	314
a. Mode 1 and Mode 2	315
b. Mode 3 and Mode 4.....	317
B. RECOMMENDATIONS FOR FUTURE WORK.....	318
BIBLIOGRAPHY.....	321

LIST OF TABLES

Table 1. Export Subsidies	16
Table 2. Domestic Substitution Subsidies	19
Table 3. GATT Negotiation Rounds.....	31
Table 4. Series of Events in Post-Uruguay Round	38
Table 5. Dispute Resolution Time Line.....	46
Table 6. WTO Member States	62
Table 7. WTO Observers	64
Table 8. Sample Schedule of Commitments: Arcadia.....	86
Table 9. Agreed Reductions in Agricultural Subsidies (Uruguay Round)	129
Table 10. Number of Export Subsidy Reduction Commitments by Member and Product Amounts.....	135
Table 11. Example of Calculating Current Total AMS	138
Table 12. Total AMS Commitments by Members, 1995-2001	140
Table 13. Agricultural Proposed Reform Regarding Amber-box Subsidies	141
Table 14. Agricultural Proposed Reform Regarding Blue-box Subsidies.....	145
Table 15. Economic Integration Agreements Between WTO Members	163
Table 16a. Working Party on GATS Rules: Hong Kong.....	165
Table 16b. Working Party on GATS Rules: Poland.....	168
Table 16c. Working Party on GATS Rules: Switzerland	171
Table 16d. Working Party on GATS Rules: New Zealand.....	176
Table 16e. Working Party on GATS Rules: Norway	179
Table 17. Summary of Members' Opinions on Service Subsidies	184
Table 18. Differences Between Subsidy Regulations in the SCM Agreement and AoA	227
Table 19. Advantages and Disadvantages of the Agriculture and Goods Model for Discipline Services Subsidies	227
Table 20. Limited Disciplines Approach: Advantages and Disadvantages.....	231

Table 21. Proposed Hybrid Classification System for GATS	255
Table 22. Proposed Hybrid Classification System for GATS	312

LIST OF FIGURES

Figure 1. GATT Dispute Settlement Procedure.....	34
Figure 2. Dispute Settlement Process	49
Figure 3. WTO Structure	55
Figure 4. MFN Treatment.....	57
Figure 5. Example A (from the perspective of <i>importing</i> country A)	70
Figure 6. Example B (from the perspective of <i>importing</i> country A)	71
Figure 7. Example C (from the perspective of <i>importing</i> country A)	72
Figure 8. Example D (from the perspective of <i>importing</i> country A)	73
Figure 9. Benitah Two Stage Process	158
Figure 10. Total Number of National Treatment Limitations: By Level of Development.....	205
Figure 11. Most- Favoured-Nation Principle.....	208
Figure 12. The SCM Agreement Dispute Settlement Procedure.....	306

I. OVERVIEW

This study considers Article XV of the General Agreement on Trade in Services¹ (GATS) and its rules on subsidies in services trade. In the Doha Round, no progress has been made on this issue.² The deadlock of the Doha Round has delayed advances in this area, consistent with the otherwise slow development of subsidy regulation in services compared with other issues in the GATS. This study will emphasize the importance of subsidies regulations in services and propose a legal framework for World Trade Organization (WTO) Members to consider in future negotiations.

A. HISTORICAL BACKGROUND

After the Uruguay Round, the completion of the GATS remained a matter of unfinished business. There is no doubt that the GATS was a huge step forward in the globalization of world services markets. It is also obvious, however, that there are many unsolved issues in the GATS.

¹ General Agreement on Trade in Services art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

² Mary Footer, *The General Agreement on Trade in Services: Taking Stock and Moving Forward*, 29 *Legal Issues of Economic Integration*, 21-22 (2002).

The March 30, 1995 establishment of the Working Party on GATS Rules (WPGR) showed a clear intent to deal with many of these GATS problems.³

The Working Party's mandate includes issues related to safeguard measures, government procurement, and subsidies. Nonetheless, the WPGR did not make any progress until July 22, 2002.⁴ Moreover, of these three issues, only the topic of safeguard measures was given a specific deadline for completion within the GATS negotiations.⁵ As a result of this focus, safeguards have taken over the GATS discussions, leaving little room for consideration of subsidies issues. Due to the delay of the negotiations concerning safeguard measures, no substantial progress has been made on the subsidy issue.

Even though there is no comprehensive evidence showing subsidies in services, consideration of WTO Trade Policy Reviews suggests that Members do engage in granting subsidies in their domestic sectors, including transportation, telecommunication, tourism, financial services, and education.⁶

Article XV of the GATS explicitly stipulates Members' obligations regarding subsidies granted on trade in services:

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.⁷ The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall

³ GATS, *supra* note 1, art. XXIV

⁴ Working Party on GATS Rules, *Work Programmes*, S/WPGR/7 (25 July 2002).

⁵ GATS, *supra* note 1, art. X(3) ("The provisions of paragraph 2 should cease to apply three years after the date of entry into force of the WTO Agreement.")

⁶ Working Parties on GATS Rules, *Subsidies for Services Sectors: Information Contained in WTO Trade Policy Review*, S/WPGR/W/25/Add.2 (December 12, 2000).

⁷ A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

This provision places upon Members obligations to:

- (1) recognize the trade-distortive effects resulting from subsidies;
- (2) enter into negotiations to develop the necessary multilateral disciplines to avoid such trade-distortive effects;
- (3) address the appropriateness of countervailing procedures;
- (4) recognize the role of subsidies in relation to the development programmes of developing countries for flexibility;
- (5) exchange information concerning all domestic subsidies related to trade in services; and
- (6) create a dispute resolution mechanism for dealing with service subsidies (this is an implied obligation, even though Article XV:2 does not explicitly mention any).

As this list indicates, GATS Article XV only establishes guidance for Members to follow. Nevertheless, it obligates Members to conduct negotiations.⁸ It does not provide substantive rules for determining how to define “subsidies” in services, how to calculate the amount of subsidies, and how to determine if an aid is a subsidy. Moreover, it provides no guidance on procedures for dispute resolution in subsidy related matters.⁹

⁸ GATS, *supra* note 1, art. XV, footnote 7.

⁹ GATS, *supra* note 1, art. XV(2) simply accords Members to give sympathetic consideration on any request from other Members who allege to be inflicted by their service subsidies.

This framework (or lack thereof) raises important questions regarding the matter of subsidies in services trade. Time was limited in the Uruguay Round, and many GATS details were not put on the table for Members to negotiate. Thus, it is crucial that consideration be given to the need for future negotiation of important issues in the GATS system.

B. ORGANIZATION OF THE DISSERTATION

This dissertation can be illustrated in a chapter-by-chapter chart for a better understanding of its structure.

Chapters	Contents
Chapter 1	Provide a basic overview of the dissertation. Break down the analysis into three parts: introduction, information collection, and theory development
Chapter 2	Briefly introduce the transition and historical background from the GATT era to the WTO era. Point out two essential principles in this international trade system: most-favoured-nation and national treatment.
Chapter 3	Focus on the General Agreement on Trade in Services, including its development from the past to the present, its unique categorization of trade in services, and its problems.
Chapter 4	Focus on the Agreement on Subsidies and Countervailing Measures, including its historical transition, the elements necessary to determine subsidies, and the requirements to be met before the implementation of countervailing measures.
Chapter 5	Focus on the subsidy-related part of the Agreement on Agriculture, including its exception from the general subsidy regulations and the purpose behind such an exception.
Chapter 6	Confirm the importance and necessity of subsidies regulation in service trades. Summarize Members' submissions and scholarly publications on the definition of a service subsidy.
Chapter 7	Propose a legal framework to regulate service subsidies, starting by defining "subsidy," and moving to categorizing different types of subsidies.

Chapter 8	Discuss the appropriateness of countervailing measures in service subsidy rules. Explain the rationales for having a comprehensive countervailing measure system and the feasibility of a specific countervailing system.
Chapter 9	Propose a legal framework for countervailing measures in service trades. Apply the Value Added Tax system as a model.

1. Introduction to Service Subsidies

This dissertation will be divided into a total of ten chapters. In Chapter 1, I will give readers an overview of the structure of this dissertation, and provide a general description of my contribution through the paper. In Chapter 2, I will discuss the World Trade Organization (WTO) and its global importance, including a discussion of the historical transition from the General Agreement on Tariffs and Trades¹⁰ (GATT) to the present WTO and the institutional framework of the WTO. Chapter 2 will also focus on the basic legal principles embodied in the WTO Agreement,¹¹ including most-favoured-nation (MFN) treatment and national treatment (NT) under the GATT regime.

2. The Relevant Agreements

In Chapter 3, I will introduce the General Agreement on Trade in Services (GATS). This chapter will provide a thorough review of the GATS, including (1) the four modes of supplying services; (2) the unique way in which each Member's schedule of concessions is drafted; and (3) how the

¹⁰ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments - Results of the Uruguay Round vol. 1 art. XV (1994), 33 I.L.M. 1125, 1152 (1994) [hereinafter GATT 1994]

¹¹ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature April 15, 1994, Marrakesh, Morocco, 33 ILM 1140-1272 (1994) [hereinafter WTO]

most-favoured-nation treatment and national treatment principles are applied differently in the rules found in the GATS than in traditional GATT practice.

Service trades are complex and difficult to categorize. There exists no agreed definition of a service in international trade.¹² However, GATS represents a huge achievement in listing four different modes of services to be regulated. The GATS categorization is based upon the “supply modes of services.” These four modes are services trade conducted,¹³

- (1) from the territory of one Member into the territory of any other Member (Mode I: cross-border);
- (2) in the territory of one Member to the service consumer of any other Member (Mode II: consumption abroad);
- (3) by a service supplier of one Member, through commercial presence in the territory of any other Member (Mode III: commercial presence); and
- (4) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode IV: movement of natural persons).

These four modes will be discussed in greater detail in Chapter 3. In addition to a basic GATS overview, I will also review current issues regarding GATS and Members’ attitudes towards the agreement.

In Chapter 4, I will provide an introduction to the Agreement on Subsidies and Countervailing Measures (the SCM AGREEMENT). The SCM Agreement serves two purposes under the WTO: to discipline nations in their use of subsidies, and to specify actions that can be taken to confront the damage caused by subsidies. The SCM Agreement clearly defines

¹² WTO Law – From A European Perspective, 280 (Birgitte Egelund Olsen ed., 2006)

¹³ GATS, *supra* note 1, art. I:2.

subsidies, identifying all possible forms of subsidies.¹⁴ Moreover, the Agreement categorizes subsidies into three types: prohibited subsidies,¹⁵ actionable subsidies,¹⁶ and non-actionable subsidies.¹⁷ Chapter 4 will include further elaboration of the issues raised by the structure and substance of the SCM Agreement.

In Chapter 5, I will provide an introduction to the Agreement on Agriculture (AoA), concentrating on agricultural subsidies, including both export and domestic subsidies. Since agricultural trade is a special and sensitive subject in the international trade system, the elimination of all of the restrictions on agricultural products that have been around for many years cannot be accomplished in a short time frame. Managing agriculture-related matters has been a large and contentious issue carried over from the Uruguay Round to the Doha Round.¹⁸ The AoA provides a relatively accommodating framework on agricultural subsidies when compared to the SCM Agreement. Moreover, the AoA provides flexibility for developing countries and least-developed countries (LDCs).¹⁹ This special flexibility is important in harmonizing the agricultural laws of Members, especially between developed and developing countries. This makes the application of the AoA in context of GATS subsidy matters helpful in motivating Members to move forward.

¹⁴ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 14. [hereinafter the SCM Agreement], art. 1.

¹⁵ *Id.* arts. 3 and 4

¹⁶ *Id.* arts. 5-7

¹⁷ *Id.* arts. 8 and 9

¹⁸ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS*, 583-584(2006). (“Agricultural products have long been important for most countries’ trades. For European countries and United States, agricultural exports are essential interests to their local industries. These industries have long been protected and heavily subsidized by countries around the world. Since the goal for GATT/WTO is to have a world of free trade without other interferences, countries politically protecting and financially subsidizing local industries are not preferred. Therefore, one of the most difficult tasks for GATT/WTO is to open Members’ domestic markets for agricultural products.”)

¹⁹ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 410 [hereinafter AoA], art. 15

3. Theory Development

In Chapter 6, I will demonstrate the need for multilateral rules governing subsidies in services trade. In Chapter 7, suggested rules on GATS Article XV(1) will be elaborated, addressing the definition of a subsidy. In Chapter 8, I will discuss the appropriateness of having countervailing measures in GATS. In Chapter 9, a suggested legal mechanism to deal with countervailing duties will be elaborated. In Chapter 10, I will give a summary of the dissertation, and discuss possible future work on this subject.

It is useful here to provide a brief overview of the theory underlying this dissertation, as well as a basic review of issues that will be the focus of Chapters 6 through 9. Prior to discussing the regulation of subsidies in services, we must understand why it is important to regulate subsidies. Thus, Chapter 6 will begin with a demonstration of the importance of having subsidy regulations in the GATS. This starting point coincides with one of the GATS Article XV obligations, which in turn is related to a discussion of the trade-distortive effects of subsidies. Apart from discussing the nature of subsidies themselves, proof of their importance can be evidenced by real examples, demonstrated in existing international agreements and the regional regulations of Member States.²⁰

Also in the first part of Chapter 6, I will explain the differences between goods and services, as well as the differences between laws that govern goods and services trade. We must ask whether goods and services are so different that we need another instrument to deal with subsidies in services – or whether we can use existing mechanisms originally applicable to trade in goods. Trade in goods and trade in services differ in many respects, and we must ask whether

²⁰ Some international agreements have established category regulating service subsidy issues. *E.g.*, the Australia-New Zealand Closer Economic Relations Trade Agreement and the European Community Treaty. For introduction on specific articles in these agreements, please refer to Chapter 6.I.B in this dissertation.

such differences cause unsolvable gaps when applying the subsidy definition in the SCM Agreement to the services area.

Some believe that subsidy disputes can be resolved using the current rules, and that there is no need to put the issue on the negotiating table right now.²¹ The question of whether the existing rules in the GATS can cover all possible problems, and eliminate the need for separate subsidy rules applicable to trade in services, is also addressed in Chapter 6.

Briefly stating the theory developed in Chapter 6, I suggest that the existing rules dealing with trade in goods are not sufficient to regulate subsidy issues in the services sector. Some scholars suggest that subsidy regulation is not necessary since existing trade rules, other than those dealing with subsidies,²² can cover the same scope. I will scrutinize at length all possible laws which could restrain service subsidies in order to prove that those regulations are insufficient to deal with subsidy problems. Therefore, I will conclude that laws related to service subsidies are necessary in the GATS.

In Chapter 6, I will briefly (1) introduce Members' discussions on service subsidy issue, and (2) answer why current GATS rules, the MFN treatment principle and the NT principle, are not sufficient to deal with service subsidy issues.

²¹ Marc Benitah, *Subsidies, Services and Sustainable Development*, ICTSD Programme on Trade in Services and Sustainable Development, at. 5 (2005), available at <http://www.tradecapacitypakistan.com/pdf/ICTSD%20Paper%20Services%20GVA%20JUL%2005.pdf>. 楊光華,<服務補貼規範發展必要性之初探>, 第四屆國際經貿法學發展學術研討會論文集, translated in Guan-hua Yang, *Preliminary Discussion on the necessity of subsidy regulations in GATS*, *Chenchi Law Review*, Vol. 4, 268 (2004). (After the author's preliminary discussion on GATS Article XV, she believes that it is not necessary to develop laws on service subsidies because subsidy in services is mostly in violation of national treatment principle. Therefore, it is not necessary to develop subsidy rules in GATS right now. As for other opposing reasons in details, please refer to Chapter 6.III.B in this dissertation.)

²² MFN and NT are two main focuses on discussing whether current laws are sufficient to deal with service subsidy. See Marc Benitah, *supra* note 21, at 7 and 8 (2004); also Chapter III.B of this dissertation for more elaboration.

a. Current Members' Discussions on the Definition of Service Subsidies In Chapter 6, after demonstrating the importance of regulating subsidies in the GATS, I will move on to introduce Members' submissions concerning service subsidies. A principal question raised by those submissions is what the definition of a service subsidy will be in future negotiations. In this study, I will rely principally on two sources: WTO Members' submissions – including internal documents, and scholarly writings. Even though service subsidies are a relatively new concept, many WTO Members have submitted documents in the WTO meetings.²³ Hence, in Chapter 6, the documents I will discuss include:

- (1) Submission from Chile:²⁴ This document provides some preliminary thoughts on subsidies in services trade, their trade-distortive effects, the nature of subsidies, the resulting damages, and countervailing measures.
- (2) Submission from Argentina and Hong Kong, China:²⁵ This document considers the necessary elements to improve data collection on domestic service sectors.
- (3) Submission from Argentina, Chile, and Hong Kong, China:²⁶ This document provides suggestions on how to simplify the questionnaire concerning domestic programs for service subsidies.

²³ Working Party on GATS Rules, *Communication from Hong Kong, China and Mexico: Non-Actionable Subsidies in Trade in Services*, JOB(07)/27 (7 March 2007). Working Party on GATS Rules, *Submission from Norway: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.1 (23 June 1997). Working Party on GATS Rules, *Submission from New Zealand: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.2 (23 July 1997). Working Party on GATS Rules, *Submission from Hong Kong, China: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.3 (23 July 1999). Working Party on GATS Rules, *Submission from Poland: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.4 (2 March 2000), S/WPGR/W/16/Add.4/Suppl.1 (20 September 2000). Working Party on GATS Rules, *Submission from Switzerland: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.5 (22 December 2005).

²⁴ Working Party on GATS Rules, *Communication from Chile: The Subsidies Issues*, S/WPGR/W/10 (2 April 1996).

²⁵ Working Party on GATS Rules, *Communication from Argentina and Hong Kong, China: Development of Multilateral Disciplines Governing Trade Distortive Subsidies in Services*, S/WPGR/W/31 (16 March 2000).

²⁶ Working Party on GATS Rules, *Communication from Argentina and Hong Kong, China: Informal Paper*,

- (4) Submission from Poland:²⁷ This document provides opinions on the scope of trade subsidies, and on the definition of subsidy.
- (5) Submission from Chile:²⁸ This document lists four examples of subsidies: exportation programs; and services related to technology, tourism, and infrastructure programs. It then discusses how to define whether a subsidy exists, focusing on the form of the subsidy, the beneficiary, and the trade-distortive effect.
- (6) Submissions from Chinese Taipei:²⁹ This document answers Chile's submission in three parts: (i) what is the form of a subsidy? (ii) who are the beneficiaries?, and (iii) what are the trade-distortive effects?
- (7) Submissions from Mexico and Hong Kong, China:³⁰ This document raises questions about Members' consideration of non-actionable service subsidies.

The position of some current Members, including those on the Working Party, favors the application of the definition of subsidy in the SCM AGREEMENT as a starting point.³¹

However, Members and scholars also note that, due to the differences between goods and

Job(02)/84 (15 July 2002).

²⁷ Working Party on GATS Rules, *Communication from Poland: Definition of Subsidies in GATS*, JOB(02)/207 (13 December 2002)

²⁸ Working Party on GATS Rules, *Communication from Chile: Some thoughts about Subsidies Program in Services*, JOB(03)/218 (2 December, 2003).

²⁹ Working Party on GATS Rules, *Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu: Definition of Subsidies in Services*, JOB(04)/78 (17 June, 2004).

³⁰ Working Party on GATS Rules, *Communication from Hong Kong, China and Mexico: Non-actionable Subsidies in Trade in Services*, JOB(07)/27 (27 March, 2007)

³¹ From several WTO documents, we can see Members' intention towards applying ASCM structure in defining subsidies in services. See Working Party on GATS Rules, *Communication from Singapore: An illustrative List of Definitional Issues that could relate to Subsidies in Services*, JOB(04)/180 (1 December, 2004). Working Party on GATS Rules, *supra* note 28. Working Party on GATS Rules, *supra* note 29. Also, for the GATS Working Party's perspective, in their notes, definition of ASCM is applied in determining whether a subsidy in service might exist. See Working Party on GATS Rules, *Subsidies for Service Sectors: Information Contained in WTO Trade Policy Reviews*, S/WPGR/W/25 (26 January, 1998)

services, the definition in the SCM AGREEMENT must be revised or supplemented.³² This means that there are several alternative answers to whether the rules in the SCM AGREEMENT should be applicable to service trades. For example, questions about the form of the subsidy, the subject (beneficiary) of the subsidy, the distortive effect *across the border*, and the *specificity* of the subsidy, all offer useful focus in determining differences in the appropriate subsidies regime for trade in goods and for trade in services.

Using all relevant Members' submissions, I will target crucial issues in defining a service subsidy. Analysis of these issues will facilitate offering advice for addressing them in Chapter 7.

b. Subsidy Definition in Services Trade under the WTO Chapter 7 focuses on finding answers to the questions raised in Chapter 6. In Chapter 7, I will break the subject into several issues and sub-questions for discussion. These will include:

- (1) The definition of subsidy
 - (a) Is the “financial contribution” proscribed in GATS Article I(1) applicable to services trade? If yes, does Article I(1) provide an exhaustive list for purposes of service subsidies?
 - (b) Is it appropriate to use the “specificity” criterion to determine the existence of subsidies in services trade?

³² Working Party on GATS Rules, *Report of The Meeting of 1 October 2003: Note by the Secretariat, S/WPGR/M/44* (28 October 2003). (Members, such as, Singapore, Australia, presented their views to use ASCM definition as a start.). See also Working Party on GATS Rules, *Report of The Meeting of 24 November 2004: Note by the Secretariat, S/WPGR/M/50* (17 January 2005). (United States, Singapore, Hong Kong, China, Korea, and Australia supported the idea of applying ASCM definition as provisional definitions to collect Members' relevant information regarding domestic subsidies). 林彩瑜, <有關新加坡及瑞士所提服務補貼文件之法律意見>, 台大法律學院 WTO 研究中心, translated in Cai-yu Lin, *Legal Opinions Regarding Submissions of Service Subsidies Presented by Singapore and Switzerland*, Taiwan School of Laws: WTO Center, January 2005, at 7. (The author points out the question that due to the differences between goods and services, and four modes of supplies in GATS, the ASCM definition needs to be modified.)

- (c) Is the concept of “benefits” described in the SCM AGREEMENT applicable to service subsidies?
- (2) Possible non-actionable subsidies in services
 - (a) Are the non-actionable subsidies discussed in the SCM AGREEMENT or the AoA applicable in the GATS?
 - (b) Are there any possible situations where governmental financial aid should be exempt from subsidy disciplines?
- (3) Differential treatment

GATS Article XV:1 stipulates that developing countries should be accorded “differential treatment.” Is there a standard for the application of this rule in the granting of privileges?

c. The Starting Point for Subsidy Definition under the GATS The first part of Chapter 7 will provide a definition of a service subsidy. My thoughts on how to define and classify subsidies rest on the present examples from the SCM Agreement and the AoA. I propose to start from the subsidy rules we already have in this field, and then offer revisions to these rules to fit the field of services. The guiding principle is that service subsidies which can constitute trade barriers should be prohibited, while exceptions should be allowed in certain situations that do not result in trade barriers.

d. The SCM Agreement or AoA Classification I will then determine whether service subsidy regulations should follow the “green-light” or “red-light” subsidy classification in the SCM AGREEMENT or the “green-box” or “blue-box” subsidy classification in the AoA. Each of these two different classification systems has its own advantages and disadvantages. I conclude

that beginning by defining the scope of non-actionable/green-box subsidies is less sensitive and more efficient for all Members.

WTO Members fall into two categories expressed in their submissions about the classification of service subsidies. One group would prefer to adopt the SCM AGREEMENT structure, which sorts out three kinds of subsidies: prohibited subsidies (red-light subsidies), actionable subsidies (yellow-light subsidies), and non-actionable subsidies (green-light subsidies). Even though the green-light category no longer exists,³³ Members think it is necessary to have this category at the beginning of the development of subsidy regulations applicable to services.³⁴ Representative countries in this group include Singapore³⁵ and Chinese Taipei.³⁶ The other group is inclined to adopt the AoA structure, which differentiates between two types of subsidies: green-box subsidies³⁷ and blue-box subsidies.³⁸ This group includes Argentina and Hong Kong, China.³⁹ In this study, I will consider which classification method is most appropriate for service subsidies, as well as whether other possibilities exist.

After deciding which classification method to apply, I must determine which service industries should belong to which type of subsidy. Given the complexity and extent of subsidies, we should start with the easy part of this subject, by defining what kinds of subsidies should be acceptable under the final system. WTO Members have, in fact, proposed to start the

³³ The SCM Agreement originally contained this third category: non-actionable subsidies. But it existed for five years, ending on 31 December 1999, and was not extended. The agreement applies to agricultural goods, except when the subsidies are exempt under the Agriculture Agreement, due to expire at the end of 2003.

³⁴ Working Party on GATS Rules *supra* note 30.

³⁵ Working Party on GATS Rules, *Communication from Singapore: An illustrative List of Definitional issues that could relate to Subsidies in Services*, JOB (04)/180 (1 December, 2004), para. 3 (h) and (i).

³⁶ Working Party on GATS Rules, *supra* note 29.

³⁷ They are measures with minimal impact on trade can be used freely including government services such as research, disease control, infrastructure and food security. Also they include payments made directly to farmers that do not stimulate production, such as certain forms of direct income support, assistance to help farmers restructure agriculture, and direct payments under environmental and regional assistance programmes.

³⁸ They include certain direct payments to farmers where the farmers are required to limit production. Sometimes it is called the "blue-box" subsidies.

³⁹ Working Party on GATS Rules, *supra* note 25, para.10 (d).

negotiations with the “non-actionable” subsidies in services.⁴⁰ This approach has been presented by Mexico and Hong Kong, China.⁴¹ In their submissions, they argue that such an approach does not diminish the importance of the issue, but implies how much work still needs to be done in order to build up an effective system. Moreover, this approach offers more incentives for Members to work on service subsidy issues and helps to move forward from the current deadlock in the negotiations.

In the last part of Chapter 7, I will discuss the need for special and differential treatment for developing and least developed countries in GATS subsidy matters. My preliminary inclination is to include such treatment. Such a privilege encourages Members to participate in GATS subsidy regulations.

e. The Appropriateness of Countervailing Measures in Services Trade In Chapter 8, I will address the appropriateness of countervailing measures in GATS – something Members have not yet considered. Unlike with the subsidy definition, which is a substantive issue, countervailing measures are procedural concerns. Therefore, this section of my dissertation will consider practical suggestions rather than theoretical ones.

A countervailing measure is an “action taken by the *importing country*, usually in the form of increased duties to offset subsidies given to producers or exporters in the exporting country (emphasis added).”⁴² Therefore, countervailing duties collection can only occur for goods at the point of import, as is authorized by the SCM AGREEMENT.

⁴⁰ Working Party on GATS Rules, *supra* note 30.

⁴¹ *Id.*

⁴² World Trade Organization, *Glossary term: countervailing measures*, http://www.wto.org/english/thewto_e/glossary_e/countervailing_measures_e.htm. SCM Agreement, *supra* note 14, footnote 36. (Countervailing duties are defined as “ should be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.”)

My preliminary question is whether there can be one comprehensive mechanism to regulate all countervailing measures in service subsidies given the many differences between trade in goods and trade in services. The first step is to see whether real examples of export services trade situations could occur in each mode of service supply. However, since there are different modes of service supply in GATS, analyzing services trade is more complex than analyzing trade in goods. Especially in the Mode II service supply, it is the consumer who crosses the border, not the service supplier. In order to cover all possible countervailable examples, I will apply prohibited subsidy situations stipulated in the SCM Agreement Article 3⁴³ to services trades.

I will differentiate the possible situations by putting them into two categories: (1) Export Subsidies (Table 1) and (2) Domestic Substitution Subsidies (Table 2). My purpose is to demonstrate that, sometimes, it is not always either possible or likely that services trade may benefit from subsidies. If it is improbable that service subsidies in a certain mode of supply will occur, the question becomes whether it is really necessary to regulate all modes of supply.

Table 1. Export Subsidies

SS = Service Supplier
G = Government

Mode	Subsidy Recipient	Consumers	Subsidy Provider	Type	Example	Location of Injured Industries
I: Cross-border	SS of Country A	Country B	G of Country A	Export	Subsidizes establishment of on-line legal consultation providing services to foreigners	Country B
II: Consumption abroad	SS of Country A	Country B	G of Country A	Import(?)	Subsidizes tourism business (such as hotels, resorts) to	Country B

⁴³ *Id.* at art. 3. (“Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.”)

					attract foreigners	
III: Commercial presence	SS of Country A	Country B	G of Country A	Export	Subsidizes offices and companies overseas (possible?)	Country B or Other countries?
IV: Movement of natural persons	SS of Country A	Country B	G of Country A	Export	Subsidizes natural persons, such as lawyer, engineers, accounts, etc. to work overseas	Country B

(This table is created by the author.⁴⁴)

Table 1 illustrates possible examples of export service subsidies. In the situations described in this table, I hypothesize that Country A provides service subsidies to its service suppliers. These service suppliers, who receive the subsidies, “export” their services to consumers in Country B. As a result, service suppliers in Country B might suffer injuries from lost sales of services. The example in Mode I is comparably a more comprehensible example than the examples in other modes. Suppose Country A’s government provides subsidies to its local law firms, which render legal consultation through the Internet. In other words, Country A’s law firms are “exporting” their legal services to other countries, including Country B. As a result, Country B’s local law firms may suffer injury as a result of Country A’s subsidies because Country B’s nationals may seek legal services from Country A’s on-line legal service suppliers.

The most difficult/untraditional analysis occurs with the example in Mode II. In Mode II, customers are traveling abroad to consume services. Suppose, for example, that Country A’s government provides subsidies to its local tourism industry – such as giving special discounts on hotels located in a specific area, offering free training for local tour guides, and even building transportation services for advancing the regional tourist business. Suppose also that this subsidy policy does attract foreigners to Country A. This example shows us that Country A is “exporting” its services overseas through marketing and facilitating local tourism. Does this

⁴⁴ The original document was presented to the Bureau of Trade in Taiwan, Republic of China, for research on service subsidies in May, 2007.

situation qualify as an *export subsidy*? Do all (or any) Mode II subsidies cause trade-distortive effects?⁴⁵

There are questions with the examples in Mode III as well. A country will subsidize its local companies to provide services within its territory since these subsidy policies can advance its development and its people can benefit from governmental financial aids. Could a country like Country A in Table 2 choose to encourage its own nationals to invest overseas? The question is: if this does occur, should such subsidies be countervailable? Is trade-distortive theory applicable under this circumstance? As we know, export subsidies in goods trade are *prohibited* under all kinds of circumstances. In the case of service trades, however, such a subsidy may in fact provide advantages to Country B that flow from the subsidies provided in Country A. Would Country B be likely to challenge such a subsidy? If they would be likely to do so, should the GATS mechanism provide for such a challenge? Or should GATS offer any remedy if a third Country's service industry is affected?

The same concern appears to arise in the examples in Mode IV, where a government subsidizes natural persons instead of legal persons. Is a Mode IV subsidy likely to have trade distortive effects in Country B? Are there any benefits received by Country B if a Mode IV subsidy is granted? Should we just categorize it as a prohibited subsidy? If so, how might it be appropriate (or possible) for Country B to assess countervailing duties on Country A lawyers (or other service providers) operating within Country B with the benefit of subsidies from Country A?

⁴⁵ See Working Party on GATS Rules, *Report of the Meeting of 7 February 2005: Note by the Secretariat*, S/WPGR/M/51 (18 March, 2005), paras. 9-10 (Japan and Thailand expressed their doubts on such a trade-distortive effect issue).

Table 2. Domestic Substitution Subsidies

SS = Service Supplier
G = Government

Mode	Subsidy Recipient	Consumers	Subsidy Provider	Type	Example	Location of Injured Industries
I: Cross-border	SS of Country A	Country A	G of Country A	Domestic Support	Subsidizes domestic on-line education to nationals	SS of Country B that located in Country B
II: Consumption abroad	SS of Country A	Country A	G of Country A	?	?	?
III: Commercial presence	SS of Country A	Country A	G of Country A	Domestic Support	Subsidizes domestic offices and companies	SS of Country B that located in Country A
IV: Movement of natural persons	SS of Country A	Country A	G of Country A	Domestic Support	Subsidizes domestic natural persons, such as lawyers, engineers, accountants, etc.	SS of Country B that located in Country A

(This table is created by the author.⁴⁶)

Table 2 provides a general review of the results when a government may provide possible domestic subsidies to its own industries, creating benefits in local competition against foreign suppliers of the same services. It illustrates a situation where Country A provides subsidies to its domestic service suppliers, who, in turn, provide services to local consumers in Country A. As a result, service suppliers from other countries (such as Country B) may suffer losses in Country A's markets.

The example in Mode I applies to the situation where Country A provides subsidies to its domestic education institutions, which provide on-line education to Country A nationals. Suppose Country B service suppliers, which are operating in Country A, provide similar education through the Internet to the nationals in Country A. The subsidy action taken by

⁴⁶ The original document was presented to the Bureau of Trade in Taiwan, Republic of China, for research on service subsidies in May, 2007.

Country A will then enhance the market power of Country A service suppliers. Such a result may cause injuries to Country B service suppliers.

Table 2 demonstrates that it is unlikely that examples in Mode II can ever exist *de facto*. With tourism services, for example, it is improbable that the government of Country A would subsidize its own domestic service suppliers for traveling to Country B, which helps to promote Country B's economy.⁴⁷ In my preliminary observation, a Mode II actionable subsidy is unlikely to occur in the real world, I don't think it is necessary to discuss it. However, this study invites different points of view on this matter in the future.

The examples in Mode III and Mode IV are similar to each other in many respects. Basically, the only difference is that in Mode III, Country A's government provides support to offices and companies in its territory, while in Mode IV the subjects receiving support are natural persons/individuals, not legal persons/corporations. Still, under these two situations, since Country A provides support to its domestic industries/individuals, Country B's industries/individuals located in Country A will suffer injury because of the distortion in Country A's domestic market.

In Modes I, III, and IV, any subsidy granted to nationals of Country A by the government of Country A is a violation of the national treatment (NT) principle,⁴⁸ because Country A accords different treatment to its own corporations/nationals compared with foreign service suppliers (Country B) located within Country A. At first glance, this conclusion supports the arguments of

⁴⁷ But a common example that does occur to people is the education services when Country A provides scholarships so that its students can study at universities in Country B. This gives us a moment to think about the definition of "subsidy" in service trades. The subject who receives subsidies should be "service providers," instead of "consumers." Therefore, students who receive scholarships to study abroad should be deemed to be consumers, rather than service providers. Thus, this common "subsidy" should not qualify as a subsidy in the Mode II example.

⁴⁸ GATS, *supra* note 1, art. XVII. (It stipulates NT principle as "in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member should accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.")

those who suggest that no regulation of service subsidies is necessary. This position suggests that we do not need to have additional subsidy regulations because existing GATS rules, especially the NT principle, are able sufficiently to control service subsidies. The problem with this analysis is that application of the NT principle depends on each Member's schedule of concessions.⁴⁹ If a Member does not commit to opening a specific service sector, the NT principle cannot be applied to that sector.⁵⁰ In this regard, I propose that having a mechanism to discipline service subsidies is still indispensable.

If we assume that a mechanism to regulate service subsidies is necessary, we then need to think about whether it is necessary to have a regulatory system to cover all modes of supply. Should we focus only on those modes of supply that are most likely to create problems due to the difficulty of keeping track of all service trades and the low-probability of subsidies in certain modes of supply? The Member submissions to date suggest that there is no agreement on how to deal with service subsidies in all modes of supply. In fact, Members have not agreed upon the definition and scope of subsidies in service trades. If a solution that theoretically covers all modes of supply is not possible, at least now, should we just forget about the form but focus on the substance?

I propose that we should address the real problem and not get tripped up by trying to follow a comprehensive theoretical approach. In Chapter 9, I aim to provide an alternative for Members to discuss.

I will follow Members' logic in trying to establish a comprehensive legal mechanism and prove that it will lead them to the same result, which demonstrates that a comprehensive legal

⁴⁹ *Id.*

⁵⁰ *Id.* art. XVI.1 ("With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.")

system to regulate service subsidies is unlikely to be established in the near future. I do not conclude that it is never possible to have a comprehensive system; however, with Members' unwillingness and the near failure of negotiations, to have some system is definitely better than to have nothing.

Once we determine to regulate service subsidies, if we are to then allow countervailing measures we must first answer three fundamental questions. Only if we can answer each question affirmatively can we then move to a system of countervailing measures in service subsidies. These three questions are:

- (1) Is it probable/likely that subsidies will occur in each service mode of supply? (hereinafter "the probability question")
- (2) Is it feasible to have countervailing measures on service subsidies? (hereinafter "the feasibility question")?
- (3) Is it practical to have countervailing measures on service subsidies? (hereinafter "the administerability question")?

Each question may prove more difficult than the one preceding it. Consideration of these questions will begin in Chapter 8 of this study, where I will answer the first of them. With so many differences between goods and services, there are serious doubts about whether having countervailing measures is appropriate in service trades.⁵¹ I will begin by discussing the rationale for having countervailing measures in the GATT. These countervailing measures have been employed by many developed countries for years, with the United States and Europe leading in their use. Understanding the rationale for and impact of countervailing measures under the GATT can provide some measure of how they might function within the GATS.

⁵¹*Id.* art. XV.

(1) The Probability Question In Chapter 8, I will consider whether the rationale for countervailing measures applied to subsidies of goods is suitable for services. Countervailing measures are only feasible when there are export subsidies. It is thus necessary to determine whether there could be export subsidies in all four modes of service supply (the probability question). Exporting services is an abstract concept, and in some instances it is difficult to determine if there is an export subsidy taking place. Based on Table 1, examples show that Mode II is unlikely to produce the export of services from a traditional perspective. Thus, how can we manage to regulate the situation if the Mode II exporting subsidy does take place? Or, can we develop a specific approach, apart from countervailing measures, to deal with the Mode II example?

(2) The Feasibility Question After demonstrating the probability question, the next problem is to determine the conditions when a country can collect duties (the feasibility question) in Chapter 9. In the case of goods, three requirements must be met to impose a countervailing duty (CVD): an import product must be subsidized, such an import subsidy must cause injury to the domestic industry, and there must exist a causal relationship between the subsidy and the injury.⁵² Is it feasible to apply the same requirements to services?

Another difficulty comes in establishing the rules for proving that domestic industries have suffered *material injury*⁵³ because of a subsidy. What is the standard to determine whether

⁵² SCM Agreement, *supra* note 14, art. 11.2 (“An application[of countervailing duty investigation]...shall include sufficient evidence of the existence of (a) *a subsidy* and, if possible, its amount, (b) *injury* within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) *a causal link* between the subsidized imports and the alleged injury.... (emphasis added).”)

⁵³ *Id.* art. 15.7 (It provides some factors as examples:

- “(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

an injury is *material* or not? Most often, it is determined on a case-by-case basis, usually by domestic authorities. However, some objective evidence is required, and the GATS should provide guidance for domestic authorities in determining when an injury is material.

Compared with trade in goods, it is relatively difficult to prove that a domestic service industry suffers *material injury* and that such injuries are caused by subsidized imports. Even though these are technical matters that require economic evaluation, I will try to put legal theories into practice and make suggestions in a realistic format.

(3) The Administerability Question Also in Chapter 9, I will discuss whether it is practical to administer countervailing measures in service trades (the administerability question). In the case of goods, the collection of countervailing duties (CVD) is possible because goods are easy to target when they cross a border.⁵⁴ In the case of services, on the other hand, it is more difficult to determine the border crossing event.⁵⁵ The application of a CVD to trade in services will not only cost Member states more to administer, but may also fail to achieve a satisfactory result. Moreover, countervailing measures are effective when subsidies cause injury, but the injury may not occur within only one country. As discussed earlier in this chapter, not all export subsidies have effect in the same territory. This is true, for example, with Mode II. Collecting duties within another Member's territory will not likely be possible. If there is no way to collect the countervailing duty, any discussion of this issue will be futile.

Many countries collect a value-added tax (VAT) on the sale of both goods and services. These countries include France,⁵⁶ Canada,⁵⁷ and Japan.⁵⁸ I will examine the structure of this

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
(v) inventories of the product being investigated.”)

⁵⁴ Marc Benitah, *supra* note 21, at 33.

⁵⁵ *Id.*

⁵⁶ France enacted its first value-added tax in 1995. See GEORGE N. CARLSON, VALUE-ADDED TAX: EUROPEAN EXPERIENCE AND LESSONS FOR THE UNITED STATES, 2 (1980).

system because it is used to collect taxes on trade in services as well as on trade in goods. This taxation mechanism demonstrates that it is possible to target potential taxpayers for payment of charges assessed on the sale of services. This is an essential requirement in considering the administerability question when analyzing possible CVD regimes for subsidies on services. If it is possible to apply the VAT model to the collection of CVDs on services, then the answer to the administerability question may be affirmative. Even if the VAT system can only be applicable to certain modes of supply, it provides a starting point in applying countervailing duties to services. Indeed, service trades regulated in the GATS can take many forms of entry into territory. I will conduct a more thorough analysis of this issue in the subsequent chapters.

f. If It Is Inappropriate to Have Countervailing Measures, What's Next? GATS Article XV requires Members to determine “the *appropriateness* of countervailing procedures.”⁵⁹ Obviously, even the Members themselves were not sure whether the concept of countervailing measures could be applied in the case of service trades; otherwise, the article would require the construction of the framework for countervailing measures. So the answer to the appropriateness question may well be negative.

Hence, after examining the above questions, we may conclude that neither a comprehensive nor a specific countervailing measure system is likely to work. The question then becomes whether we simply forget about the application of countervailing measures. This analysis requires consideration of those situations where countervailing measures are found to be inappropriate. Will Members simply go directly to the Dispute Settlement Body (DSB) to file a complaint? Could we just abandon countervailing measures in certain modes and allow

⁵⁷ Canada enacted its first valued-added tax (GST) in 1989.

⁵⁸ Japan enacted its value-added tax system (Consumption Tax) in April 1st, 1989.

⁵⁹ GATS, *supra* note 1, art. XV.

Members to file complaints in the DSB based on the evidence that other Members illegally subsidize their service industries?

g. Specific Dispute Resolution Mechanism under the GATS No discussion of a proposed specific mechanism exists so far regarding the dispute settlement issues that accompany the implementation of a subsidies regime for trade in services. Nevertheless, I will discuss this issue. The format of the dispute resolution process relies upon Members' decisions on previous substantive issues. Thus, there is a need to discuss setting up specific regulation for subsidies in services.

C. CONCLUSIONS

In Chapter 10, I will review the service subsidy issues that have been covered in this dissertation. The lack of current accurate data available in unclassified information will make it impossible to fully justify some of my ideas.

I do propose that a workable definition of a service subsidy can be established. Lack of information exchange is not an excuse for Members' inaction in fulfilling the requirements of GATS Article XV. GATS Article XV does not specify information exchange as a necessary condition to establish service subsidy regulations. It simply states that, "[f]or the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers." My proposed definition begins with the SCM Agreement definition, adding minor adjustments.

Regarding the service subsidy categorization, both the SCM Agreement and the AoA classification systems have advantages and disadvantages. I define a third choice, which is a combination of SCM Agreement and AoA structures. This hybrid system of categorization aims to associate the advantages of both existing systems for trade in goods, taking into account the special characteristics of services trades. With the hybrid system proposal, I believe Members can be more motivated in participating in service subsidy negotiations.

In the end, I do not propose to solve all of the problems in determining the appropriateness of countervailing procedures. My effort is to identify the problems. Much more effort on the part of Member states is required in order to establish a comprehensive set of rules for service subsidies. I do propose several collection procedures based on the VAT/RST tax systems. The collection of countervailing duties in service subsidies is not without any solution. However, the collection of duties on service subsidies is much more complicated than with subsidies on goods. It is up to the WTO Members to determine whether to allow countervailing measures in cases of service subsidies. My effort in this dissertation is to identify the problems and suggest some models for a workable solution.

What my research does indicate is that Members will need to give service subsidies greater attention as the Doha Round moves forward. I believe that effort can be successful and that WTO Members can create a more comprehensive legal system for the global market, including rules on service subsidies.

II. THE CREATION OF THE WORLD TRADE ORGANIZATION

This chapter serves as a brief introduction to the historical background of the GATT and the transition from the GATT to the WTO. Familiarity with this historical transition and the legal reasoning behind it provides insights into the subsequent development of trade theory and law. In addition to reviewing the evolution of the GATT to the WTO, this chapter introduces the two principles crucial to the creation of this international trade system: the Most-Favoured-Nation (MFN) and National-Treatment (NT) principles. These two principles are crucial to understanding the WTO.

A. EVOLUTION OF THE GATT TO THE WTO

While the WTO has only existed since 1995, its history can be traced back to when the creation of the GATT in 1948. The GATT provided rules for the international trade system, and became the *de facto* international trade organization. As the result of several negotiation rounds (Table 3 below), GATT evolved from 1947 to 1994, leading to the creation of the WTO, which added coverage of services and intellectual property rights.

1. GATT Overview

a. History/Background The Bretton Woods Conference in 1944 resulted in the creation of the International Monetary Fund (IMF), and the International Bank for Reconstruction and

Development (the World Bank).¹ In 1948, the Draft Charter for an International Trade Organization (ITO) was completed, after a series of conferences held in 1946, 1947, and 1948.² At the 1947 conference in Geneva, the ITO Charter, including the GATT, was completed.³ Three important issues were considered at that meeting:⁴

- (1) the world's dedication to establishing a major international trade institute;
- (2) the commitment to negotiate for a multilateral agreement to reduce tariffs reciprocally; and
- (3) the drafting of the "general clauses" relating to tariff obligations.

The GATT helped the world trading system establish some fundamental principles that underlie the present WTO framework. These included the Most-Favoured-Nation⁵ and National Treatment principles,⁶ and concept of Schedules of Concessions.⁷ Hence, from 1948 until 1994, GATT provided the rules for much of world trade and presided over periods with some of the highest growth rates in international commerce.⁸

The GATT was only adopted provisionally, however, and was not intended to function as an organization.⁹ The ITO never came into being because the United States Senate refused to

¹ JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE*, 15 (1998); For more details on the GATT history, *See generally* WTO official website, available at www.wto.org or RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* (2007).

² *See generally* John H. Jackson, *The Uruguay Round And The Launch Of The WTO: Significance & Challenges*, in, *THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION*, 7 (Terence P. Stewart ed., 1996).

³ *Id.* at 16 ("The history of the preparation of GATT is intertwined with the preparation of the ITO Charter. The 1947 Geneva meeting was actually an elaborate conference in three major parts. One part was devoted to continuing the preparation of a charter for a major international trade institution. A second part was devoted to the negotiation of a multilateral agreement to reduce tariffs reciprocally. A third part concentrated on drafting the 'general clauses' of obligations relating to the tariff obligations. These two latter parts together would constitute the General Agreement on Tariffs and Trade.").

⁴ *Id.*

⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], art. I.

⁶ *Id.* art. III.

⁷ *Id.* art. II.

⁸ World Trade Organization, *Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

⁹ Jackson, *supra* note 1, at 16. ("So the US negotiators returned to Geneva and redrafted the general GATT clauses

ratify the treaty.¹⁰ The GATT became effective in the United States as an Executive Agreement, and gradually become the focus of the international trade community.

Eight rounds of multilateral trade negotiations took place from 1947 to 1994 during the GATT era. They were the Geneva Round (1947), the Annecy Round (1949), the Torquay Round (1951), the Geneva Round (1956), the Dillon Round (1960-1961), the Kennedy Round (1964-1967), the Tokyo Round (1973-1979), and the Uruguay Round (1986-1994). The following table provides an overview of these GATT trade rounds:

to avoid the suggestion of an organization. Thus, multilateral decisions under GATT were taken by the 'CONTRACTING PARTIES' jointly, and not by any 'organizational body.'" In the footnote 12, he further notes that the redrafted document "[was] commonly called the 'Dunkel Text' after the GATT Director-General Arthur Dunkel."

¹⁰ Jackson, *supra* note 1, at 18. ("The US President submitted the Havana Charter (ITO draft) to the Congress in mid-1948, but after several years it became clear that the Congress would not approve the Charter, and in 1951 the President announced that he would no longer seek approval.").

Table 3. GATT Negotiation Rounds

Year	Place/Name	Subjects covered	Countries
1947	Geneva	Tariffs	23
1949	Annecy	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960-1961	Geneva (Dillon Round)	Tariffs	26
1964-1967	Geneva (Kennedy Round)	Tariffs and anti-dumping measures	62
1973-1979	Geneva (Tokyo Round)	Tariffs, non-tariff measures, “framework” agreements	102
1986-1994	Geneva (Uruguay Round)	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc	123

(This table is based on the WTO official website¹¹)

By the early 1980s, the GATT could no longer meet the needs of changing circumstances in international economic activities.¹² Several problems occurred, including but not limited to some major flaws: provisional application, waiver authority, and dispute settlement discrepancies.¹³

b. Provisional Application and Grandfathered Rights and Exceptions¹⁴ According to the GATT 1947 Protocol of Provisional Application, countries were bound to apply the GATT “provisionally on and after 1 January 1948,” and new Contracting Parties would do so after joining the GATT system. The Protocol also contained a Grandfather clause, allowing Contracting Parties to keep in effect prior trade restrictions that were inconsistent with GATT rules.¹⁵ Based on these, some Contracting Parties were permitted to maintain measures that

¹¹ World Trade Organization, *supra* note 8. *See generally* Bhala, *supra* note 1, Chapter 1.

¹² *See generally*, Jackson, *supra* note 2.

¹³ Jackson, *supra* note 2. WTO LAW – FROM A EUROPEAN PERSPECTIVE, at 16-24 (Birgitte Egelund Olsen ed., 2006); Amelia Porges, *The Marrakesh Agreement Establishing the World Trade Organization*, 67-73, in, THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, 67-73 (Terence P. Stewart ed., 1996).

contradicted GATT Part II principles, e.g. National Treatment Principles or quota restrictions, etc.

c. Waiver Authority and Amendments The GATT provided Contracting Parties a right of waiver in several other matters as well.¹⁶ However, those articles do not stipulate any time limitation upon the waivers, and this enabled parties to intentionally jeopardize the agreement itself.¹⁷ Difficulties inherent in the GATT amendment processes made the amendment of treaties difficult and almost impossible, resulting in the creation of many side treaties among GATT Contracting Parties.¹⁸

d. Discrepancies in the Dispute Settlement Procedures¹⁹ Another problem with GATT rules adopted without an administering institution was the lack of unified dispute settlement procedures. In the 1979 Tokyo Round, this subject was addressed, leading to a “Dispute Settlement Understanding,” which evolved into the WTO Dispute Settlement Procedure.²⁰

¹⁴ JOHN H. JACKSON, RESTRUCTURING GATT SYSTEM, 45 (1990).

¹⁵ GATT, *supra* note 5, protocol para. 1. (“The Government.....undertakes.....to apply provisionally on and after 1 January 1948: (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.”)

¹⁶ GATT, *supra* note 5, art VI & art XXV.

¹⁷ Such as the waiver for the U.S.-Canada Automobile Agreement, BUSD 14S/37; waiver for the Section 22 of the U.S. Agricultural Adjustment Act, BISD 3S/32, 3S/141.

¹⁸ GATT, *supra* note 5, art. XXX (“[A]mendments to the provisions of Part I of this Agreement or the provisions of Article XXIX or of this Article *shall become effective upon acceptance by all the contracting parties*, and other amendments to this Agreement *shall become effective, in respect of those contracting parties which accept them.....*”(emphasis added)) See also Jackson, *supra* note 14, at 45-6 (1990) (“the amending provision of the basic treaty structure are such that it is now rarely considered possible to amend the GATT. The delay required by the treaty acceptance process, the difficulty of obtaining the required number of acceptances, the shift in bargaining power involved under the amending procedure in the context of a large Membership, and the fact that even when an amendment is effective in GATT it will not apply to countries which do not accept, are all reasons why the amending procedure has fallen into disuse...One result has been the development of an elaborate system of side treaties, which create some of their own problems.”).

¹⁹ See generally Jackson, *supra* note 14, Chapter 6. See also Jackson, *supra* note 1, Chapter 4.

²⁰ Olsen ed., *supra* note 13, at 16-24. Porges, *supra* note 13, at 26.

Until the Tokyo Round was completed, no specific legal instruments regulated the process of GATT dispute settlement. Article XXIII of the GATT 1947 provided only basic guidance for dealing with disputes.²¹ The procedure is illustrated below:²²

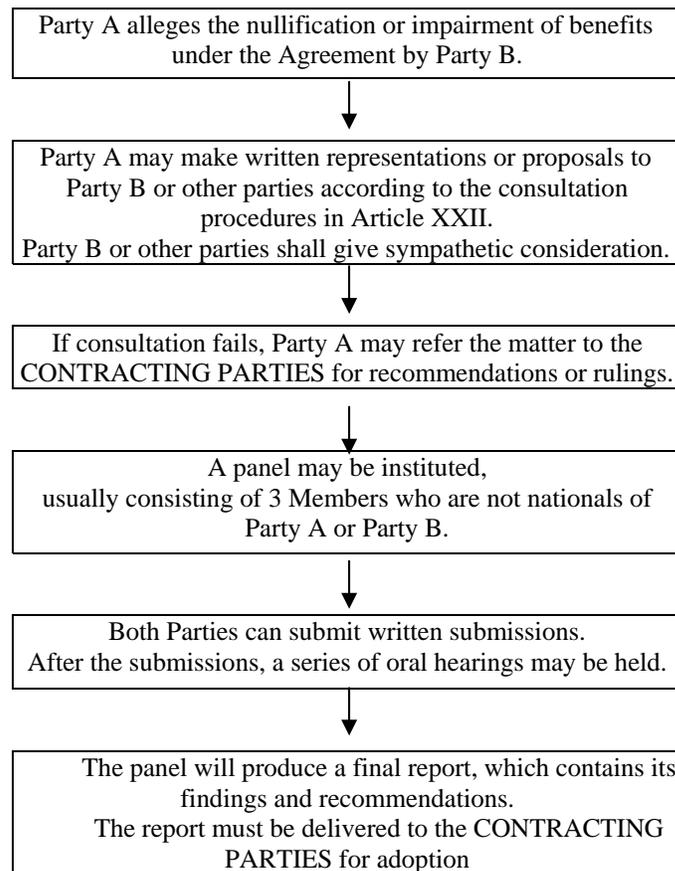
²¹ GATT, *supra* note 5, art. XXIII. (“1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary²¹ to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.”)

²² Michael Patrick Tkacik, *Post-Uruguay GATT/WTO Dispute Settlement: Substance, Strengths, Weakness, and Cause for Concern*, 9 Int'l Legal Persp., 169 (1997).



(The figure is made by the author)

Figure 1. GATT Dispute Settlement Procedure

The Panel report could contain three possible findings: the measure in question could be found to be directly inconsistent with specific GATT provisions (a violation nullification or impairment); or determined to be indirectly nullifying or impairing some benefits accruing under GATT (a non-violation nullification or impairment); or there could simply be no nullification or impairment. Typically, if a violation nullification or impairment were found to exist, the Panel would request that the measure in question be removed or that some other measures should be applied. As a last resort, if a party still did not comply with the decision, the Council²³ could

²³ Jackson, *supra* note 1, at 68. (“Council” is the standing body of the GATT, which met regularly and disposed of most of the business of GATT. This body was not provided in the GATT text, but arose through practice and decision of the CONTRACTING PARTIES. The example for Council to authorize retaliation was only once. It took

suggest retaliation by authorizing the successful Contracting Party to suspend concessions in a reciprocal fashion.²⁴

In the GATT Council, consensus on dispute settlement was required at each of three stages: establishment of a panel, adoption of a panel report, and authorization of the suspension of concessions. The consensus requirement was a weakness allowing a losing party to block any of these three decisions.²⁵

2. WTO Overview

a. History/Background In September 1986, the Uruguay Round was begun in Punta del Este, Uruguay, where countries negotiated the Ministerial Declaration for the Round.²⁶ In this Declaration, countries acknowledged the inefficiencies of the GATT and acknowledged the need for a more complete trading organization.

The GATT Contracting Parties eventually accepted a negotiating agenda that covered virtually every outstanding trade policy issue.²⁷ The Uruguay Round was intended to extend the

place between the Netherlands and the United States in 1953. The dispute was concerning the dairy products from the Netherlands.). See also *Netherlands Measures of Suspension of Obligations to the United States*, GATT, B.I.S.D. (1 Supp.) at 32 (1953).

²⁴ ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 238, 120 (1993).

²⁵ Jackson, *supra* note 14, at 65. See also Porges, *supra* note 13, at 70 (“The dispute settlement provisions of Article XXIII of the GATT 1947 call for the Contracting Parties to investigate complaints brought to them, and permit the Contracting Parties to authorize a contracting party to suspend concessions or other GATT 1947 obligations with respect to another contracting party. Collective decisions were required for establishment of a panel of experts to investigate the dispute, for adoption (or not) of the panel’s report, and for authorization of suspension of concessions.”).

²⁶ WORLD TRADE ORGANIZATION, GATT BASIC INSTRUMENTS AND SELECTIVE DOCUMENTS, Supp. 19ff. (1987).

²⁷ World Trade Organization, *Understanding the WTO: Basics, The Uruguay Round*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

trading system into several new areas, and to reform trade in the sensitive sectors of agriculture and textiles.²⁸ All the original GATT articles were included in the talks.

b. Before the Uruguay Round The Uruguay Round is frequently referred to as the birth of the initial idea of a unified trading system. But by the end of the Uruguay Round, there had actually been no discussion on the establishment of a world organization on international trade.²⁹ Canada had originally proposed the creation of an international trade institute in 1990. During that same year, the European Community (which later became the European Union) also suggested the establishment of a trade organization, calling it the “Multilateral Trade Organization, MTO.”³⁰ At the end of the Uruguay Round, Professor John Howard Jackson³¹ from the United States saw the opportunity to create a more complete and detailed trade system and recommended the establishment of an international organization.

c. During the Uruguay Round At the start of the Uruguay Round in Punta del Este, Contracting Party ministers accepted a negotiating agenda, which included nearly every important trade policy issue. Since the Uruguay agenda covered almost all topics in the GATT, the ministers gave themselves four years to complete it.

²⁸ *Id.*

²⁹ World Trade Organization, *WTO/GATT Ministerial Declaration on the Uruguay Round (Declaration of 20 September 1986)*, available at <http://www.jus.uio.no/lm/wto.gatt.ministerial.declaration.uruguay.round.1986/landscape.pdf>. See also Jackson, *supra* note 14, at 38-41.

³⁰ JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT*, 301 (1995). TERENCE STEWART, *GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1994)*, 1942 (1999).

³¹ University Professor; A.B., Princeton; J.D., University of Michigan; LL.D. (Hon.), Hamburg University (Germany); LLD (Hon.), European University Institute, Florence, Italy.

In December, 1988, ministers gathered in Montreal, Canada, for an assessment of progress.³² But these talks ended in a deadlock, with the major disagreement focusing mostly on agricultural trade rules.³³ The European Community's negotiating mandate on agricultural products was so limited that some agricultural exporting countries walked out, and the negotiations were on the edge of collapse.³⁴ The deadlock was not resolved until the next meeting held in Geneva.

d. After the Uruguay Round To break the 1991 deadlock, GATT Director-General Arthur Dunkel prepared a draft, which became known as the *Dunkel Text*, which included the creation of a new international organization. This draft was put on the agenda in Geneva in December 1991, and became the basis for the final agreement. Later, in 1992, the US and EU reached a deal known as the Blair House accord. In this agreement, the two parties settled most of their differences on agricultural issues.³⁵ On April 15th, 1994, the package of agreements was opened for signature in Marrakesh.³⁶ On January 1, 1995, the World Trade Organization came into being.

This series of important events is delineated chronologically in the following table.³⁷

³² World Trade Organization, *supra* note 27.

³³ *Id.*

³⁴ Porges, *supra* note 13, at 77.

³⁵ World Trade Organization, *supra* note 27.

³⁶ 羅昌發, 國際貿易法, *translated in* CHANG-FA LO, THE INTERNATIONAL TRADE LAWS, 9 (2002). The Declaration was signed by ministers from most of the 123 participating governments. The full text is *available at* http://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm.

³⁷ World Trade Organization, *supra* note 27.

Table 4. Series of Events in Post-Uruguay Round

Date	Place	Events
1986/9	Punta del Este, Uruguay	Launch of the Uruguay Round
1988/12	Montreal	Ministerial mid-term review
1989/4	Geneva	Ministerial mid-term review completed
1990/12	Brussels	Ministerial meeting in deadlock and it has to be “closing”
1991/12	Geneva	First draft of Final Act completed. (The Dunkel Text)
1992/11	Washington	US and EC achieved “Blair House” breakthrough on agriculture
1993/7	Tokyo	Quad achieve market access breakthrough at G7 summit
1993/12	Geneva	Most negotiations end (some market access issues remain)
1994/4/15	Marrakesh	Agreement was open for signature (Marrakesh Declaration)
1995/1/1	Geneva	WTO established, and the WTO Agreements take effect

B. BASIC FRAMEWORK OF THE WTO

Established in 1995, The World Trade Organization (WTO) is a multilateral trading system that inherited many of its components from the GATT.

The WTO Agreement in general combines two functions:³⁸

- (1) To provide a coherent legal framework for applying all of the Uruguay Round agreements and making the single undertaking a reality.
- (2) To deal with issues that are common to international organizations generally: what the organization’s scope is to be, how it is to be structured, who can participate, how decisions are to be made, and housekeeping issues such as the budget, the secretariat, legal personality, privileges and immunities, and statute of the organizations, and other treaty law issues.

³⁸ Porges, *supra* note 13, 81-82.

An overall understanding of the WTO from different perspectives can be gained by considering the questions that follow.

1. Why Does the World Need the WTO?

The purpose and objectives of the WTO are stated in the agreement's preamble: to recognize the importance of world cooperation in trade, and to increase the standard of living of all human beings.³⁹ Compared with the preamble of the GATT 1947,⁴⁰ the WTO Agreement includes reference to environmental protection, demonstrating that countries are concerned not only with trade, but also with other issues beyond trade.

In the GATT 1947, the preamble included language focused on, "developing the *full use of the resources of the world* and expanding the production and exchange of goods (emphasis added)." The changes in the WTO wording indicate that the international community is not just considering economic benefits but it is also concerned about its citizens' financial and environmental well-being.

These fundamental differences are not without legal significance. Although the preamble of a treaty does not have any binding force *per se*, in *US-Shrimp*, the Appellate Body held that, "As this preambular language reflects the intentions of negotiators ... *we believe it must add*

³⁹ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement], preamble para.1. ("*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development....").

⁴⁰ GATT, *supra* note 5, preamble. ("Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods")

colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreements.”⁴¹

Moreover, in Article II.1, the WTO Agreement states that the WTO is to, “provide the common institutional framework for the conduct of trade relations among its Members.....

2. What Is the Scope of the WTO?

The WTO Agreement provides the umbrella for administering an additional twenty-nine Agreements and Understandings, four Annexes, and one Final Act. These agreements can be categorized in two groups: Multilateral Trade Agreements and Plurilateral Trade Agreements. Agreements in Annexes 1, 2, and 3 are multilateral trade agreements while agreements in Annex 4 are plurilateral agreements.

All the Members are bound by the multilateral trade agreements as a single undertaking according to WTO Article II(2);⁴² however, with respect to the obligations set out under the plurilateral trade agreements, they are binding only among the countries who are parties to them.⁴³

⁴¹ Appellate Body Report, *United States – Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R (12 October 1998), at 153

⁴² WTO Agreement, *supra* note 39, art. II(2) (“The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, binding on all Members”).

⁴³ WTO Agreement, *supra* note 39, art.II:3 (“The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.”)

a. Multilateral Trade Agreements Annex 1 is divided into three parts: 1A, 1B, and 1C.

Annex 1A contains several agreements, which include:

- (a) the General Agreements on Tariffs and Trades 1994, which incorporates and amends the GATT 1947;
- (b) the Agreement on Agriculture;
- (c) the Agreement on the Application of Sanitary and Phytosanitary Measures;
- (d) the Agreement on Textiles and Clothing;
- (e) the Agreement on Technical Barriers to Trade;
- (f) the Agreement on Trade-Related Investment Measures;
- (g) the Agreement on Implementation of Article VI of the GATT 1994;
- (h) the Agreement on Implementation of Article VII of the GATT 1994;
- (i) the Agreement on Preshipment Inspection;
- (j) the Agreement on Rules of Origin;
- (k) the Agreement on Import Licensing Procedures;
- (l) the Agreement on Subsidies and Countervailing Measures; and
- (m) the Agreement on Safeguards.

Annex 1B is the General Agreement on Trade in Services (GATS), and 1C is the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement. Annex 2 is the Understanding on the Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU). Annex 3 is the Trade Policy Review Mechanism (TPRM).

b. Plurilateral Trade Agreements All agreements listed under Annex 4 are plurilateral trade agreements. They are the Agreement on Trade in Civil Aircraft (4A), the Agreement on

Government Procurement (4B), the International Dairy Agreement (4D), and the International Bovine Meat Agreement (4D)

3. Who Can Participate in the WTO?

The WTO offers two different categories of Membership: original Membership and accession.⁴⁴

In the GATT era, participating countries were called Contracting Parties, while in the WTO era, the participants are called Members.

a. Original Membership Article XI of the WTO Agreement stipulates that,

The Contracting Parties to GATT 1947...which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO for the initial group of countries.⁴⁵

Those who, as of 1994, had already complied with the obligations set forth in this article and accepted the WTO Agreement package automatically became Members of the WTO. However, for those who were original Contracting Party, but did not immediately accept the WTO Agreement, Article XIV provides a Grace Period of up to 2 years after the date of the WTO agreement's entry into force for retention of Member status.⁴⁶

⁴⁴ Porges, *supra* note 13, at 91.

⁴⁵ WTO Agreement, *supra* note 39, art. XI, paragraph 1. ("The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.")

⁴⁶ WTO Agreement, *supra* note 39, art XIV, paragraph 1. ("This Agreement and the Multilateral Trade Agreements annexed.....shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance")

b. Accession In the GATT era, accession was governed by Article XXXIII, which required a two-thirds vote of approval by the existing CONTRACTING PARTIES.⁴⁷ The primary influencing factor in receiving enough votes for accession was the applicant's willingness to negotiate tariff concessions in order to fulfill the *reciprocity* requirements.⁴⁸ This process was sometimes referred to as *negotiating the ticket of admission* into GATT.⁴⁹

In the WTO era, the accession procedure is the same as it was in the GATT era, and is stipulated in Article XII of the WTO Agreement.⁵⁰ However, unlike the GATT era, in order to accede to the WTO, a country must to accept all multilateral agreements, and cannot choose to opt out of any of them.

Another interesting change regarding Membership in the WTO system is that full national sovereignty is not an *absolute* condition for participating in the WTO.⁵¹ Article XII of WTO Agreement states that, “[a]ny State or *separate customs territory* possessing full autonomy in the conduct of its external commercial relations and of the other matters... may accede to this Agreement.” (emphasis added) This Article shows that WTO is trying to integrate the world economic markets in spite of political issues.

⁴⁷ GATT, *supra* note 5, art. XXXIII. (“A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.”).

⁴⁸ Jackson, *supra* note 1, at 47.

⁴⁹ Jackson, *supra* note 1, at 48.

⁵⁰ WTO Agreement, *supra* note 39, art. XII, (“a. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

b. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

c. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.”)

⁵¹ Jackson, *supra* note 1, at 48.

To date, one hundred fifty-one countries have joined the WTO as Members and thirty-one countries have obtained observer status. Following this chapter are tables that list Member countries with their dates of Memberships (Table 6), and observer nations (Table 7).⁵²

4. What Does The WTO Do?

In the WTO Agreement, Article III stipulates five different functions of the WTO:

a. Implementation of Agreements Article III says that, “[t]he WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.”⁵³

The WTO agreements require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted.⁵⁴ Various WTO councils and committees seek to ensure that these requirements are being followed and that WTO agreements are being properly implemented.⁵⁵

b. Dispute Settlement Several changes were made regarding the old GATT dispute settlement system. In Article II of the Understanding on the Rules and Procedures Governing the

⁵² World Trade Organization, *UNDERSTANDING THE WTO: THE ORGANIZATION Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁵³ WTO Agreement, *supra* note 39, art. III, paragraph 1.

⁵⁴ World Trade Organization, *supra* note 53.

⁵⁵ *Id.*; Examples can also be found in the obligations of the Committee on Sanitary and Phytosanitary Measures (the SPS committee) and the work of the WTO Committee on Safeguards. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 33 I.L.M. 1125, 1153 (1994) [hereinafter WTO SPS Agreement], art. 12, paragraph 2. (“The Committee shall encourage and facilitate *ad hoc* consultations or negotiations among Members on specific sanitary or phytosanitary issues.....”; Agreement on Safeguards, Article 13 states, “.....The Committee will have the following functions: (a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement.....”).

Settlement of Disputes (DSU), the WTO establishes a Dispute Settlement Body (DSB) to govern the process of dispute settlement.⁵⁶ The function of the DSB includes administering these rules and procedures, establishing panels, adopting Panel and Appellate Body reports, maintaining surveillance of implementation of rulings and recommendations, and authorizing suspension of concessions and other obligations under the covered agreements.⁵⁷ Not all international organizations have such an integrated system for handling the dispute settlement process. The WTO DSU inherited some fundamental principles from the GATT and revised some shortcomings. The dispute settlement mechanism plays a key role because it can ensure the functioning and stability of an organization. Hence, the WTO dispute settlement system is referred to as the “jewel in the crown.”⁵⁸ In Article 3.2 of the DSU, the following sentence clearly emphasizes its importance: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”

With a more intact dispute settlement system, the WTO shows its commitment to reinforce its set game rules. The DSU not only provides a more detailed procedure for dispute

⁵⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU], art 2. (“1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term “Member” as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.”)

⁵⁷ Porges, *supra* note 13, at 95.

⁵⁸ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS*, 94 (2005).

resolution, but it also sets time limitations, which could result in disciplining Members more effectively:

Table 5. Dispute Resolution Time Line⁵⁹

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, Members may settle their dispute themselves at any stage. Totals are also approximate	
60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO Members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	(with appeal)

Two other significant changes have also been made in the dispute settlement process. One is found in the process for the establishment of a Panel, and the other is the creation of the Appellate Body. Organizing a Panel for the resolution of a dispute in the GATT era required consensus voting.⁶⁰ Therefore, any proposal had to be mutually agreed upon by all Contracting Parties. However, in the practice of WTO, as long as a complaining Member makes a request, the DSB will set up a Panel to handle the issue.⁶¹ Thus, the consensus process has been changed to reverse consensus, and it now requires a unanimous agreement *not* to set up a requested Panel.

⁵⁹ World Trade Organization, *UNDERSTANDING THE WTO: SETTLING DISPUTES A unique contribution*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

⁶⁰ Porges, *supra* note 13, at 70. (“Collective decisions were required for establishment of a panel of experts to investigate the dispute, for adoption (or not) of the Panel’s report, and for authorization of suspension of concessions. As of 1979, the consensus rule applied to all three of these decisions, with the result that the defending government could block establishment of a panel, could block adoptions of a panel’s report, and could block any authorization of retaliation.”).

⁶¹ DSU, *supra* note 56, art. 6. (“If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel.”).

Article 17 of the DSU gives Members a right to file an Appellate review.⁶² The permanent Appellate Body is composed of seven persons, each serving a four-year term, and has the right to uphold, modify, or reverse the decision of a Panel.⁶³

In the GATT era, after the Panel reached a conclusion, a unanimous decision of all Contracting Parties was required to adopt its conclusion and recommendations.⁶⁴ This procedure gave the dissenting party the chance to obstruct the process of adoption of a Panel decision,⁶⁵ and thus allowed for intentional and arbitrary delay in the process of dispute settlement. This has been changed. Unlike the GATT system, the present WTO DSU system is changed into the *reverse* consensus decision, which means that a report is deemed adopted unless there is a consensus against adoption.⁶⁶ If an appeal is taken, however, then the Panel report is not adopted.⁶⁷ These changes have strengthened the role of dispute settlement process in the WTO.

⁶² DSU, *supra* note 56, art 17 para.1. (“A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.”).

⁶³ DSU, *supra* note 56, art. 17. (“2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor’s term. 3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body Membership shall be broadly representative of Membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.”)

⁶⁴ Jackson, *supra* note 1, at 68. (“for the Panel to make its report and deliver it to the Council...The practice then became firmly established that if the Council approved the report by consensus it became binding; if it did not approve, the report would not have a binding status. The problem was consensus. In effect, the procedure which relied on consensus meant that the nation that lost in the Panel...could block the Council action by raising objections to the consensus...This blocking was deemed to be the most significant defect in the GATT process.”)

⁶⁵ There are several examples of the obstruction. Please see Norio Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, 12 *J. International Arbitration*, no.3, p.106-8 (1995).

⁶⁶ DSU, *supra* note 56, art. 16 para. 4. (“Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.”) *See*

An overview of the whole dispute settlement process is illustrated in the following Figure:⁶⁸

also Jackson, *supra* note 1, at 76. (Professor Jackson explained the term “reverse consensus.”)

⁶⁷ *Id.*

⁶⁸ World Trade Organization, *UNDERSTANDING THE WTO: SETTLING DISPUTES The panel process*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm.

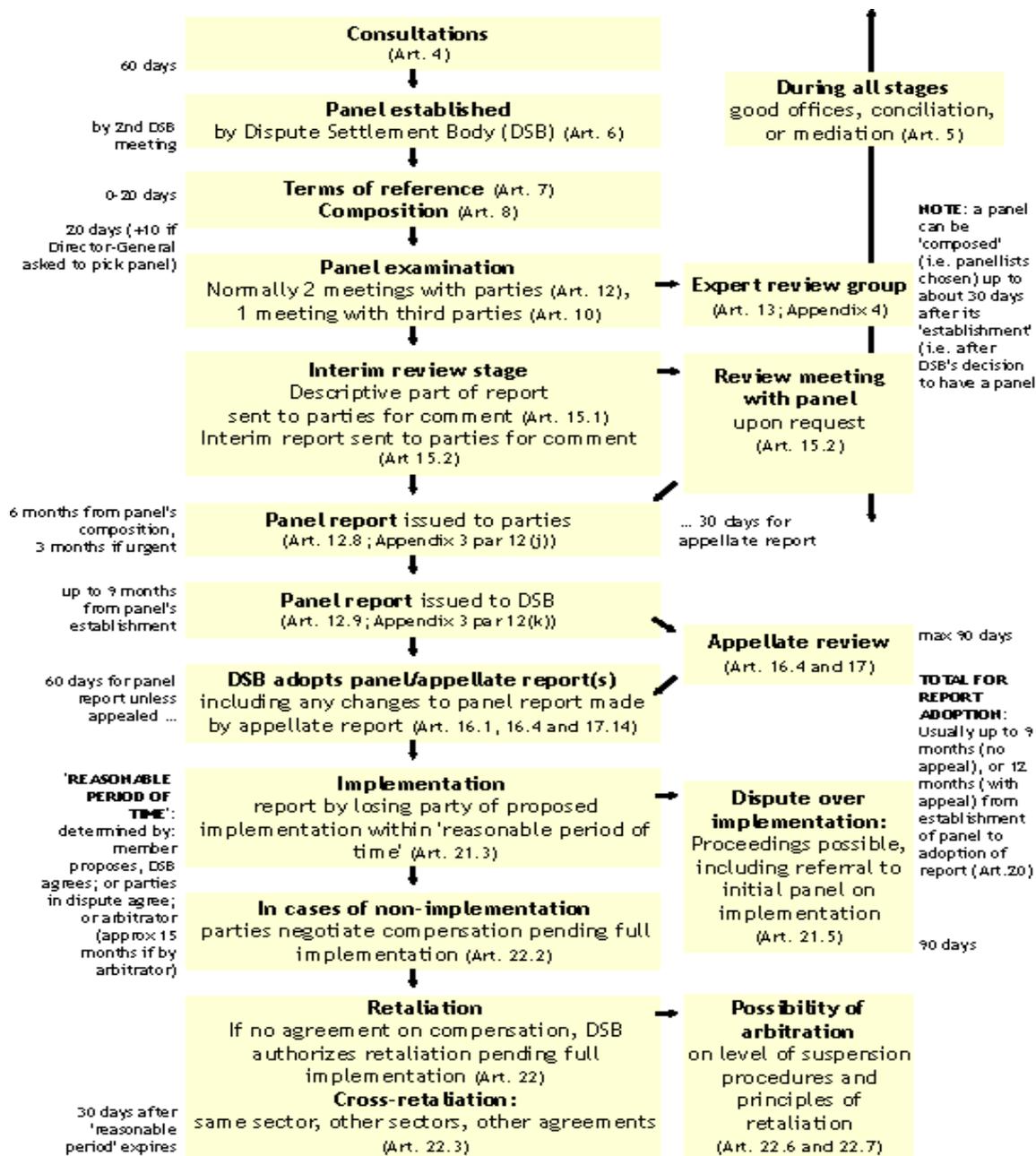


Figure 2. Dispute Settlement Process

c. Trade Policy Review The WTO Agreement provides that, “[t]he WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the “TPRM”) provided for in Annex 3 to this Agreement.”⁶⁹ The purpose of the TPRM is:⁷⁰

- (1) to achieve greater transparency in, and understanding of, the trade policies and practices of Members; and
- (2) to contribute to improved adherence by all Members to rules, disciplines and commitments made under the WTO Agreements.⁷¹

The TPRM is responsible for the periodic review of an individual Member’s domestic trade policy. The four largest economies, The European Union, the United States, Japan, and Canada, are subject to trade policy review every two years.⁷² The next 16 Members are to be reviewed every four years.⁷³ Others are reviewed every six years.⁷⁴ The least-developed countries may qualify for an exception and be given a longer time period.⁷⁵

d. Co-operation with the IMF and World Bank The fourth WTO function stipulated in Article III is found in the assertion that, “[w]ith a view to achieving greater coherence in global

⁶⁹ WTO Agreement, *supra* note 39, art. III, paragraph 4.

⁷⁰ Trade Policy Review Mechanism, para. A(i). (“The purpose of the Trade Policy Review Mechanism (“TPRM”) is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members’ trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.”)

⁷¹ Bossche, *supra* note 60, at 95.

⁷² Trade Policy Review Mechanism, para. C(ii). (“The trade policies and practices of all Members shall be subject to periodic review. The impact of individual Members on the functioning of the multilateral trading system, defined in terms of their share of world trade in a recent representative period, will be the determining factor in deciding on the frequency of reviews. The first four trading entities so identified (counting the European Communities as one) shall be subject to review every two years. The next 16 shall be reviewed every four years. Other Members shall be reviewed every six years, except that a longer period may be fixed for least-developed country Members....”)

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.”⁷⁶ In order to create greater international economic integration, the WTO has agreements with both the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank).⁷⁷ The WTO provides greater international economic integration by working closely with them.

C. CURRENT STATUS OF THE WORLD TRADE ORGANIZATION

The major difference between the WTO and other international organizations⁷⁸ is that all major decisions are made by the membership as a whole, either by ministers or by their ambassadors or delegates.⁷⁹ Decisions are normally taken by consensus.⁸⁰ This part will introduce some major institutional elements of the WTO.

⁷⁶ WTO Agreement, *supra* note 39, art. III, paragraph 5.

⁷⁷ Agreement between the International Monetary Fund and the World Trade Organization, WT/GC/W/43, Annex I, 11/4/1996; Agreement between the International Bank for Reconstruction and Development and the World Trade Organization, WT/GC/W/43, Annex II, 11/4/1996.

⁷⁸ For example, in World Bank and International Monetary Fund, power is delegated to a board of directors or the organization’s head.

⁷⁹ World Trade Organization, *UNDERSTANDING THE WTO: THE ORGANIZATION Whose WTO is it anyway?*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

⁸⁰ WTO Agreement, *supra* note 39, art. IX para. 1. (“The WTO shall continue the practice of decision-making by *consensus* followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.”). *See also* World Trade Organization, *supra* note 80.

1. The Ministerial Conference and Other Bodies

Getting more than one hundred fifty Members to agree on something can be challenging. However, the consensus system also makes the result more acceptable to the Members since no country opposes that result.⁸¹ The WTO remains a *Member-driven, consensus-based* organization.⁸²

Article IV of the WTO Agreement lays out the organization's structure. It can be divided into four different categories: The Ministerial Conference,⁸³ General Councils,⁸⁴ Special Councils,⁸⁵ and Committees.⁸⁶ Currently, there are 70 WTO bodies, 34 of which are standing bodies.⁸⁷

a. Highest Authority: The Ministerial Conference The WTO is controlled by all Member states, and Members normally make their decisions through a consensus-based process. Members make these decisions in councils and committees.⁸⁸

The Ministerial Conference has the most important role in the WTO system. It has to meet at least once every two years. Article IV(1) specifies that the Ministerial Conference “shall carry out the functions of the WTO and take actions necessary to this effect...[and] shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements.”

⁸¹ World Trade Organization, *supra* note 80.

⁸² *Id.*

⁸³ WTO Agreement, *supra* note 39, art. IV, para. 1.

⁸⁴ *Id.* at para. 2.

⁸⁵ *Id.* at para. 5.

⁸⁶ *Id.* at para. 7.

⁸⁷ Minutes of Meeting, WT/GC/M/73 (11, March, 2002).

⁸⁸ WTO Agreement, *supra* note 83.

b. Second Level: The General Council, in Three Guises Everyday activities between Ministerial Conferences are handled by three bodies:

- (a) The General Council deals with all sectors within the WTO, including goods, services, and agriculture. The Council is composed of representatives of all the Members, and meets as appropriate, or about seven times a year.⁸⁹ It can also discharge the responsibilities of both the DSB and the TPRB.⁹⁰
- (b) The Dispute Settlement Body has its own chairman and may establish necessary rules of procedure as long as they are for the fulfillment of those responsibilities.⁹¹
- (c) The Trade Policy Review Body may also have its own chairman and establish necessary rules of procedure as long as they are for the fulfillment of those responsibilities.⁹²

c. Third Level: Special Councils (Councils for Each Broad Area of Trade, And More) and Committees Three other councils, each handling trade in different areas, report to the General Council.⁹³ They are:

- (a) the Council for Trade in Goods (Goods Council);
- (b) the Council for Trade in Services (Services Council); and
- (c) the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council)

Each council deals with its respective areas of trade. These Councils also oversee the functioning of the Goods agreement (GATT), GATS, and TRIPS, and have subsidiary bodies.

⁸⁹ WTO Agreement, *supra* note 84.

⁹⁰ *Id.* at para. 3 and para. 4.

⁹¹ *Id.* at para. 3.

⁹² *Id.* at para. 4.

⁹³ WTO Agreement, *supra* note 85.

Six other bodies report to the General Council. Because their missions and scopes are more limited, they are called *Committees*. Their responsibilities include trade and development, the environment, regional trading arrangement, and administration.⁹⁴

In 1996, the Singapore Ministerial Conference decided to establish new working groups to handle the investment and competition policy, transparency in government procurement, and trade facilitation.⁹⁵ Two subsidiary organs are responsible for the plurilateral agreements and have to inform the General Council of their activities regularly.⁹⁶

d. Fourth Level: Various Committees This level is comprised of many specialized committees working on different issues. As previously mentioned, several subsidiary bodies sit under the Councils. The Goods Council's subsidiary bodies, for example, comprise 11 committees dealing with specific subjects, including agriculture, market access, subsidies, and anti-dumping measures.⁹⁷

DSB, has two subsidiary bodies: Dispute settlement *Panels* of experts appointed to adjudicate unresolved disputes and the *Appellate Body* that deals with appeals.⁹⁸ They both provide the Members a place for discussion and negotiation on current issues and serve as a connection between Members and governmental officials.⁹⁹ The Figure below provides a detailed structure of the WTO:

⁹⁴ *Id.* at para. 7.

⁹⁵ World Trade Organization, *supra* note 80.

⁹⁶ WTO Agreement, *supra* note 39, art. IV para. 8.

⁹⁷ World Trade Organization, *supra* note 80.

⁹⁸ *Id.*

⁹⁹ Porges, *supra* note 13, at 90.

WTO structure

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, and plurilateral committees.

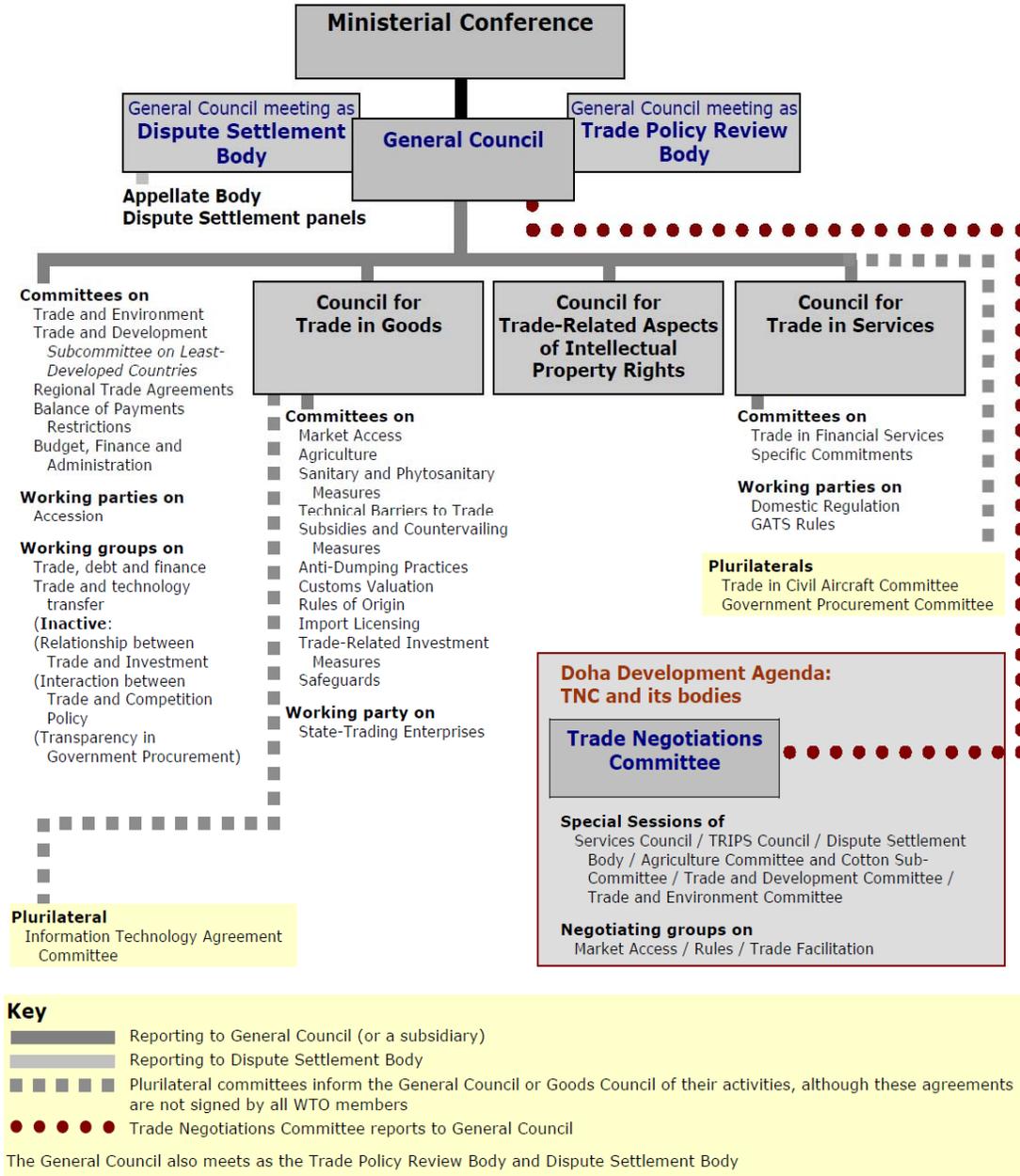


Figure 3. WTO Structure

2. Non-Discrimination Principles

Discrimination among states in the form of protectionism was common practice in the 1930s.¹⁰⁰ After World War II, the principle non-discrimination norms were included in the GATT.¹⁰¹ The WTO, again, recognizes the importance of eliminating discrimination in trade among states.¹⁰²

Two types of non-discrimination principles are embodied in the GATT/WTO: Most-Favored-Nation (MFN) treatment and the National Treatment (NT) obligation.¹⁰³ The following paragraphs will discuss these two principles in the GATT/WTO.

a. Most-Favored-Nation (MFN) Treatment MFN treatment can be found in GATT Article I, GATS Article II, and TRIPS Article 4. It is best described as the principle of not discriminating among one's trading partners.¹⁰⁴

What Is MFN Treatment?

The history of MFN treatment dates back to the 12th century.¹⁰⁵ In Article I of GATT, the MFN principle is listed at the top of other obligations. This principle obliges every country to treat commercial activities of a particular foreign country or its citizens at least as favorably as it treats the activities of any other country.¹⁰⁶ It can be described in the following figure:¹⁰⁷

¹⁰⁰ Bossche, *supra* note 60, at 208.

¹⁰¹ JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO*, 57 (2000).

¹⁰² WTO Agreement, *supra* note 39, preamble paragraph 3. (“*Being* desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the *elimination of discriminatory treatment in international trade relations...*”)

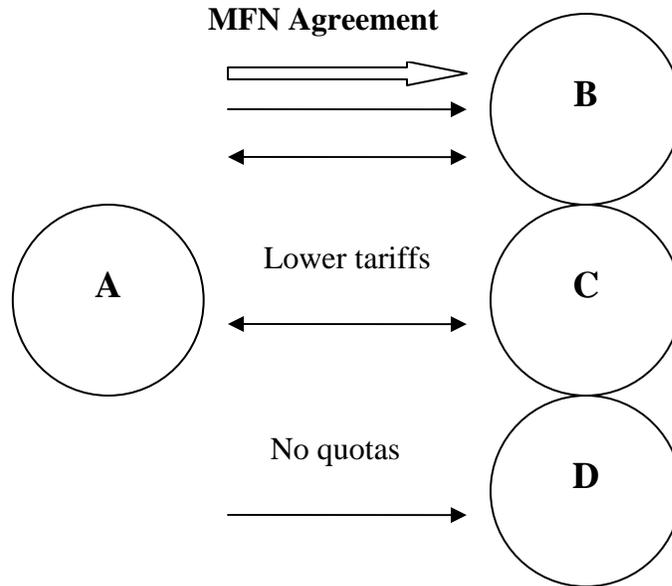
¹⁰³ See generally Jackson, *supra* note 103, Part III.5 (Introducing these two non-discrimination principles in details).

¹⁰⁴ WTO Glossary, http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm.

¹⁰⁵ See generally THE MOST-FAVORED-NATION PROVISION, EXECUTIVE BRANCH GATT STUDY, NO.9, 93D CONG., 2D SESS. 1974, 1.

¹⁰⁶ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM*, 160-161 (1989).

¹⁰⁷ This figure is created by the author.



Whatever A granted C or D in a bilateral agreement, B would automatically be entitled to without entering further agreements with A.

Figure 4. MFN Treatment

Why Do We Need MFN Treatment?

There are good reasons to incorporate MFN treatment in GATT/WTO:¹⁰⁸

- (1) From the trade policy perspective, MFN treatment can ensure both countries' trade concessions actually work. Without MFN treatment, one country can sign several more favorable treaties with other countries after making a prior most favorable treaty with another country. The later ones will make the previous one void since the previous one is no longer the most favorable.
- (2) In the international trade system, many interests and privileges are procured through negotiations. Big countries generally possess more bargaining power than small countries. By applying the MFN treatment principle, there will be less

¹⁰⁸ Jackson et al., *supra* note 30, at 437. See also Jackson, *supra* note 108, at 134-135.

tension among countries, and the fairness of international trade can be strengthened.

(3) MFN treatment can limit domestic administrative branches' discretionary powers.

The less influence/interference a domestic administration has, the more effectively international trade can function.

Based on these reasons, the text of GATT/WTO provides that,

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country *shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*¹⁰⁹

b. The National Treatment (NT) Principle The NT principle means giving others the same treatment as is given to one's own nationals.¹¹⁰ It is included in GATT Article 3, GATS Article 17, and TRIPS Article 3.¹¹¹

What is the NT Principle?

The purpose of MFN treatment and the NT principle is the same: To make sure Members are treated non-discriminatorily. However, the MFN principle asks each Member state to treat other Member states as equal states, no less or no more favorably. Hence, the MFN principle deals with Members' laws *externally*.

¹⁰⁹ GATT, *supra* note 5, art. I:1.

¹¹⁰ World Trade Organization, *supra* note 104.

¹¹¹ *Id.*

On the other hand, the NT principle asks Member state to treat the products imported from other Member states as equal to its own domestic products. Therefore, the NT principle deals with Members' laws *internally*.

Why Do We Need the National Treatment Principle?

GATT Article III requires that Members refrain from using methods other than customs or border measures to distort trade with other Members. Since GATT has set up rules on customs¹¹² and border measures,¹¹³ GATT Article III targets primarily internal taxes or any measures that might affect internal sales. This fits the non-discrimination purpose, because with the NT principle Members cannot freely exercise their discretion in domestic regulations in a manner that would result in protectionism.¹¹⁴

Following this reasoning, the GATT Panel in *United States-Taxes on Petroleum and Certain Imported Substances* held that,

The general prohibition of quantitative restrictions under Article XI...and the national treatment obligation of Article III...have essentially the same rationales, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade.¹¹⁵

This report of the GATT Panel was adopted on 17 June 1987, and emphasizes the importance of the NT principle within the WTO organization. However, the NT principle is not absolute. Members still have the power to disregard this principle under certain specialized

¹¹² GATT, *supra* note 5, art. II.1.(a) states that, "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." This article restrains Members from arbitrarily raising their custom rates.

¹¹³ GATT, *supra* note 5, art. XI.1 states that, "No prohibitions or restrictions other than duties, taxes or other charges.....shall be instituted or maintained.....on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." This article prohibits Members from using quantitative restriction on imported products.

¹¹⁴ JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, at 273-274.

¹¹⁵ *United States-Taxes on Petroleum and Certain Imported Substances* (June, 17, 1987), GATT, BISD, 34S, at 160.

circumstances. This view was made clear in the Italian Discrimination case against Imported Agricultural Machinery, where the Panel stated that, “it was not the intention of the General Agreement to limit the right of a contracting party to adopt measures which appear to be necessary to foster its economic development or to protect a domestic a industry, provided that such measures were permitted by the General Agreement.”¹¹⁶

3. Exceptions to Non-Discrimination Principles

There are two major exceptions to the MFN and NT principles in the WTO organization: general exceptions in GATT Article XX, and examples listed in GATT Article XXIV.

a. GATT Article XX Exceptions Despite the advantages derived from the MFN principle, there are exceptions allowed to this basic concept. GATT Article XX allows exceptions to the MFN principle, when the measure involved is:¹¹⁷

- (1) necessary to protect public morals;
- (2) necessary to protect human, animal or plant life or health;
- (3) relating to the importations or exportations of gold or silver;
- (4) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
- (5) relating to the products of prison labour;

¹¹⁶ *Italian Discrimination against Imported Agricultural Machinery* (Oct. 23, 1958), GATT, BISD, 7S, at 65.

¹¹⁷ GATT, *supra* note 5, art. XX.

- (6) imposed for the protection of national treasures of artistic, historic or archaeological value; or
- (7) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; and so on.

Each category not only has its own criteria, but additional requirements are also stated in the chapeau of Article XX,¹¹⁸ which requires that any exception cannot be applied in an arbitrary or unjustifiable discrimination manner.

b. GATT Article XXIV Exceptions In addition to the general exceptions, two other exceptions result from the authorization of “free trade areas (FTAs)” and “custom unions (CUs).” Some suggested that at the time when GATT was drafted, it was expected to embody those “preferential systems.”¹¹⁹ Both FTAs and CUs are authorized under Article XXIV of the GATT. The historical background and philosophy behind them were the precedents of special frontier tariffs between adjacent countries, and the belief that world welfare could be enhanced by regional trade when restrictions to trade (mainly tariffs) among several countries are totally eliminated.¹²⁰

This “all-or-nothing” idea allows departure from the MFN principle under the GATT system, but there are still loopholes in the Article. These loopholes have endangered the original purposes, and some countries have taken advantage of them by claiming interim agreements as authorized exceptions, which has resulted in more than 100 Article XXIV-type arrangements.

¹¹⁸ GATT, *supra* note 5, art. XX chapeau. (“Subject to the requirement that such measures are not applied in a manner which would constitute *a means of arbitrary or unjustifiable discrimination* between countries...”)

¹¹⁹ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS*, 2ND EDITION, 163-4 (1997).

¹²⁰ *Id.* at 165.

Following the Uruguay Round, an “Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994,” was enacted. It provides more detailed rules regarding FTAs, CUs, and interim agreements.

D. THE WORLD TRADE ORGANIZATION IN THE FUTURE

The establishment of World Trade Organization is one of the great successes in international legal history. However, the resulting progress has not always been smooth. WTO Director-General Pascal Lamy indicated the need for Member cooperation in negotiations by emphasizing three necessary elements:

“One, political leadership... Trade agreements are struck by governments, not by wise men, think tanks or Director-Generals. Leaders must act to convince and spend political capital to make them happen. The time for technical work is long past. It is the hour of politics. **Two, pragmatism and spirit of compromise.** There has to be give and take...Smaller steps that show demonstrable progress might inspire the confidence and trust to weave all topics into a final package **And, three, there has to be a spirit of realism.** Asking for the moon and using empty rhetoric is normal in any negotiation but we are now past that point. We must now seek realistic and creative solutions. To stand behind redlines waiting for others to move only breeds mistrust and stalls the negotiations, postponing benefits to the world economy.”¹²¹

A functioning world economy requires not only a single global organization, but the full participation of its Members as well.

Table 6. WTO Member States

Country	Entry Date	Country	Entry Date
<u>Albania</u>	8 September 2000	<u>Angola</u>	23 November 1996
<u>Antigua and Barbuda</u>	1 January 1995	<u>Argentina</u>	1 January 1995
<u>Armenia</u>	5 February 2003	<u>Australia</u>	1 January 1995
<u>Austria</u>	1 January 1995	<u>Bahrain, Kingdom of</u>	1 January 1995
<u>Bangladesh</u>	1 January 1995	<u>Barbados</u>	1 January 1995

¹²¹ World Trade Organization, *WTO NEWS: SPEECHES — DG PASCAL LAMY 6 September 2011, Lamy looks at the multilateral trading system of the future* http://www.wto.org/english/news_e/sppl_e/sppl205_e.htm.

Country	Entry Date	Country	Entry Date
<u>Belgium</u>	1 January 1995	<u>Belize</u>	1 January 1995
<u>Benin</u>	22 February 1996	<u>Bangladesh</u>	1 January 1995
<u>Barbados</u>	1 January 1995	<u>Belgium</u>	1 January 1995
<u>Belize</u>	1 January 1995	<u>Benin</u>	22 February 1996
<u>Bolivia</u>	12 September 1995	<u>Botswana</u>	31 May 1995
<u>Brazil</u>	1 January 1995	<u>Brunei Darussalam</u>	1 January 1995
<u>Bulgaria</u>	1 December 1996	<u>Burkina Faso</u>	3 June 1995
<u>Burundi</u>	23 July 1995	<u>Cambodia</u>	13 October 2004
<u>Cameroon</u>	13 December 1995	<u>Canada</u>	1 January 1995
<u>Central African Republic</u>	31 May 1995	<u>Chad</u>	19 October 1996
<u>Chile</u>	1 January 1995	<u>China</u>	11 December 2001
<u>Colombia</u>	30 April 1995	<u>Congo</u>	27 March 1997
<u>Costa Rica</u>	1 January 1995	<u>Côte d'Ivoire</u>	1 January 1995
<u>Croatia</u>	30 November 2000	<u>Cuba</u>	20 April 1995
<u>Cyprus</u>	30 July 1995	<u>Czech Republic</u>	1 January 1995
<u>Democratic Republic of the Congo</u>	1 January 1997	<u>Denmark</u>	1 January 1995
<u>Djibouti</u>	31 May 1995	<u>Dominica</u>	1 January 1995
<u>Dominican Republic</u>	9 March 1995	<u>Ecuador</u>	21 January 1996
<u>Egypt</u>	30 June 1995	<u>El Salvador</u>	7 May 1995
<u>Estonia</u>	13 November 1999	<u>European Communities</u>	1 January 1995
<u>Fiji</u>	14 January 1996	<u>Finland</u>	1 January 1995
<u>Former Yugoslav Republic of Macedonia (FYROM)</u>	4 April 2003	<u>France</u>	1 January 1995
<u>Gabon</u>	1 January 1995	<u>The Gambia</u>	23 October 1996
<u>Georgia</u>	14 June 2000	<u>Germany</u>	1 January 1995
<u>Ghana</u>	1 January 1995	<u>Greece</u>	1 January 1995
<u>Grenada</u>	22 February 1996	<u>Guatemala</u>	21 July 1995
<u>Guinea</u>	25 October 1995	<u>Guinea Bissau</u>	31 May 1995
<u>Guyana</u>	1 January 1995	<u>Haiti</u>	30 January 1996
<u>Honduras</u>	1 January 1995	<u>Hong Kong, China</u>	1 January 1995
<u>Hungary</u>	1 January 1995	<u>Iceland</u>	1 January 1995
<u>India</u>	1 January 1995	<u>Indonesia</u>	1 January 1995
<u>Ireland</u>	1 January 1995	<u>Israel</u>	21 April 1995
<u>Italy</u>	1 January 1995	<u>Jamaica</u>	9 March 1995
<u>Japan</u>	1 January 1995	<u>Jordan</u>	11 April 2000
<u>Kenya</u>	1 January 1995	<u>Korea, Republic of</u>	1 January 1995
<u>Kuwait</u>	1 January 1995	<u>Kyrgyz Republic</u>	20 December 1998
<u>Latvia</u>	10 February 1999	<u>Lesotho</u>	31 May 1995
<u>Liechtenstein</u>	1 September 1995	<u>Lithuania</u>	31 May 2001
<u>Luxembourg</u>	1 January 1995	<u>Macao, China</u>	1 January 1995
<u>Madagascar</u>	17 November 1995	<u>Malawi</u>	31 May 1995
<u>Malaysia</u>	1 January 1995	<u>Maldives</u>	31 May 1995
<u>Mali</u>	31 May 1995	<u>Malta</u>	1 January 1995
<u>Mauritania</u>	31 May 1995	<u>Mauritius</u>	1 January 1995
<u>Mexico</u>	1 January 1995	<u>Moldova</u>	26 July 2001
<u>Mongolia</u>	29 January 1997	<u>Morocco</u>	1 January 1995
<u>Mozambique</u>	26 August 1995	<u>Myanmar</u>	1 January 1995
<u>Namibia</u>	1 January 1995	<u>Nepal</u>	23 April 2004
<u>Netherlands</u> For the Kingdom in Europe and for the Netherlands	1 January 1995	<u>New Zealand</u>	1 January 1995
<u>Nicaragua</u>	3 September 1995	<u>Niger</u>	13 December 1996
<u>Nigeria</u>	1 January 1995	<u>Norway</u>	1 January 1995
<u>Oman</u>	9 November 2000	<u>Pakistan</u>	1 January 1995

<u>Country</u>	<u>Entry Date</u>	<u>Country</u>	<u>Entry Date</u>
<u>Panama</u>	6 September 1997	<u>Papua, New Guinea</u>	9 June 1996
<u>Paraguay</u>	1 January 1995	<u>Peru</u>	1 January 1995
<u>Philippines</u>	1 January 1995	<u>Poland</u>	1 July 1995
<u>Portugal</u>	1 January 1995	<u>Qatar</u>	13 January 1996
<u>Romania</u>	1 January 1995	<u>Rwanda</u>	22 May 1996
<u>Saint Kitts and Nevis</u>	21 February 1996	<u>Saint Lucia</u>	1 January 1995
<u>Saint Vincent & the Grenadines</u>	1 January 1995	<u>Saudi Arabia</u>	11 December 2005
<u>Senegal</u>	1 January 1995	<u>Sierra Leone</u>	23 July 1995
<u>Singapore</u>	1 January 1995	<u>Slovak Republic</u>	1 January 1995
<u>Slovenia</u>	30 July 1995	<u>Solomon Islands</u>	26 July 1996
<u>South Africa</u>	1 January 1995	<u>Spain</u>	1 January 1995
<u>Sri Lanka</u>	1 January 1995	<u>Suriname</u>	1 January 1995
<u>Swaziland</u>	1 January 1995	<u>Sweden</u>	1 January 1995
<u>Switzerland</u>	1 July 1995	<u>Chinese Taipei</u>	1 January 2002
<u>Senegal</u>	1 January 1995	<u>Sierra Leone</u>	23 July 1995
<u>Singapore</u>	1 January 1995	<u>Slovak Republic</u>	1 January 1995
<u>Slovenia</u>	30 July 1995	<u>Solomon Islands</u>	26 July 1996
<u>South Africa</u>	1 January 1995	<u>Spain</u>	1 January 1995
<u>United Arab Emirates</u>	10 April 1996	<u>United Kingdom</u>	1 January 1995
<u>United States of America</u>	1 January 1995	<u>Uruguay</u>	1 January 1995
<u>Venezuela (Bolvarian Republic of)</u>	1 January 1995	<u>Viet Nam</u>	11 January 2007
<u>Zambia</u>	1 January 1995	<u>Zimbabwe</u>	5 March 1995

Table 7. WTO Observers

<u>Afghanistan</u>	<u>Algeria</u>	<u>Andorra</u>	<u>Azerbaijan</u>
<u>Bahamas</u>	<u>Belarus</u>	<u>Bhutan</u>	<u>Bosnia and Herzegovina</u>
<u>Cape Verde</u>	Equatorial Guinea	<u>Ethiopia</u>	Holy See (Vatican)
<u>Iran</u>	<u>Iraq</u>	<u>Lao People's Democratic Republic</u>	<u>Lebanese Republic</u>
<u>Libya</u>	<u>Montenegro</u>	<u>Russian Federation</u>	<u>Samoa</u>
<u>Sao Tomé and Principe</u>	<u>Serbia</u>	<u>Seychelles</u>	<u>Sudan</u>
<u>Seychelles</u>	<u>Sudan</u>	<u>Tajikistan</u>	<u>Ukraine</u>
<u>Uzbekistan</u>	<u>Vanuatu</u>	Yemen	

III. AN OVERVIEW OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The General Agreement on Trade in Services (GATS) is the first multilateral agreement that covers services trade.¹ The GATT 1947 did not regulate services. Only a few of its articles could be considered to affect services, such as Article IV (Special Provisions relating to Cinematograph Films).² The creation of GATS was thus a significant step in international trade law. The international community had been reluctant to control trade in services because that trade did not gain as much attention as did trade in goods.³ Moreover, the question of whether trade in services could be regulated has generally been controversial.⁴

¹ World Trade Organization, *The General Agreement on Trade in Services: An introduction*, 29 March 2006, at 2, available at http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc. WTO LAW – FROM A EUROPEAN PERSPECTIVE, 279 (Birgitte Egelund Olsen ed., 2006).

² General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1999, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS], art. IV. (“If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

- (a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;
- (b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
- (c) Notwithstanding the provisions of subparagraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of subparagraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; *Provided* that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;
- (d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.”)

³ Olsen ed., *supra* note 1, at 280. (“In recent decades national economies and the international economy have increasingly been based on trade in services rather than trade in goods. Trade in services accounts for about 61% of the GDP and more than half of the employment in developed countries. Even though the picture is not yet the same

New technologies have changed regulators' perspectives toward trade in services. Whereas large sectors of the service economy--from hotels to personal services--required face-to-face contacts with customers, scientific developments have made face-to-face interpersonal communication no longer necessary in many service trades.⁵ Most banking services, for example, are managed through electronic information exchange.⁶

Between 1970 and 1980, many countries relaxed their restrictions on domestic services markets.⁷ Fewer restrictions provided more opportunities for service suppliers to grow and compete. Meanwhile, service suppliers began to pay attention to other countries' service markets.

for developing countries, the trend shows increasing economic importance of trade in services, also for developing countries.”)

⁴ JOHN, H, JACKSON, *THE WORLD TRADING SYSTEM*, 306 (1997). (“However, there were a number of conceptual difficulties for a negotiation on the trade in services. First and perhaps most fundamental, was the question whether the normal economic principles of ‘comparative advantage’ would apply to services trade, as well as to trade in goods. Some economists and other writers argued that it would, and although the evidence does not seem to this writer overwhelmingly clear, a judgment to go ahead with international rules seemed appropriate.”)

⁵ World Trade Organization, *supra* note 1. (“The emergence of the Internet has helped to create a range of internationally tradeable product variants - from e-banking to tele-health and distance learning - that were unknown only two decades ago, and has removed distance-related barriers to trade that had disadvantaged suppliers and users in remote locations (relevant areas include professional services such as software development, consultancy and advisory services, etc.).”)

⁶ *Id.*

⁷ *Id.* (“Services have recently become the most dynamic segment of international trade. Since 1980, world services trade has grown faster, albeit from a relatively modest basis, than merchandise flows. Defying wide-spread misconceptions, developing countries have strongly participated in that growth. Whereas in 1980 their share of world services exports amounted to 20%, in 2004 it was 24% on a Balance of Payment (BOP) basis.”)

A. A GENERAL INTRODUCTION TO THE GENERAL AGREEMENT ON TRADES IN SERVICES (GATS)

Increases in trade in services have occurred in both developed and developing countries.⁸ Several policy groups and interested enterprises have emphasized the need to discipline services trade.⁹ However, the complexity of services raised doubts in the services trade negotiations.¹⁰ Still, the Uruguay Round text concerning trade in services is considered to be a positive achievement.¹¹

A service is not defined in the GATS, and the need for an authoritative definition and scope remains controversial.¹² The GATS only lists different “modes” by which services are supplied, and divides the scope of services in this manner. The OECD has defined services as “a diverse group of economic activities not directly associated with the manufacture of goods, mining or agriculture. They typically involve the provision of human value-added in the form of labor, advice, managerial skill, entertainment, training intermediation, and the like.”¹³ Despite the absence of a single agreed upon definition of services within the WTO, the GATS created rules applicable to service trades, representing a new perspective on trade regulation.

⁸ *The Manufacturing Myth*, THE ECONOMIST, March 19, 1994, at 91. *Supra* note 4, at footnote 3. (“In 1994, approximately 70 percent of American jobs were tied to the service sector and total U.S. exports of services reached \$200 billion, see 1994 Annual Report U.S. Trade Representative, 29; a 1991 report to the U.S. Congress estimated that the trade in services accounted for 25 percent of all world trade, see Report to the Congress of Fast-Track Procedures, 1 March 1991, at 51.”)

⁹ *Supra* note 4.

¹⁰ *Id.* footnote 2. (He points out in GATT Uruguay Round Document MTN.GNS/W/120, of 10 July 1991, including a Service Sectoral Classification list of approximately 122 or more sectors.) See also Jude Kearny, *Document of the U.S. Department of Commerce, October 1994, Benefits to Service Industries of the General Agreement on Trade in Services*, 2. (It reports there are about 150 service sectors and subsectors.)

¹¹ *Supra* note 4.

¹² Aly K. Abu-Akeel, *Definition Of Trade In Services Under The Gats: Legal Implications*, 32 GW J. Int’l L. & Econ. 189, 191 (1999).

¹³ The Organization for Economic Co-operation and Development, *The Service Economy*, SCIENCE TECHNOLOGY INDUSTRY BUSINESS AND INDUSTRY POLICY FORUM SERIES, 2000, at 7, available at <http://www.oecd.org/dataoecd/10/33/2090561.pdf>.

The topics dealt with in the GATS can be discerned from a review of its Article headings:

GATS Articles

PART I	SCOPE AND DEFINITION
Article I	
PART II	GENERAL OBLIGATIONS AND DISCIPLINES
Article II	Most-Favoured-Nation Treatment
Article III	Transparency
Article III bis	Disclosure of Confidential Information
Article IV	Increasing Participation of Developing Countries
Article V	Economic Integration
Article V bis	Labour Markets Integration Agreements
Article VI	Domestic Regulation
Article VII	Recognition
Article VIII	Monopolies and Exclusive Service Suppliers
Article IX	Business Practices
Article X	Emergency Safeguard Measures
Article XI	Payments and Transfers
Article XII	Restrictions to Safeguard the Balance of Payment
Article XIII	Government Procurement
Article XIV	General Exceptions
Article XIV bis	Security Exceptions
Article XV	Subsidies
PART III	SPECIFIC COMMITMENTS
Article XVI	Market Access
Article XVII	National Treatment
Article XVIII	Additional Commitments
PART IV	PROGRESSIVE LIBERALIZATION
Article XIX	Negotiation of Specific Commitments
Article XX	Schedules of Specific Commitments
Article XXI	Modification of Schedules
PART V	INSTITUTIONAL PROVISIONS
Article XXII	Consultation
Article XXIII	Dispute Settlement and Enforcement
Article XXIV	Council for Trade in Services
Article XXV	Technical Cooperation
Article XXVI	Relationship with Other International Organization
PART VI	FINAL PROVISIONS
Article XXVII	Denial of Benefits
Article XXVIII	Definitions
Article XXIX	Annexes

This structure of the GATS demonstrates three parts to its basic rules. They are (Part I) the main Articles themselves (containing general rules); (Part II) disciplines and the Annexes

(dealing with rules for specific sectors); and (Part III) “the individual countries’ specific commitments to provide access to their markets, including indications of where countries are temporarily not applying most-favored-nation (MFN) treatment and the principle of non-discrimination (national treatment).”¹⁴ There are two other parts dealing with Members’ commitments to future negotiations with respect to liberalization (Part IV) and the institutional provisions (Part V).

1. The Concept of “Modes” of Services

Article I(2) of the GATS provides that:

For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (1) from the territory of one Member into the territory of any other Member;
- (2) in the territory of one Member to the service consumer of any other Member;
- (3) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (4) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

These four categories have become referred to as separate “modes” of services supply, and the GATS rules distinguish among the various modes.

¹⁴ Olsen ed., *supra* note 1, at 281-282.

a. Mode I - Cross-Border Mode I, known as *cross-border*, describes a situation in which the services supplied from the territory of a Member State are traded into the territory of any other country. This mode may be illustrated as follows:

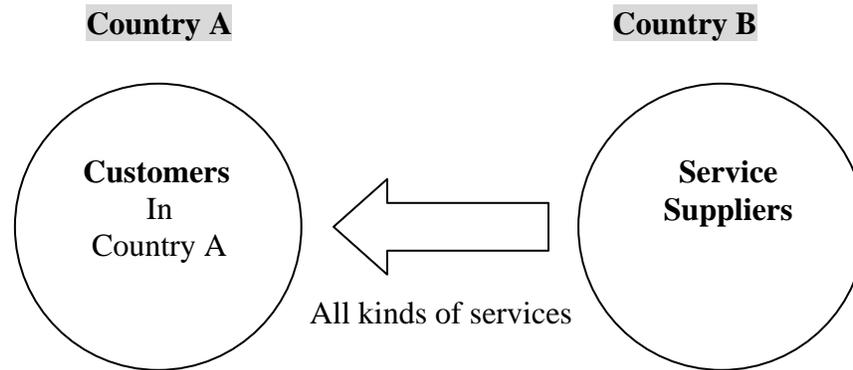


Figure 5. Example A (from the perspective of *importing* country A)

A user in country A receives services from abroad through its telecommunications or postal infrastructure. Examples of this type of supply of services include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.¹⁵

Mode I cross-border trade in services is similar to trade in goods, and the only difference is the regulatory object. The main distinction is that trade in services generally does not allow for physical observation during the process of import/export. Hence, trade in services brings with it difficulties that include problems in collecting taxes.¹⁶ There simply is no physical entry at the border as there is with trade in goods.

b. Mode II - Consumption Abroad Mode II describes the circumstances in which services from the territory of one Member State are supplied to the service consumer of any other

¹⁵ World Trade Organization, *supra* note 1, at 4.

¹⁶ 羅昌發, 國際貿易法, *translated in* CHANG-FA LO, INTERNATIONAL TRADE LAW, 509 (1999).

Member State within the service provider's home state. This particular mode is illustrated as follows:

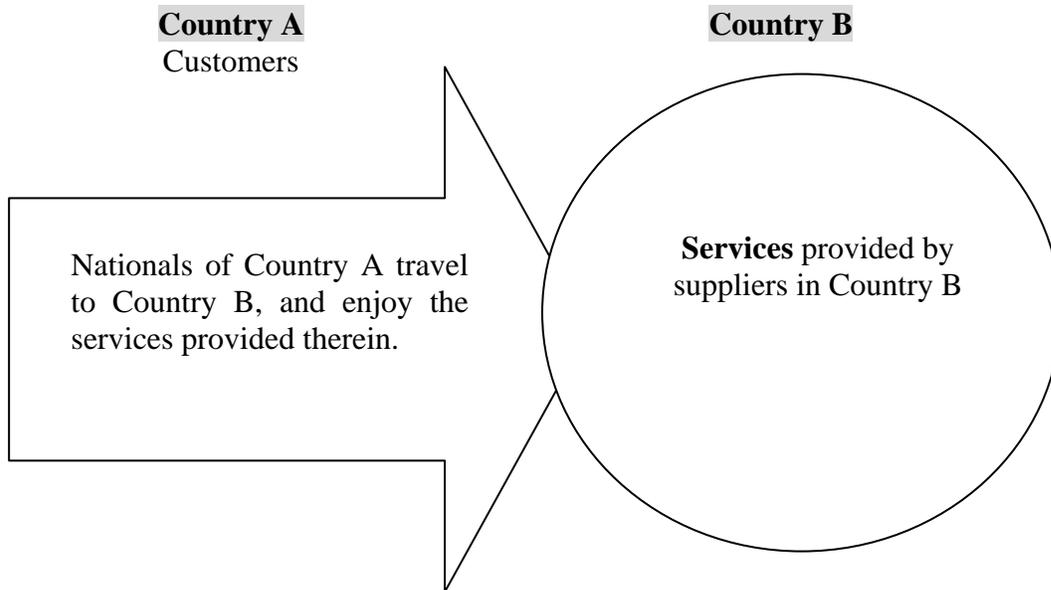


Figure 6: Example B (from the perspective of *importing* country A)

Nationals of A move abroad as tourists, students, or patients to consume the respective services.¹⁷

¹⁷ World Trade Organization, *supra* note 1, at 4.

c. Mode III - Commercial Presence Mode III supply of services occurs when services are supplied by a supplier from one Member, through commercial presence in the territory of any other Member. This mode may be illustrated as follows:

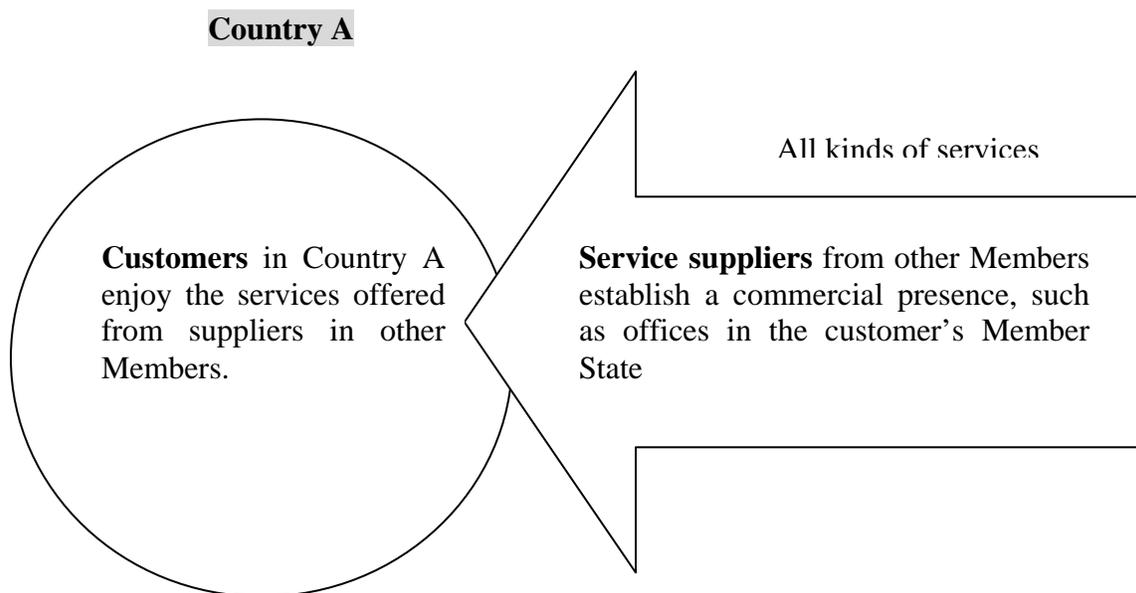


Figure 7. Example C (from the perspective of *importing* country A)

The service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned – and controlled – company (*e.g.*, bank, hotel group, construction company, etc.)¹⁸

Mode III is defined in GATS Article XXVIII. Commercial presence means any type of business or professional establishment, including:

- (1) the constitution, acquisition or maintenance of a juridical person, or
- (2) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.¹⁹

Compared to trade in goods, this mode involves a very unique type of sale. In the situation of goods, if the suppliers established a commercial presence in another Members'

¹⁸ *Id.*

¹⁹ GATS, *supra* note 2, art. XXVIII para. (d).

territory, it would likely be defined as falling under the scope of investment, instead of the trade in goods.²⁰

Generally, trade and investment are treated as different types of cross-border economic activity.²¹ In trade, the exporter generally does not have to take the risks incurred in setting up operations overseas. The downside is that the trader cannot exploit foreign materials and laborers, and must face possible obstacles, such as tariffs, during the importation process. On the other hand, while investing in foreign countries may avoid importation obstacles, investors must bear other significant risks, including those associated with the investment of capital.²²

d. Mode IV - Movement of Natural Persons Mode IV occurs when services are supplied within one Member through the presence of natural persons from another Member in the territory of the first Member. This mode may be illustrated as follows:

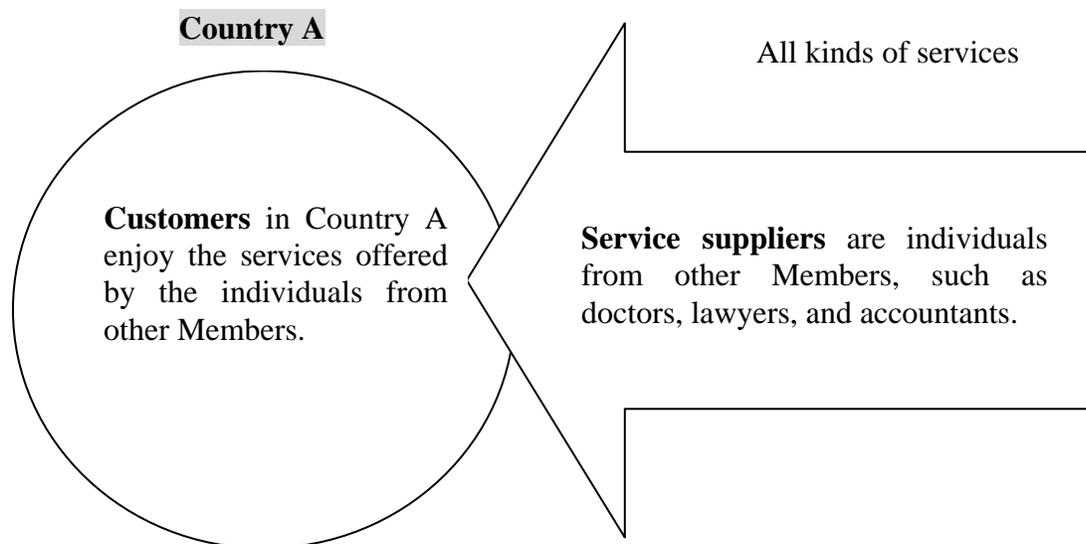


Figure 8. Example D (from the perspective of *importing* country A)

²⁰ Lo, *supra* note 16, at 510.

²¹ *Id.*

²² *Id.* at footnote 11.

A foreign national provides a service within A as an independent supplier (*e.g.*, consultant, health worker) or employee of a service supplier (*e.g.* consultancy firm, hospital, construction company)²³

Mode IV raises questions concerning immigration and emigration policies. The GATS provides an Annex to regulate such issues.²⁴

2. The Scope of the GATS

GATS Article I(3)(b) and (c) define the scope of covered services. In paragraph (b), the wording is *services*. Paragraph (b) provides that the definition of services includes “any service in any sector, except services supplied in the exercise of governmental authority.”²⁵ Thus, GATS rules apply to all services except for services supplied by governments. Paragraph (c) then defines the exception-to-the-exception, providing that a governmental *service* includes only “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”²⁶ Consequently, should, for example, government-sponsored banks offer financial services to the public, they would be regulated by the GATS.

The GATS, as a whole, is designed to regulate the supply of services.²⁷ The four modes of supply take into account the basic characteristics of trade in services. Unlike the trade in goods, which can be separated clearly into different stages, services trade often involves

²³ World Trade Organization, *supra* note 4, at 4.

²⁴ GATS, *supra* note 2, annex on movement of natural persons supplying services under the agreement, para. 1. (“This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.”)

²⁵ GATS, *supra* note 2, art. I(3)(b).

²⁶ *Id.* art. I(3)(c).

²⁷ GATS, *supra* note 2, art. XXVIII, para (b). (The definition of service supply “includes the production, distribution, marketing, sale and delivery of a service.”)

simultaneous purchase and use, with the services being consumed at the time they are produced.²⁸

The differences between goods and services trade make a clear understanding of the GATS schedules particularly important. Thus, the most evident difference in the application of the GATT and the GATS is in each Member's schedule of concessions (GATT) and schedule of commitments (GATS).

But, one must ask: are goods and services so different that we need an alternative system to regulate trades in services? The structure of the GATS suggests that trade regulations should treat services and goods quite differently.²⁹ Because Members consider goods and services to be distinct in nature, they draft their commitments quite differently.³⁰ The GATS commitments of Members are based on 12 service classifications.³¹ These sectors are:

- (1) Business services (including professional services and computer services),
- (2) Communication services,
- (3) Construction and related engineering services,
- (4) Distribution services,
- (5) Educational services,
- (6) Environmental services,

²⁸ Olsen ed., *supra* note 1, at 285. (“services are intangible, perishable and non-storable.”)

²⁹ Jackson, *supra* note 4, at 307. (“Another difficult conceptual questions about the negotiation on services is whether the well-established and well-known principles regarding trade in goods, could be applied by analogy to trade and services. These principles, included the most-favoured-nation principle, the national treatment principle, and concepts of market access such as ‘schedule concessions’ reciprocally negotiated. National Treatment in particular was problematical because certain kinds of services seemed to call for special principles to handle some particular policy risks that are posed by imports, compared to domestic services providers... Thus, it was argued, that to apply a national treatment concept to services required considerable expertise about particular service sectors, and this could result in changes needed to the basic concepts of national treatment so as to effectively balance the need for trade liberalization against appropriate national government regulatory and prudential policies related to the particular service sectors—banking, insurance, brokerage, and so on.”)

³⁰ World Trade Organization, *supra* note 1, at 4.

³¹ WTO Special Distribution, *Services sectoral classification list: Note by the Secretariat*, MTN.GNS/W/120 (10 July 1991).

- (7) Financial services (including insurance and banking),
- (8) Health-related and social services,
- (9) Tourism and travel-related services,
- (10) Recreational, cultural and sporting services,
- (11) Transport services, and
- (12) Other services not included elsewhere.

These 12 sectors are further divided into 160 sub-sectors.³² When Members prepare their commitments, they choose in what sectors the rules should apply, or how open they want a particular sector to be.³³

3. GATS Article II— The Most-Favoured-Nation Principle

The Most-Favored-Nation principle of the GATS is found in Article II:1, which provides that, “With respect to any measure covered by this Agreement, each Member should accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.” The main difference between the Most-Favored-Nation (MFN) obligation in the GATT and the MFN obligation in the GATS is found in the approach to subsidies.³⁴ The GATT

³² World Trade Organization, *supra* note 1, at 5.

³³ *Id.*

³⁴ Marc Benita, *Subsidies, Services and Sustainable Development*, ICTSD Programme on Trade in Services and Sustainable Development, at 10 (2005), available at <http://www.tradecapacitypakistan.com/pdf/ICTSD%20Paper%20Services%20GVA%20JUL%202005.pdf> (“There is a fundamental difference between the GATS and the GATT (which deals only with goods) when linking the MFN obligation to subsidies. In the GATT context, MFN only targets measures *at the border* (such as customs duties and other charges). It does not cover measures affecting the process of production of a good within a Member’s territory. As a result, a subsidy does not fall under Article I of the GATT, which contains the MFN clause in goods. In the GATS context, however, the situation is different as the MFN obligation applies to *any* measure “affecting trade in services”. Therefore MFN applies if a subsidy is granted in a discriminatory manner within a Member’s territory.”)

is targeted at the regulation of the trade of goods, and its MFN principle controls Members' border measures, such as customs duties or quotas.³⁵

Article II(1) of the GATS applies both to *de jure* and to *de facto* discrimination. In the Appellate Body opinion in the EC-Bananas III case,³⁶ it was stated that,

The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult – and, indeed, it would be a good deal easier in the case of trade in services.³⁷

This concept applied by the Appellate Body to goods is equally applicable to services.

The MFN principle applies to all service sectors in the GATS. But there are some temporary exceptions allowed.³⁸ The reason for these exceptions is that, at the time of concluding the GATS, there were already preferential agreements among Members, either bilaterally or in small groups.³⁹ As such, Members gave themselves the right to list MFN exemptions with their commitments. Still, certain restrictions apply to the MFN exemptions. They can only be made once, and will normally last no more than ten years.⁴⁰ A Member's notification of an exemption must include:

- (1) a description of the sector or sectors in which the exemption applies;

³⁵ World Trade Organization, *supra* note 1, at 5.

³⁶ Appellate Body Report, *European Communities – Regime For The Importation, Sale And Distribution Of Bananas*, WT/DS27/AB/R, para. 190 (9 September 1997).

³⁷ *Id.* at para. 233.

³⁸ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS*, 325 (2006).

³⁹ World Trade Organization, *Understanding The WTO: The Agreements, Services: rules for growth and investment*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm. Richard B Self, *General Agreement On Trade In Services*, in *THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION*, 527 (Terence P. Stewart ed., 1996). (“The adoption of the exemptions provision was highly controversial among the parties, and it was adopted to address two situations: (1) where parties regulated under the principle of reciprocity and were not prepared, in some instances, to remove such provisions; and (2) the concern that the obligation would require that a more liberal regulatory regime of one country would extend a ‘free-ride’ to the more protected regimes of other countries, thus depriving it of the potential leverage to address market access problems.”)

⁴⁰ GATS, *supra* note 2, Annex On Article II Exemptions para. 6. (“In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.”). See also Self, *supra* note 39, at 528.

- (2) a description of the measure, indicating why it is inconsistent with Article II;
- (3) the country or countries to which the measure applies;
- (4) the intended duration of the exemption; and
- (5) the conditions creating the need for the exemption.”⁴¹

4. GATS Article XVII - National Treatment

The National Treatment (NT) principle adopted in the GATS is also different from the one included in the GATT. GATS Article XVII provides that,

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member should accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own *like services* and *service suppliers*.⁴²

Here, it is easy to see the differences between the GATT, which applies to measures affecting products, and the GATS. The NT principle in the GATS not only regulates the service itself, but also regulates the service supplier.

Before discussing national treatment under the GATS, there is one further concept that requires introduction: market access.⁴³ GATS Article XVI(1) provides that, “With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”⁴⁴

⁴¹ Bossche, *supra* note 38.

⁴² GATS, *supra* note 2, art. XVII(1).

⁴³ GATS, *supra* note 2, art. XVI.

⁴⁴ *Id.* at para. 1.

The GATS gives Members freedom to decide their individual commitments, to open markets in specific sectors, and to choose how open the markets for each sector will be.⁴⁵ Members list those sectors they are willing to open and decide the extent of market access in those sectors. Most importantly, any limitations on national treatment must also be listed.⁴⁶ An understanding of the following terms is useful in understanding the scheduling of commitments:

- (1) *Market-access commitment*: if country A commits to allow foreign banks to operate in the domestic market, this is called a market-access commitment.
- (2) *Market-access limitation*: if country A limits the licenses it will issue, this is called a market-access limitation.
- (3) *Exception to the NT principle*: if country A only allows foreign banks one branch, while domestic banks are allowed numerous branches, this is an exception to the national treatment principle.⁴⁷

Article XVII(1) implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers.⁴⁸ It operates the same as the MFN principle, in that Members can list limitations upon their national treatment commitment. Hence, inconsistent measures and discriminatory subsidies are allowed as long as they are listed in a Member's schedules.

⁴⁵ World Trade Organization, *supra* note 39.

⁴⁶ GATS, *supra* note 2, art. XVII para. 1. ("In the sectors inscribed in its Schedule, and *subject to any conditions and qualifications set out therein*, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers"). *See also* Bossche, *supra* note 38, at 365.

⁴⁷ World Trade Organization, *supra* note 39.

⁴⁸ *Id.*

The NT obligation applies regardless of whether or not foreign services and suppliers are treated in an identical way to their national counterpart.⁴⁹ What matters is that they are granted equal opportunities to compete.⁵⁰

B. THE GATS ANNEXES

The complexity of services makes regulating service suppliers more difficult than regulating goods. This complexity is the reason for the various annexes to the GATS. These annexes are:

- (1) Annex on Article II Exemptions;
- (2) Annex on Movement of Natural Persons Supplying Services under the Agreement;
- (3) Annex on Air Transport Services;
- (4) Annex on Financial Services;
- (5) Second Annex on Financial Services;
- (6) Annex on Negotiations on Maritime Transport Services;
- (7) Annex on Telecommunications; and
- (8) Annex on Negotiations on Basic Telecommunications.

The annexes may be divided into different subject-matter groups governing different sectors of services, including the movement of natural persons, financial services, telecommunication, and air transport services.⁵¹

⁴⁹ GATS, *supra* note 2, art. XVII para. 2. (“A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.”)

⁵⁰ *Id.* at para. 3 (“Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”). World Trade Organization, *supra* note 39.

1. The Movement of Natural Persons

The Movement of Natural Persons Annex covers “measures affecting natural persons who are service suppliers of a Member, and natural persons who are employed by a service supplier of a Member, in respect of the supply of a service.”⁵² Most services regulations require that natural persons conduct and execute services. Therefore, this Annex ensures persons the right to stay and move temporarily within Members’ territories. However, it also allows Members to remain free to decide measures regarding citizenship, residence, and access on a permanent basis.⁵³

2. Air Transportation

The Air Transportation Annex covers “measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services.”⁵⁴ Traffic rights and directly related activities are excluded from the GATS, since they are regulated by other bilateral agreements.⁵⁵ Only measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system (CRS) services have been included.⁵⁶ Members are currently reviewing this Annex.⁵⁷

⁵¹ World Trade Organization, *supra* note 39.

⁵² GATS, *supra* note 2, annex on movement of natural persons supplying services under the agreement, para. 1.

⁵³ *Id.* at para. 2. *See also Id.* at para. 4. (“The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.”)

⁵⁴ GATS, *supra* note 2, annex on air transportation service, para. 1.

⁵⁵ *Id.* at para. 2. (“The Agreement, including its dispute settlement procedures, shall not apply to measures affecting: (a) traffic rights, however granted; or (b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex.”)

⁵⁶ *Id.* at para. 3. (“The Agreement shall apply to measures affecting:

(a) aircraft repair and maintenance services;
(b) the selling and marketing of air transport services;

3. Financial Services⁵⁸

The Financial Services Annex applies “to measures affecting the supply of financial services.”⁵⁹

Financial stability is key to a country’s entire economy. This Annex gives Members a good deal of discretion to apply measures (such as those for the protection of investors, depositors, and insurance policy holders) and to ensure the integrity and stability of the financial system.⁶⁰

However, this Annex excludes the services provided when a government is exercising its authority over a public entity,⁶¹ such as government services or central bank services.⁶²

(c) computer reservation system (CRS) services.”)

⁵⁷ *Id.* at para. 5. (“The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.”). World Trade Organization, *supra* note 39.

⁵⁸ Olsen ed., *supra* note 1, at 313 (There are two Annexes relating to financial services, Annex On Financial Services and Second Annex On Financial Services. However, the second one is less important since “it merely mandates the ongoing negotiations after the entry into force of the WTO Agreement, and contains no substantive rules on Members’ obligations within the financial service sectors.”).

⁵⁹ GATS, *supra* note 2, annex on financial services, para 1(a).

⁶⁰ *Id.* at para. 2. (“*Domestic Regulation*: (a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement. (b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.”). World Trade Organization, *supra* note 39.

⁶¹ *Id.* at para. 5(c). (“Public entity” means: (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.”)

⁶² *Id.* at para.1. (“*Scope and Definition* of this Annex,

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, “services supplied in the exercise of governmental authority” means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(ii) activities forming part of a statutory system of social security or public retirement plans; and

(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, “services” shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.”). World

4. Telecommunications⁶³

The Telecommunications Annex applies to “all measures of a Member that affect access to and use of public telecommunications transport networks and services.”⁶⁴ The telecommunications sector has a dual role:

- (1) it is a distinct sector of economic activity; and
- (2) it is an underlying means of supplying other economic activities (e.g., electronic money transfers).⁶⁵

The main purpose of this Annex is to ensure that foreign telecommunication service suppliers are accorded the same public access as are domestic suppliers.⁶⁶

Trade Organization, *supra* note 39.

⁶³ Olsen ed., *supra* note 1, at 316. (There are also two Annexes relating Telecommunication, Annex On Telecommunications and Annex On Negotiations On Basic Telecommunications. The later one is less important because it’s only temporary. “The function of this Annex was to postpone the need to specify exceptions to MFN (Article II) treatment for basic communications until the completion of negotiations that followed the entry into force of the GATS.”)

⁶⁴ GATS, *supra* note 2, annex on telecommunications, para. 2(a).

⁶⁵ *Id.* at para. 1. (“Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.”). *See also* World Trade Organization, *supra* note 39.

⁶⁶ *Id.* para 5. (“*Access to and use of Public Telecommunications Transport Networks and Services*

- (a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).
- (b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:
 - (i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier’s services;
 - (ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and
 - (iii) to use operating protocols of the service supplier’s choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.
- (c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-

C. THE GATS'S SCHEDULE OF COMMITMENTS

As noted above, the obligations of any WTO Member under the GATS are dictated by the provisions of the Agreement and its Annexes, as well as by the specific commitments contained in the national Schedule of Commitments.⁶⁷ The Schedule of Commitments is a relatively

corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

- (d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.
- (e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:
- (i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;
 - (ii) to protect the technical integrity of public telecommunications transport networks or services; or
 - (iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.
- (f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:
- (i) restrictions on resale or shared use of such services;
 - (ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;
 - (iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);
 - (iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;
 - (v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or
 - (vi) notification, registration and licensing.
- (g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.”)

⁶⁷ Jackson, *supra* note 4, at 308. (“The treatment for scheduled service concessions is also covered by text that limits six ‘prohibited’ actions (unless exceptions are listed in a Schedule), defined as:

- limits on the number of service providers
- limits on the total value of service transactions or assets imported
- limits on the number of service operations or quantity of service imports
- limits on the number of natural persons that may be employed in a particular service sector
- measures that restrict or require specific types of legal entity or joint venture for supplying the service
- limits on the participation of foreign capital in shareholding or investment.”)

complex document, more difficult to read than a tariff schedule under the GATT. A Schedule of Commitments contains at least eight entries per sector:⁶⁸

- 1-4. the commitments regarding market access and national treatment with regard to each of the four modes of supply;
5. the 1st Column, which specifies the sector or sub-sector concerned;
6. the 2nd Column, which sets out any limitations on market access that fall within the six types of restrictions mentioned in Article XVI:2;
7. the 3rd Column, which contains any limitations that the Member may want to place, in accordance with Article XVII, on national treatment; and
8. the 4th Column, which provides the opportunity to undertake additional commitments as envisaged in Article XVIII.

Any of the entries under market access or national treatment may vary within a spectrum, the opposing ends of which are full commitment without limitation (“none”) and full discretion to apply any measure falling under the relevant Article (“unbound”).

The schedule is divided into two parts. While Part I lists “horizontal commitments” (*i.e.* entries that apply across all sectors that have been scheduled), Part II sets out commitments on a sector-by-sector basis.

In the example below, the horizontal commitments under Mode III, national treatment, reserve the right to deny foreign land ownership. Under Mode IV, Arcadia (the hypothetical Member) would be able to prevent any foreigner from entering its territory to supply services, except for the specified groups of persons. Within the retailing sector, whose definitional scope is further clarified by reference to the United Nations provisional Central Product Classification (CPC), commitments vary widely across modes. Most liberal are those for Mode II (consumption

⁶⁸ World Trade Organization, *supra* note 1, at 11-12.

abroad) where Arcadia is bound not to take any measure under either Article XVI or XVII that would prevent or discourage its residents from shopping abroad.

Table 8. Sample Schedule of Commitments: Arcadia⁶⁹

Modes of supply: (1) Cross-border supply; (2) Consumption supply; (3) Commercial presence; (4)

Presence of natural persons

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	(4) Unbound, other than for (a) temporary presence, as intra-corporate transferees, of essential senior executives and specialists and (b) presence for up to 90 days of representatives of a service provider to negotiate sales of services.	(3) Authorization is required for acquisition of land by foreigners.	
II. SECTOR-SPECIFIC COMMITMENTS			
4.DISTRIBUTION SERVICES C. Retailing services (CPC 631, 632)	(1) Unbound (except for mail order: none). (2) None. (3) Foreign equity participation limited to 51 per cent. (4) Unbound, except as indicated in horizontal section.	(1) Unbound (except for mail order: none). (2) None. (3) Investment grants are available only to companies controlled by Arcadian nationals. (4) Unbound.	

D. THE HISTORY OF PAST NEGOTIATIONS

Compared with other agreements, the GATS has a relatively slow phase in process. Due to the unique characteristics of services trade, GATS has several special clauses and regulations built into its design. Future negotiation rounds will play an important role in the development of the GATS.⁷⁰

⁶⁹ *Id.*

⁷⁰ Jackson, *supra* note 4, at 307. (“The Uruguay Round succeeded in developing the General Agreement on Trade in Services – GATS as a sort of a framework agreement for the entire landscape of services trade. The Agreement went relatively far in embracing the traditional GATT concepts (MFN, national treatment, schedules of concessions), but clearly had to adapt those concepts for the new terrain encountered. Furthermore, this services agreement leaves a great deal open, in some cases calling for specific ongoing negotiations, in other cases simply leaving it to the future

1. The Post 1993 Uruguay Round Situation

In the 1970s, the United States first proposed to incorporate services into the GATT framework. In 1982, the U.S. made specific proposals at a Ministerial meeting.⁷¹ However, many countries were uncertain about the idea of having an international agreement on trade in services. One of the major problems was the difference between developed countries and developing countries regarding the incentives for regulating services.⁷² Developing countries paid less attention to rules on services; instead, the rules on goods were their concern. From the developed countries' perspectives, the shift of focus from goods to services represented a recognition of the lower production costs for goods in developing countries.⁷³

Eventually, the General Agreement on Trade in Services (GATS) was completed because of the pressure coming from the developed countries.⁷⁴ However, the GATS allows a high degree of flexibility, both within the framework of its rules and also in terms of market access commitments.⁷⁵

2. The 1995 Working Party on GATS Rules

The GATS is not yet an end-product, but a first step in global liberalization of trade in services.⁷⁶ As the Uruguay Round ended, the GATS provided only a basic framework. Hence, based on

to see what negotiators will be able to do.”)

⁷¹ Self, *supra* note 39, at 529.

⁷² Olsen ed., *supra* note 1, at 280-281.

⁷³ *Id.* at 281.

⁷⁴ *Id.*

⁷⁵ World Trade Organization, *supra* note 39.

⁷⁶ Olsen ed., *supra* note 1, at 279.

GATS Article XXIV, the Council for Trade in Services established the Working Party on GATS Rules (WPGA) on March 30, 1995.

Article XXIV(1) provides that, “The Council for Trade in Services ... may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.” After its establishment, the Working Party became responsible for GATS negotiation topics, such as emergency safeguard measures, government procurement, and subsidy issues.⁷⁷

3. The 2001 Guidelines and Procedures for the Negotiations on Trade in Services

On March 29, 2001, the Council for Trade in Services approved the “Guidelines and Procedures for the Negotiations on Trade in Services.”⁷⁸ The objectives and principles of the Guidelines provide for:

- (1) progressive liberalization to be retained as the main concept;⁷⁹
- (2) appropriate flexibility for developing countries, with special priority to be given to least-developed countries;⁸⁰
- (3) reference to the needs of small and medium-sized suppliers;⁸¹ and
- (4) respect for “the existing structure and principles of the GATS.”⁸²

In terms of scope, of the Guidelines provide for:

⁷⁷ World Trade Organization, *SERVICES: COUNCIL, The Services Council, its Committees and other subsidiary bodies*, http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm.

⁷⁸ Special Session of the Council for Trade in Services, *Guidelines and Procedures for the Negotiations on Trade in Services, adopted by the Special Session of the Council for Trade in Services on 28 March 2001, S/L/93* (29 March 2001).

⁷⁹ *Id.* at para. 1.

⁸⁰ *Supra* note 79, at para. 2.

⁸¹ *Id.* at para. 3.

⁸² *Id.* at para. 4.

- (1) no exclusion of sectors or modes from the scope of the negotiations, with special attention to be given to developing countries;⁸³
- (2) MFN exemptions to be included in the negotiation discussion;⁸⁴ and
- (3) required rule-making agendas concerning disciplines on domestic regulation (Article VI:4), emergency safeguards (Article X), government procurement (Article XIII) and subsidies (Article XV).⁸⁵

In terms of modalities and procedures, the Guidelines provide for:

- (1) schedules current at the outset to be the starting point;⁸⁶
- (2) request-offer negotiations to be the main approach to adjustment going forward;⁸⁷
- (3) common criteria for negotiating credit for autonomous liberalization, to be developed by the Services Council in Modalities for the Treatment of Autonomous Liberalization;⁸⁸
- (4) an ongoing assessment of trade in services;⁸⁹ and
- (5) a mandate to the Services Council to evaluate the results of the negotiations prior to their completion in the light of Article IV.⁹⁰

4. The Doha Round Mandates with Respect to GATS

In the Doha Ministerial Declaration,⁹¹ coverage of services was limited to the 2001 Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services.⁹² The

⁸³ *Id.* at para. 5.

⁸⁴ *Id.* at para. 6.

⁸⁵ *Id.* at para. 7.

⁸⁶ *Id.* at para. 10.

⁸⁷ *Id.* at para. 11.

⁸⁸ *Id.* at para. 13.

⁸⁹ *Id.* at para. 14.

⁹⁰ *Id.* at para. 18.

declaration set out dates for the circulation of initial requests, stating that “Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.”⁹³

5. The Cancun Meeting and the “July 2004 Package”

At the Cancun Meeting of the Doha Round, in early September 2003, there was failure regarding progress on the GATS. The concluding statement⁹⁴ simply reinstated the Doha Round mandates by stating that, “[n]otwithstanding this setback, we reaffirm all our Doha Declarations and Decisions and recommit ourselves to working to implement them fully and faithfully.”⁹⁵ Reflecting the lack of political impetus, the request-and-offer process in services virtually came to a halt in the wake of Cancun.⁹⁶

In mid 2004, the so called “July 2004 package (Decision Adopted by the General Council on August 1 2004)”⁹⁷ was introduced to give momentum to the negotiations. The Package set up a date of May 2005 for submitting revised offers on services.⁹⁸ Upon agreement by the Council for Trade in Services, the Package also listed recommendations that:

- (1) Members that had not yet submitted initial offers do so as soon as possible;⁹⁹

⁹¹ Ministerial Declaration, *DOHA WTO Ministerial 2001: adopted on 14 November 2001*, WT/MIN(01)/DEC/1 (20 November 2001).

⁹² *Id.* at para. 15.

⁹³ *Id.*

⁹⁴ Ministerial Conference Fifth Session Cancún, 10 - 14 September 2003, *Ministerial Declaration, Adopted on 14 September 2003*, WT/MIN(03)/20 (23 September 2003).

⁹⁵ *Id.* at para. 6.

⁹⁶ World Trade Organization, *Services: Negotiations, Key stages in the negotiations*, http://www.wto.org/english/tratop_e/serv_e/key_stages_e.htm.

⁹⁷ Doha Work Programme, *Decision Adopted by the General Council on 1 August 2004*, WT/L/579 (2 August, 2004).

⁹⁸ *Id.*, para. 1(e).

⁹⁹ *Id.*, at Annex C, para. (a).

- (2) Members ensure high quality of offers, in particular in sectors and modes of export interest to developing countries, with special attention being given to least-developed countries (LDCs);¹⁰⁰
- (3) Members intensify efforts to conclude the rule-making negotiations under Articles VI.4, X, XIII and XV in accordance with their mandates and deadlines;¹⁰¹ and
- (4) Members provide “targeted” technical assistance to developing countries with a view to enabling them to participate effectively.¹⁰²

6. The Hong Kong Ministerial Declaration

The Hong Kong Ministerial Declaration of 18 December 2005 reaffirmed the principles set out in Annex C to the July 2004 package, including

the objectives and principles stipulated in the GATS, the Doha Ministerial Declaration, the Guidelines and Procedures for the Negotiations on Trade in Services adopted by the Special Session of the Council for Trade in Services on 28 March 2001 and the Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services adopted on 3 September 2003, as well as Annex C of the Decision adopted by the General Council on 1 August 2004.¹⁰³

The Hong Kong Ministerial Declaration also requested that Members intensify negotiations in accordance with Annex C and improve their quality, with particular attention to export interests of developing countries.¹⁰⁴ Additionally, the Declaration recognized “the

¹⁰⁰ *Id.* at para. (c).

¹⁰¹ *Id.* at para. (e).

¹⁰² *Id.* at para. (f).

¹⁰³ Ministerial Conference Sixth Session Hong Kong, 13 - 18 December 2005, *Ministerial Declaration: adopted on 18 December 2005*, WT/MIN(05)/DEC (22 December 2005), at para. 25.

¹⁰⁴ *Id.* at para. 27; World Trade Organization, *Services: Negotiations, Key stages in the negotiations*, http://www.wto.org/english/tratop_e/serv_e/key_stages_e.htm.

particular economic situation of LDCs, including the difficulties they face, and acknowledge[d] that they are not expected to undertake new commitments.”¹⁰⁵

Annex C contained a more detailed negotiating objective than had any previous document.¹⁰⁶ It established a framework for:

- (1) offering new or improved commitments under each mode of supply;
- (2) treating Most-Favoured Nation (MFN) exemptions; and
- (3) scheduling and classification of commitments.¹⁰⁷

It also requested that Members intensify their efforts to conclude the rule-making negotiations.¹⁰⁸ However, the Doha Development Agenda negotiations were suspended from mid-July 2006 until January 2007, without any new timelines agreed by negotiations.¹⁰⁹

On May 26, 2008, the Chair of the services negotiations issued a report listing the elements required for the completion of the services negotiations.¹¹⁰ In the report, the Chair addressed issues such as participants’ level of ambition, their willingness to bind existing and improved levels of market access, and their approaches to national treatment.¹¹¹ The report also mentioned that the Members had reached conclusions on certain issues, stating that:

- (1) Members reaffirm their commitment as made in the Hong Kong Ministerial Declaration to conclude negotiations on GATS Rules pursuant to Articles X, XIII, and XV, in accordance with their respective mandates and timelines.

¹⁰⁵ *Id.* at para. 26.

¹⁰⁶ World Trade Organization, *supra* note 105.

¹⁰⁷ *Id.*

¹⁰⁸ Doha Work Programme, *supra* note 98, at Annex C, para. (e).

¹⁰⁹ World Trade Organization, *Services: Negotiations, Current negotiations*, http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm.

¹¹⁰ Council for Trade in Services Special Session, *Elements Required For The Completion Of The Services Negotiations: Report by the Chairman*, TN/S/33 (26 May 2008).

¹¹¹ World Trade Organization, *supra* note 105.

- (2) Members take note of the ... submission of specific and concrete proposals, to facilitate consideration and engagement in all three areas.
- (3) Members recognize the importance attached by some delegations to the objectives and principles contained in these proposals.¹¹²

These documents demonstrate that Article XV service subsidy issues remain a concern in achieving the completion of GATS issues during the Doha Round. Negotiations on service subsidies are behind the schedule of progress made on emergency safeguard measures and government procurement.¹¹³ Nonetheless, the Members have formally recognized the importance of Article XV, and the indispensable need to establish a legal framework for service subsidies.

¹¹² Council for Trade in Services Special Session, *supra* note 111, at para. 6.

¹¹³ Working Parties on GATS Rules, *Work Programmes*, S/WPGR/7 (25 July 2002). (This document points out three parts of service regulations: emergency safeguard measure, subsidies, and government procurement. Unlike emergency safeguard measure and government procurement, it basically does not provide any concrete guidance for service subsidy regulations. For detailed information, please see Chapter 6 of this dissertation.)

IV. AN OVERVIEW OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (ASCM)

A. GENERAL INTRODUCTION

The Agreement on Subsidies and Countervailing Measures (ASCM) was concluded as one of the Uruguay Round agreements. The object and purpose of the ASCM is to discipline the use of subsidies, which may have trade-distortive effects,¹ and to give Members the right to take action when their industries are harmed by subsidies. To do this, the Agreement categorizes subsidies into three types: prohibited subsidies,² actionable subsidies,³ and non-actionable subsidies.⁴ The category in which a specific subsidy falls determines the nature and extent of the relief mechanism that can be applied to counteract it.

1. Historical Background

A subsidy is a means of governmental support to domestic industries. Due to their impact on economic competition among nations, the GATT system regulates and restrains their application.

¹ Panel Report, *Brazil – Export Financing Programme for aircraft*, WT/DS46/R, para. 7.26 (April 14, 1999). Panel Report, *Canada-Measures affecting the export of civilian aircraft*, WT/DS70/R, para. 9.119 (April 14, 1999).

² Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1999, 1867 U.N.T.S. 14. [hereinafter the SCM Agreement], art. 3 and 4.

³ The SCM Agreement, *supra* note 2, art. 5, 6, and 7.

⁴ *Id.* art. 8 and 9.

a. The Tokyo Round Subsidy Codes The Tokyo Round Agreements included the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (Subsidies Code).⁵ This Subsidies Code provided regulations concerning procedural notification; consultation and dispute settlement; remedial measures and countermeasures; and criteria for determining material injury. The Code:⁶

- (1) for the first time, prohibited export subsidies on non-primary products as well as primary mineral products;⁷
- (2) contained the description of export subsidies, listed the test for determining whether an export subsidy exists, and included an illustrative list of subsidy practices;
- (3) recognized the harmful trade effects of domestic subsidies⁸ and permitted relief (including countermeasures) where such subsidies injure domestic producers and nullify or impair benefits of concessions under the GATT (including tariff bindings), or cause serious prejudice to other Contracting Parties;
- (4) stated the commitment by signatories to “take into account” conditions of world trade and production (e.g. prices, capacity, etc.) in fashioning their subsidy practices;
- (5) improved discipline on the use of export subsidies for agriculture;

⁵ WORLD TRADE ORGANIZATION, GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 1147-1150 (1995).

⁶ COMMITTEE OF WAYS AND MEANS U.S. HOUSE OF REPRESENTATIVES, OVERVIEWS AND COMPILATION OF U.S. TRADE STATUTES, 85 (2001).

⁷ M. Jean Anderson and Gregory Husisian, *The Subsidies Agreement*, in, THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, 300 (Terence P. Stewart ed., 1996).

⁸ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, reprinted in GATT, Basic Instruments and Selected Documents (BISD) (26th Supp. 1980) at 56, art. 8.3.

- (6) included provisions governing the use and phase-out of export subsidies by developing countries;
- (7) revised the dispute settlement process;
- (8) provided greater transparency regarding subsidy practices including provisions for GATT notification of practices of other countries;
- (9) included an injury and causation test designed to afford relief where subsidized imports (whether an export or domestic subsidy is involved) impact domestic producers either through volume or through effect on prices;⁹ and
- (10) provided greater transparency in the administration of CVD laws and regulations.

The Tokyo Subsidies Code demonstrated remarkable progress in disciplining subsidies at the international level. However, it did not result in all of the benefits expected by Contracting Parties. Its failure led to the birth of the Uruguay Round Subsidies Agreement.¹⁰

b. The Uruguay Round Subsidy Agreement The current Agreement on Subsidies and Countervailing Measures (ASCM) was concluded as part of the Uruguay Round Agreements. It contains the following provisions:

PART I: GENERAL PROVISIONS

Article 1 Definition of a Subsidy

Article 2 Specificity

PART II: PROHIBITED SUBSIDIES

Article 3 Prohibition

Article 4 Remedies

Article 5 Adverse effects

PART III: ACTIONABLE SUBSIDIES

Article 6 Serious Prejudice

Article 7 Remedies

⁹ *Id.* art. 2.1. See also 19 U.S.C. §§ 1671(a)(2), 1677(7). (United States at that time was asked to add an “injury test” to its domestic CVD laws.)

¹⁰ *Supra* note 7.

PART IV: NON ACTIONABLE SUBSIDIES

Article 8 Identification of Non-Actionable Subsidies

Article 9 Consultations and Authorized Remedies

PART V: COUNTERVAILING MEASURES

Article 10 Application of Article VI of GATT 1994

Article 11 Initiation and Subsequent Investigation

Article 12 Evidences

Article 13 Consultations

Article 14 Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

Article 15 Determination of Injury

Article 16 Definition of Domestic Industry

Article 17 Provisional Measures

Article 18 Undertakings

Article 19 Imposition and Collection of Countervailing Duties

Article 20 Retroactivity

Article 21 Duration and Review of Countervailing Duties and Undertakings

Article 22 Public Notice and Explanation of Determinations

Article 23 Judicial Review

Article 24 Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

PART VI: INSTITUTIONS

Article 25 Notifications

PART VII: NOTIFICATION AND SURVEILLANCE

Article 26 Surveillance

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27 Special and Differential Treatment of Developing Country Members

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28 Existing Programmes

Article 29 Transformation into a Market Economy

PART X: DISPUTE SETTLEMENT

Article 30

PART XI: FINAL PROVISIONS

Article 31 Provisional Application

Article 32 Other Final Provisions

ASCM Annexes

Annex I Illustrative List of Export Subsidies

Annex II Guidelines on Consumption of Inputs in the Production Process

Annex III Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies

Annex IV Calculation of the Total Ad Valorem Subsidization (Paragraph 1(A) of Article 6)

Annex V Procedures For Developing Information Concerning Serious Prejudice

Annex VI Procedures for On-the-Spot Investigations Pursuant to Paragraph 6 of Article 12

Annex VII Developing Country Members Referred to in Paragraph 2(A) of Article 27

2. Elements of a Subsidy

The SCM Agreement, for the first time, provides a complete definition of a subsidy.¹¹ Article 1.1 provides that a subsidy exists “if (a)(1) there is a financial contribution by a government or any public body within the territory of a Member...; or (a)(2) there is any form of income or price support; and (b) a benefit is thereby conferred.” The definition thus makes clear the three elements required to prove the existence of a subsidy: a financial contribution, conferred by a government, which confers a benefit.

a. A Financial Contribution In order for a measure to be a subsidy, it must constitute a financial contribution or take the form of an income or price support in the sense of Article XVI of GATT 1994.¹² Article 1.1(a)(1) provides an exhaustive list of the types of financial contributions by governments that can constitute subsidies. They occur when:¹³

- (a) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), or a potential direct transfer of funds or liabilities (e.g. loan guarantees);
- (b) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

¹¹ The SCM Agreement, *supra* note 2, art. 1 and 2.

¹² General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT], art. XVI.1. (“If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.”).

¹³ The SCM Agreement, *supra* note 2, art. 1.1(a)(1). PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS*, 555-556 (2005).

- (c) a government provides goods or services other than general infrastructure, or purchases goods;
- (d) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

b. Provided by a Government or Any Public Body If a financial contribution is provided by private entities, such as corporations and companies, it will not be considered to be a subsidy. It may, however, constitute dumping. Dumping usually is a company's strategic method to cut product prices.¹⁴ In the case of a subsidy, it is a governmental authority that makes the decision to provide a financial contribution.

The test employed to determine whether there is a governmental activity is a *but for* test.¹⁵ This means that whether a support granted to a private body constitutes a subsidy depends on whether the payment would not have been granted but for governmental action.¹⁶

c. Conferring a Benefit No definition of a benefit is provided in Article for purposes of determining the existence of a subsidy. In the Dispute Settlement Body's determination in the *Canada-Aircraft* case, the panel and the Appellate Body each made several comments on how to define a benefit.¹⁷ The panel ruled that if financial contributions are "provided on terms [that]

¹⁴ Bossche, *supra* note 13, at 516. ("In fact, since prices of products are ordinarily set by private companies, 'dumping' in and of itself is not regulated by WTO law.")

¹⁵ WTO LAW – FROM A EUROPEAN PERSPECTIVE, 430 (Birgitte Egelund Olsen ed., 2006).

¹⁶ *Id.* (it refers to the panel finding in Panel Report, *Canada – Measures affecting the importation of milk and the exportation of dairy products: Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW, para. 6.39 (July 11, 2001).)

¹⁷ Appellate Report, *Canada – Measures affecting the export of civilian aircraft: recourse by Brazil to article 21.5*

are more advantageous than those that would have been available to the recipient on the market,”¹⁸ it should be considered as a benefit.

The Appellate Body further elaborated on the definition of benefit by adding the condition that “the financial contribution makes the recipient *better off* than it would otherwise have been, absent that contribution.” It went on to state that “the marketplace provides an appropriate basis for comparison ... because ... a financial contribution can be identified by determining whether the recipient has received a financial contribution on terms more favorable than those available to the recipient in the market.”¹⁹

Article 14 of the SCM Agreement provides that any method of calculating benefits is to be consistent with the following guidelines:²⁰

- (1) “government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice of private investors.”²¹
- (2) “government loans shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm *could actually obtain on the market*.”²²

of the DSU, AB-2000-4, WT/DS70/AB/R (July 21, 2000). Panel Report, *Canada – Measures affecting the export of civilian aircraft*, WT/DS70/R (April 14, 1999).

¹⁸ Panel Report, *Id.* at para. 9.112.

¹⁹ Appellate Report, *supra* note 17, at para. 157.

²⁰ RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE*, 1053 (2007). (“This list does not expressly states it is non-exclusive, but that is a reasonable reading of Article 14. Moreover, the relevant Statement of Administrative Action refers to the Article 14 list as a set of ‘guidelines’, and the U.S. CVD statute uses the word ‘including’ before presenting the list. Hence there may well be other financial contributions that confer a ‘benefit’ that do not fit neatly within the four examples.”). *See also* 19 U.S.C § 1677(5). (U.S. Countervailing duty laws tracks these same four examples)

²¹ The SCM Agreement, *supra* note 2, art. 14(a).

²² The SCM Agreement, *supra* note 2, art. 14(b).

- (3) “government loan guarantees shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee.”²³
- (4) “the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration.”²⁴

d. The Specificity Test The *specificity* test is an important and unique element found in the SCM Agreement.²⁵ A subsidy available for all industries in an economy is not prohibited since it does not distort trade, but rather promotes general development within that economy.²⁶ Therefore, the SCM Agreement makes it clear that only those subsidies given *specifically* to a certain group in an economy shall be prohibited. This is the specificity test stipulated in Article 2. Article 2.1 identifies several principles for determining when a subsidy is appropriately specific to be actionable. These principles have been described as resulting in the following types of specificity:

²³ *Id.* art. 14(c).

²⁴ *Id.* art. 14(d). (“...The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).”).

²⁵ See 19 U.S.C § 1677(5)(A). (The specificity guidelines in the SCM Agreement are modeled on the specificity test that formed part of US Countervailing Duties practices.) See also TERRENCE P. STEWART ED., THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, 331-332 (1996).

²⁶ Bossche, *supra* note 13, at 559.

- (1) “enterprise specificity: a situation where a government targets a particular company or companies for subsidization;
- (2) industry specificity: a situation where a government targets a particular sector or sectors for subsidization;
- (3) regional specificity: a situation where a government targets products in specified parts of its territory for subsidization; and
- (4) prohibited specificity: a situation where a government targets export goods or goods using domestic inputs for subsidization.”²⁷

If a subsidy falls within any of the categories above, it is deemed *specific*. Subsidies established by objective criteria will not be considered to be specific. For this purpose, objective criteria are “criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.”²⁸

²⁷ *Id.* at 559-560. The SCM Agreement, *supra* note 2, art. 2.1. (“In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
- (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.”)

²⁸ The SCM Agreement, *supra* note 2, art. 2.1(b), footnote 2.

It is important to note that the SCM Agreement applies to both *de jure* and *de facto* specific subsidies.²⁹ Article 2.1(c) lists factors that may identify *de facto* subsidies. They include:

- (1) the use of a subsidy programme by a limited number of certain enterprises;
- (2) the predominant use of the subsidy by certain enterprises;
- (3) the granting of disproportionately large amounts of subsidy to certain enterprises; and
- (4) the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.³⁰

The determination of specificity plays a crucial role in determining the relevant category of a subsidy.³¹ Unless a subsidy is specific, it will not be actionable under the SCM Agreement's terms.

3. The Traffic-Light System

The SCM Agreement provides a unique way of categorizing subsidies into three different categories: prohibited subsidies, actionable subsidies, and non-actionable subsidies.³² This has been dubbed the “traffic-light” system, with the three categories referred to as red light, yellow light, and green light.

²⁹ *Id.* art 2.1 (c). (“If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.”).

³⁰ *Id.*

³¹ Bhala, *supra* note 20, at 1054.

³² *Id.* at 1067.

Only two of the categories of subsidies, prohibited and actionable, remain governed by the SCM Agreement. The non-actionable subsidy category existed for 5 years and ended on 31 December 1999.³³

It should be noted that the SCM Agreement applies to both agricultural goods and industrial products.³⁴ Subsidies are exempt only under the *peace clause* of the Agriculture Agreement.³⁵ However, such a peace clause expired at the end of 2003.³⁶ Thus, the SCM Agreement now provides the governing rules for agricultural as well as industrial products.

a. Prohibited Subsidies Article 3 gives an explanation of prohibited subsidies. All prohibited subsidies are *per se* illegal, presumed to be specific, and presumed to cause an adverse effect.³⁷

This category includes two types of subsidies:

- (1) Export subsidies: “subsidies contingent, *in law or in fact*, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I”;³⁸
- (2) Domestic substitution subsidies: “subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.”³⁹

³³ The SCM Agreement, *supra* note 2, art. 31. (“The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.”)

³⁴ World Trade Organization, *Understanding The WTO: The Agreements, Anti-dumping, subsidies, safeguards: contingencies, etc.*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#subsidies.

³⁵ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 410. [hereinafter AoA], art. 13(a). (“domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:

- (i) non-actionable subsidies for purposes of countervailing duties;
- (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and
- (iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994.”)

³⁶ World Trade Organization, *supra* note 34.

³⁷ Bhala, *supra* note 32.

³⁸ The SCM Agreement, *supra* note 2, art. 3.1(a).

Export Subsidies

Annex I of the SCM Agreement gives a *non-exhaustive* list of the form export subsidies could take.⁴⁰ The list includes:

- (1) the provision by governments of direct subsidies to a firm or an industry contingent upon export performance;
- (2) currency retention schemes or any similar practices which involve a bonus on exports;
- (3) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments; and
- (4) the provision by governments or their agencies, either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.⁴¹

Domestic Subsidies

A domestic subsidy is also called the import substitution subsidy or local content subsidy.⁴² It occurs when a Member subsidizes the choice of domestic products over import products.

³⁹ *Id.* art. 3.1(b).

⁴⁰ Bossche, *supra* note 13, at 562.

⁴¹ The SCM Agreement, *supra* note 2, Annex I.

⁴² Bossche, *supra* note 13, at 564.

To compare export and domestic subsidies, one important concept must be understood. Article 3.1 (a) clearly prohibits subsidies contingent upon export performance, whether that subsidy is contingent *de jure* or *de facto*.⁴³ In other words, even if the subsidy does not result from legal regulation, as long as it in fact takes place during export performance, it qualifies as an export subsidy under Article 3.1(a).⁴⁴

While the same issue arises when dealing with domestic subsidies, Article 3.1(b) is silent on whether domestic subsidies not directly provided by legal regulation are prohibited upon import substitution. This issue has been clarified by the Appellate Body in *Canada-Autos*,⁴⁵ where it found only *de jure* subsidies to be subject to remedy upon the use of domestic over imported goods.⁴⁶

b. Actionable Subsidies Part III of the SCM Agreement deals with the actionable subsidy situation. Actionable subsidies, though not prohibited, are subject to challenge, either through multilateral dispute settlement or countervailing duty action. Article 5 lists the types of adverse effects that make a subsidy actionable:⁴⁷

- (1) injury to the domestic industry of another Member;
- (2) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994; and
- (3) serious prejudice to the interests of another Member.

⁴³ The SCM Agreement, *supra* note 2, art. 3.1(a). (“subsidies contingent upon, in law or in fact, whether solely or as one of several other conditions, upon export performance.....”)

⁴⁴ Bossche, *supra* note 13, at 562-563.

⁴⁵ Appellate Body Report, *Canada-Certain Measures Affecting the Automobile Industry*, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000).

⁴⁶ *Id.* para. 142. (“we believe that a finding that Article 3.1(b) extends only to contingency ‘in law’ upon the use of domestic over imported goods would make circumvention of obligations by Members too easy.”).

⁴⁷ The SCM Agreement, *supra* note 2, art. 5.

Subsidies Causing Injury to a Domestic Industry of Another Member

Article 16.1 of the SCM Agreement defines domestic industry to refer to “the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.”⁴⁸

Article 16 provides further gloss on this definition by providing that,

- (1) when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, these producers will not be included for purposes of defining “domestic industry,”⁴⁹ and
- (2) in exceptional circumstances, the territory of a Member may be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry.⁵⁰

The Article 16 definition requires both that the injuries are to be suffered by the domestic market, and that the domestic market be that of a *like product*. Footnote 46 to Article 15 defines like product as “a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in

⁴⁸ The SCM Agreement, *supra* note 2, art. 16.1. (“For the purposes of this Agreement, the term “domestic industry” shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term “domestic industry” may be interpreted as referring to the rest of the producers.”)

⁴⁹ The SCM Agreement, *supra* note 2, art. 16.1.

⁵⁰ *Id.* art. 16.2. (“In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.”).

all respects, has characteristics closely resembling those of the product under consideration.”⁵¹

The definition is similar to that found in GATT Articles I and III.⁵²

The injury criterion must be based on positive evidence and involve an objective examination of both:⁵³

- (1) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products,⁵⁴ and
- (2) the consequent impact of these imports on the domestic producers of such products.

Under Article 15.4, economic factors may be taken to indicate that an injury exists in a certain case, including:⁵⁵

- (1) actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity;
- (2) factors affecting domestic prices; and
- (3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.⁵⁶

An examination of all factors is obligatory in each case.⁵⁷ Nonetheless, the Article 15.4 list is not exhaustive, and no one factor is to be decisive.⁵⁸

⁵¹ The SCM Agreement, *supra* note 2, footnote 46.

⁵² Panel Report, *Indonesia – Certain measures affecting the automobile industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.174 (July 2, 1998). (“Although we are required in this dispute to interpret the term ‘like product’ in conformity with the specific definition provided in the in the SCM Agreement, we believe that useful guidance can nevertheless be derived from prior analysis of ‘like product’ issues under other provisions of the WTO Agreement.”).

⁵³ The SCM Agreement, *supra* note 2, art. 15.1.

⁵⁴ *Id.* footnote 46. (“Throughout this Agreement the term “like product” (“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.”)

⁵⁵ *Id.* art. 15.4.

⁵⁶ *Id.*

⁵⁷ Bossche, *supra* note 13, at 570, footnote 219. (“The existence of an obligation to examine all the factors of the

Subsidies Causing Nullification or Impairment of another Member's Benefits

The concept of nullification or impairment of another Member's benefits originated in GATT Article XXIII.⁵⁹ That provision lists situations in which Members may claim that their rights are nullified or impaired, including:

- (1) the failure of another contracting party to carry out its obligations under this Agreement, or
- (2) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (3) the existence of any other situation.⁶⁰

Article 15.4 list can be established by analogy to panel and Appellate Body reports interpreting similar provisions in the *Anti-Dumping*.”)

⁵⁸ *Supra* note 55.

⁵⁹ *Id.* footnote 12. (“The term “nullification or impairment” is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.”). GATT, *supra* note 12, art. XXIII. (“1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it. 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.”)

⁶⁰ *Id.* art. XXIII(1).

Subsidies Causing Serious Prejudice to Another Member

The SCM Agreement provides that in any of the following circumstances, a subsidy should be considered to be causing serious prejudice:

- (1) when the subsidy displaces or impedes the imports of a like product of another Member into the market of the subsidizing Member;
- (2) when the subsidy displaces or impedes the exports of a like product of another Member from a third country market;
- (3) when the subsidy causes a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market; and
- (4) when the subsidy causes an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.⁶¹

This list in Article 6.3 is not exhaustive, and it is possible that a Panel can find serious prejudice other than on these grounds.⁶²

The concept of serious prejudice includes *a* threat of serious prejudice.⁶³ Detailed information on determining such a threat is set out in the Annex V of the SCM Agreement, Procedure for Developing Information concerning Serious Prejudice. Members must cooperate

⁶¹ The SCM Agreement, *supra* note 2, art. 6.3.

⁶² Bossche, *supra* note 13, at 573, footnote 231.

⁶³ The SCM Agreement, *supra* note 2, footnote 13. (“The term “serious prejudice to the interests of another Member” is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.”)

in the evidence-gathering process. If they fail to comply, the panel may complete the record as necessary, relying on best information otherwise available.⁶⁴

c. Non-Actionable Subsidies Article 8.1 of the SCM Agreement places non-actionable subsidies in two groups:

- (1) subsidies which are not specific within the meaning of Article 2;
- (2) subsidies which are specific within the meaning of Article 2, but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c).⁶⁵

Article 8.2 divides non-actionable subsidies into three groups.

Research and development (R&D)⁶⁶

Subsidies to higher education or research establishments on a contract basis allow them to conduct fundamental research activities. Such activity can enlarge general scientific and technical knowledge, and may not necessarily be linked to industrial or commercial objectives.⁶⁷

Generally, countries are still giving subsidies to encourage or reward research activities.

Normally, a product at the research stage is far from being put on the market for sale. Permitting

⁶⁴ *Id.* Annex V, para. 6. (“If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.”).

⁶⁵ *Id.* art. 8.1.

⁶⁶ *Id.* art. 8.2 (a). (“...assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:

the assistance covers not more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre-competitive development activity and provided that such assistance is limited exclusively to:

- (i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);
- (ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;
- (iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;
- (iv) additional overhead costs incurred directly as a result of the research activity;
- (v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.”)

⁶⁷ *Id.* , *Id.* , *Id.* , *Id.* , *Id.* , translated in CHANG-FA LO, INTERNATIONAL TRADE LAW, 434 (1999).

members to subsidize domestic industries in this category will most likely not distort trade in a severe way. Thus, the SCM Agreement is lenient on this matter.

Disadvantaged regions⁶⁸

The ASCM Agreement recognizes that it is appropriate for a country to give certain necessary assistance to its developing regions and to improve living standards and economic conditions within these areas. Supporting these areas is not likely to cause trade distortion in the market.⁶⁹ With certain restrictions and criteria, WTO members can subsidize the development of such regions within their territories.

Environmental protection⁷⁰

Experience within the WTO has demonstrated that trade and environment are related in many respects. A common example occurs whenever a trade measure becomes a tool to protect

⁶⁸ The SCM Agreement, *supra* note 2, art. 8.2 (b). (“...assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development and non-specific (within the meaning of Article 2) within eligible regions provided that:

- (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;
- (ii) the region is considered as disadvantaged on the basis of neutral and objective criteria, indicating that the region’s difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;
- (iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:
 - one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;
 - unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.”).

⁶⁹ Lo, *supra* note 67, at 438.

⁷⁰ The SCM Agreement, *supra* note 2, art.8.2 (c). (“...assistance to promote adaptation of existing facilities⁷⁰ to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

- (i) is a one-time non-recurring measure; and
- (ii) is limited to 20 per cent of the cost of adaptation; and
- (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
- (iv) is directly linked to and proportionate to a firm’s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
- (v) is available to all firms which can adopt the new equipment and/or production processes.”)

the environment. Under some circumstances, subsidies can be used as a method to encourage cooperation to take measures that are beneficial to environmental protection.

Non-actionable subsidies are not totally without remedies.⁷¹ The main difference, compared with prohibited subsidies and actionable subsidies, is found in the opportunity for involvement of the Dispute Settlement Body (DSB). For any dispute resulting from a non-actionable subsidy, Members must go to the Committee on Subsidies and Countervailing Measures, not to the Dispute Settlement Body.⁷²

The Committee is to initiate an investigation and reach a conclusion. Once the Committee determines that the alleged effect does exist, “it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects.”⁷³ If the recommendation is not followed, “the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.”⁷⁴

⁷¹ *Id.* art. 9.1. (“If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.”)

⁷² *Id.* art. 9.3. (“If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.”)

⁷³ *Id.* art. 9.4. (“Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.”)

⁷⁴ *Id.* art. 9.4.

B. COUNTERVAILING MEASURES

Prohibited and actionable subsidies can be challenged multilaterally and can also be offset by applying countervailing measures.⁷⁵ Therefore, if a Member's domestic market is injured by subsidies, it has two choices:⁷⁶

- (1) It may multilaterally challenge the subsidy concerned, following Article 4 or 7 of the SCM Agreement; or
- (2) It may unilaterally impose countervailing measures on the subsidized imports.

Articles 4 and 7 of the ASCM Agreement authorize the Member alleging subsidy and injury to request consultations with the subsidizing Member.⁷⁷ If consultation fails to result in resolution of the matter, the Member may then refer the matter to the Dispute Settlement Body (DSB).⁷⁸

The dispute will first be heard by a panel.⁷⁹ The decision by the panel may either be accepted or appealed to the Appellate Body.⁸⁰ The whole process is likely to take several months.

⁷⁵ Bossche, *supra* note 13, at 574.

⁷⁶ *Id.*

⁷⁷ The SCM Agreement, *supra* note 2, art. 4.1. ("Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member *may request consultations* with such other Member."). *Id.* art. 7.1. ("Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member *may request consultations* with such other Member.")

⁷⁸ *Id.* art. 4.4. ("If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.") *Id.* art. 7.4. ("consultations do not result in a mutually agreed solution within 60 days, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.")

⁷⁹ See generally Chapter 2 for Dispute Settlement Process in the WTO era.

⁸⁰ The SCM Agreement, *supra* note 2, art. 4.8. ("Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report."). *Id.* art. 7.6. ("Within 30 days of the

The Agreement also gives Members the right to unilaterally impose countervailing measures.⁸¹ But this option is not without limitation.

1. Historical Background

Subsidies have been treated as unfair trade measures largely because it is believed that products receiving subsidies will have an unfair advantage in the market place over like products that are not subsidized. Subsidies have thus been considered to be tools to advance social interests.⁸² Subsidized products may cause harm to like products in the importing Member. Therefore, in 1897, the United States passed laws allowing the collection of countervailing duties.⁸³ The collection of countervailing duties aims to offset any adverse effects resulting from a subsidy, and thus rebalance trade conditions.⁸⁴

The Tokyo Subsidies Codes, completed in the 1970's, set out multilateral standards for countervailing duty proceedings.⁸⁵ The GATT 1947 also authorized countervailing duties. These served as the basis for the later elaboration of subsidies relief mechanisms in Part V of the SCM Agreement. The SCM Agreement definition of a countervailing duty is taken from GATT

issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.”).

⁸¹ *Id.* art. 10.

⁸² Bossche, *supra* note 13, at 551.

⁸³ JOHN H JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATION*, 255 (1989).

⁸⁴ 羅昌發, 美國貿易救濟制度：國際經貿法研究 (一), *translated in*, CHANG-FA LO, *US TRADE REMEDY SYSTEM: RESEARCH ON INTERNATIONAL TRADE LAWS-VOLUME ONE*, 105-7 (1994). Anderson and Husisian, *supra* note 7, at 321. (“By definition, countervailing measures have a different purpose and a more limited application than WTO subsidies disciplines. WTO remedies are designed to operate at the source – *i.e.*, by requesting the subsidizing government to eliminate the subsidy or its adverse effects, and can reach subsidies affecting any market. By contrast, a countervailing duty is intended to neutralize a subsidy, and a Member may impose a countervailing duty only to offset subsidies to merchandise imported into its market. Whether the foreign country removes the subsidy is irrelevant, because the offsetting duty levels the playing field in the importing country.”)

⁸⁵ Anderson and Husisian, *supra* note 84.

Article 6: “a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.”⁸⁶

2. Preconditions to Collecting Countervailing Duties

According to Article IV of the GATT,⁸⁷ and Article 10 of the SCM Agreement,⁸⁸ WTO Members can only impose countervailing duties when: (1) there are subsidized imports; (2) there is injury to the domestic industry of the like products within the meaning of Articles 15 and 16; and (3) there is a causal link between the subsidized imports and the injury to the domestic industry.⁸⁹

a. The Existence of a Subsidy The SCM Agreement sets out detailed procedural requirements regarding countervailing measures investigation that may be undertaken on the domestic level.⁹⁰

The purpose of these procedural conditions is to ensure:

- (1) that the investigation is transparent;
- (2) that the rights of all interested parties to defend themselves is respected; and
- (3) that the investigating authority fully explains the basis of its decision.⁹¹

⁸⁶ GATT, *supra* note 12, art. VI; The SCM Agreement, *supra* note 2, footnote 36.

⁸⁷ *Id.* art. VI para. 6(a). (“No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.”).

⁸⁸ The SCM Agreement, *supra* note 2, art. 10. (“Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.”)

⁸⁹ *Id.* art. 11.2. (“An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury...”). Bossche, *supra* note 13, at 575.

⁹⁰ The SCM Agreement, *supra* note 2, art. 11, 12, and 13.

The SCM Agreement also requires that the investigating report contain sufficient evidence of the amount of the subsidy, if possible.⁹²

b. The Material Injury Determination During the negotiation of the SCM Agreement, the United States, Australia, Switzerland, and the Nordic countries proposed that prohibited subsidies should be countervailable without proving injury or adverse effect.⁹³ This was countered, in particular, by the European Community and India.⁹⁴ The latter opinion prevailed,⁹⁵ and, the SCM Agreement provides that no subsidy can be countervailable without showing injury.⁹⁶

The injury determination requires the existence of *material injury*, or a threat thereof, not just *serious injury*, as is required in the Agreement on Safeguards.⁹⁷

⁹¹ Bossche, *supra* note 13, at 576. Anderson and Husisian, *supra* note 84.

⁹² The SCM Agreement, *supra* note 2, art. 11.2. (“...Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
- (iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.”)

⁹³ Anderson and Husisian, *supra* note 84, at 324.

⁹⁴ *Id.*

⁹⁵ TERRENCE P. STEWART, *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992), 891, 915 (1999).

⁹⁶ The SCM Agreement, *supra* note 2, art. 11.9 and 15.

⁹⁷ *Id.* art. 4. (“For the purposes of this Agreement: (a) “serious injury” shall be understood to mean a significant overall impairment in the position of a domestic industry; (b) “threat of serious injury” shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and (c) in determining injury or threat thereof, a “domestic industry” shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those

The concept of material injury in the SCM Agreement is divided to include:

- (1) material injury to a domestic industry;
- (2) a threat of material injury to a domestic industry; and
- (3) material retardation of the establishment of a domestic industry.⁹⁸

Article 15 of the SCM Agreement provides the rules governing the injury determination.

The determination of a threat of material injury must be supported by facts and not merely by allegation, conjecture, or remote possibility.⁹⁹ The SCM Agreement provides a non-exhaustive list of factors to be considered for this purpose:

- (1) the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- (2) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- (3) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (4) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.”). Bossche, *supra* note 13, at 569.

⁹⁸ The SCM Agreement, *supra* note 2, footnote 45. (“Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.”).

⁹⁹ *Id.* art. 15.7.

- (5) the inventories of the product being investigated.¹⁰⁰

All of these factors must be taken into consideration when determining if there is a material injury.

c. The Causal Relationship Both the Tokyo Subsidies Code and the SCM Agreement provide that, “it must be determined that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement.”¹⁰¹ No countervailing duty may be applied without the determination of this causal relationship. The SCM Agreement further points out factors to be considered in determining a causal relationship. These factors include: the volumes and prices of non-subsidized imports of the product, a contraction in demand or changes in the patterns of consumption, the development of technology, and the export performance and productivity of the domestic industry.

The SCM Agreement allows Members to assess injuries to the domestic industry cumulatively.¹⁰² However, the cumulative assessment can only be allowed when:¹⁰³

- (1) the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible, and
- (2) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.¹⁰⁴

¹⁰⁰ *Id.*

¹⁰¹ WORLD TRADE ORGANIZATION, *supra* note 5, art. 6.4. *Id.* art. 15.5.

¹⁰² The SCM Agreement, *supra* note 2, art. 15.3. (“Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports....”)

¹⁰³ *Id.*

¹⁰⁴ *Id.* art. 15.5. (“It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing

3. Three Types of Countervailing Measures

The SCM Agreement allows three kinds of measures to be taken after a domestic investigation and resulting determination of subsidy, material injury, and causal relationship. They are (1) provisional countervailing measures,¹⁰⁵ (2) voluntary undertakings,¹⁰⁶ and (3) definitive countervailing duties.¹⁰⁷ These three types of countervailing measures reflect determinations at different stages of the subsidy investigation.¹⁰⁸

a. Provisional Countervailing Measures After the domestic investigation reaches a preliminary determination that a subsidy is causing harm to the domestic industry, the Member can impose provisional countervailing measures on the product in question.¹⁰⁹ But the application of provisional countervailing measures “shall not be applied sooner than 60 days

injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.”). Bossche, *supra* note 13, at 571-572, footnote 231.

¹⁰⁵ The SCM Agreement, *supra* note 2, art. 17.

¹⁰⁶ *Id.* art. 18.

¹⁰⁷ *Id.* art. 19.

¹⁰⁸ Bossche, *supra* note 13, at 579, footnote 231.

¹⁰⁹ The SCM Agreement, *supra* note 2, art. 17.1. (“Provisional measures may be applied only if:

- (a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;
- (b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and
- (c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.”).

from the date of initiation of the investigation.”¹¹⁰ The duration of a provisional countervailing measure “shall be limited to as short a period as possible, not exceeding 4 months.”¹¹¹

b. Voluntary Undertakings During the investigation process, the investigated Members can voluntarily undertake to increase the price of the product in question. This is accomplished when either,

- (1) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
- (2) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated.¹¹²

Once a satisfactory price undertaking is received, investigations must be suspended or terminated.¹¹³ However, a price undertaking need not be accepted if the investigating authority of the importing Member considers their acceptance impractical.¹¹⁴ Such undertakings may be offered and accepted after the investigating authority has made a preliminary affirmative determination of subsidization, injury, and causation.¹¹⁵

¹¹⁰ *Id.* art. 17.3.

¹¹¹ *Id.* art. 17.4.

¹¹² *Id.* art. 18.1.

¹¹³ *Id.* art. 18.4. (“If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.”)

¹¹⁴ *Id.* art. 18.3. (“Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon”)

¹¹⁵ *Id.* art. 18.2. (“Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.”)

c. Definitive Countervailing Duties As soon as the investigating authority makes the final determination that (1) a countervailable subsidy exists; and (2) the subsidy causes, or threatens to cause, injury to the domestic industry, it can impose definitive countervailing duties.¹¹⁶ The SCM Agreement provides that “[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.”¹¹⁷ Thus, the amount of a countervailing duty can never exceed the amount of the subsidy. This prevents a Member from profiting from imposing excessive countervailing duties on imported goods.

The MFN principle, as discussed earlier, applies to the collection of countervailing duties.¹¹⁸ This means that once Country A has determined that product Z has been subsidized by Countries B, C, and D, Country A cannot exclude Country B from the collection of countervailing duties. The resulting countervailing duty must apply to all product Z exports from Countries B, C, and D.

The application of countervailing duties may not be retroactive. Thus, countervailing duties are only applied to products which enter for consumption after the decision enters into force.¹¹⁹ The same non-retroactivity applies to provisional countervailing measures.¹²⁰

¹¹⁶ *Id.* art. 19.1. (“If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.”).

¹¹⁷ *Id.* art. 19.4.

¹¹⁸ *Id.* art. 19.3. (“When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied...on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted...”).

¹¹⁹ *Id.* art. 20.1. (“Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.”).

¹²⁰ *Id.*

Moreover, if a final determination is negative, any cash deposit of the provisional duty shall be refunded and any bond released in an expeditious manner.¹²¹

A final countervailing duty is not indefinite, but has a fixed time period.¹²² The SCM Agreement provides that “[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.”¹²³ After the imposition of countervailing duties, a review can be initiated by authorities or interested parties, who must provide positive evidence substantiating the need for a review.¹²⁴

During the review, the authority should consider:

- (1) whether the continued imposition of the duty is necessary to offset subsidization,
- (2) whether the injury would be likely to continue or recur if the duty were removed or varied, or
- (3) both.¹²⁵

If the authority determines that collection of countervailing duties is no longer necessary, it must terminate the collection of countervailing duties.¹²⁶

In addition to the review mechanism, Article 21.3 of the SCM Agreement contains a so-called *sunset* clause for countervailing duties. Any definitive countervailing duty must be terminated on a date not later than five years from its imposition or the latest review.¹²⁷ In the

¹²¹ *Id.* art. 20.5.

¹²² Anderson and Husisian, *supra* note 84, at 335. (However, we should note that under the Subsidies Code, as well as prior U.S. law, countervailing duty orders were potentially unlimited in duration).

¹²³ The SCM Agreement, *supra* note 2, art. 21.1.

¹²⁴ *Id.* art. 21.2. (“The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.”)

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* art. 21.3. (“Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be

US-Carbon Steel case, the Appellate Body upheld the Panel’s finding that there is no evidentiary standard for self-initiation of sunset reviews under Article 21.3 of the SCM Agreement.¹²⁸ The sunset clause applies to price undertakings as well as to countervailing duties.¹²⁹

C. THE SCM AGREEMENT AND SERVICE SUBSIDIES

The Traffic-light categorization in the SCM Agreement is, arguably, one of the most conceptually clear ways to organize subsidies.¹³⁰ It thus provides guidance to Members in dealing with service trade subsidies. Understanding the SCM Agreement is thus important to any further discussion of subsidies in services. In Chapter 8, I will examine whether the this subsidy categorization method, and countervailing measures as applied under the SCM Agreement, are appropriate to the trade in services.

terminated on a date not later than *five years* from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The duty may remain in force pending the outcome of such a review.”).

¹²⁸ Appellate Body Report, *United States – Countervailing duties on certain corrosion-resistant carbon steel flat products from Germany*, AB-2002-4, WT/DS213/AB/R, para. 112 (November 28, 2002)

¹²⁹ The SCM Agreement, *supra* note 2, art. 21.5. (“The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.”).

¹³⁰ Bhala, *supra* note 32.

V. THE AGREEMENT ON AGRICULTURE

Agricultural matters have generated important issues on the global negotiation table.¹ Not only are foods essential to a country's security, but foods are also important to a country's economy. Article I of the General Agreement on Tariffs and Trade (GATT)² allowed countries to maintain pre-existing agricultural subsidies.³ Professor Jackson described the situation as follows:

¹ A.J. Rayner, et al., *Agriculture in the Uruguay Round: An Assessment*, Econ. J. 1513 (1993). ("Agriculture was to be center stage from the launch of the Round in July 1986 until November 1992, when bilateral negotiations between the United States and the EC resulted in the Washington Accord. Indeed, over this period, the success or failure of the Round as a whole appeared to hinge on a settlement on agriculture.")

² General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT], art. XI. ("1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a)...

(b)...

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

- (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
- (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
- (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous

Commentators and observers about the GATT system have sometimes stated that agriculture was exempt from GATT. This statement is not correct, but it reflects the unfortunate reality that agriculture has been the most difficult part of international trade to bring under international trade discipline of the GATT [M]any nations in the world ... have been largely unwilling to allow the GATT rules to constrain their policies designed to assist and protect their agriculture population.⁴

The treatment of agricultural under the GATT has been the subject of much comment and criticism, resulting in many proposals for reformation of the rules.⁵ One economist⁶ has provided the following reasons to reform agricultural trades:

- (1) National agricultural policies are under pressure in almost every country. Major changes will be easier politically if done multilaterally.
- (2) Agricultural trade, still an important though declining share of world trade, has operated too long with inadequate GATT rules, undermining the very credibility of the GATT as an institution.
- (3) Agricultural trade issues are an increasing source of friction between major trading partners. This tension could spread to other products and lead to a major trade war. In each of the last several years, there have been threats of a trade war

representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.”)

³ [REDACTED], [REDACTED], translated in CHANG-FA LO, INTERNATIONAL TRADE LAW, 329 (1999).

⁴ JOHN H. JACKSON, THE WORLD TRADING SYSTEM, 313 (1997).

⁵ WTO, UNDERSTANDING THE WTO: THE AGREEMENTS, Agriculture: fairer markets for farmers, notes that “The original GATT did apply to agricultural trade, but it contained loopholes. For example, it allowed countries to use some non-tariff measures such as import quotas, and to subsidize. Agricultural trade became highly distorted, especially with the use of export subsidies which would not normally have been allowed for industrial products.” http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm; see also *id.* at 313, (United States action in response to the loose GATT regulations regarding agricultural trades. “For the United States this has been particularly worrisome, because it believes that it has a strong comparative advantage in the production of many agricultural goods, and that its agriculture producers were thwarted by other country limitations on imports of agricultural goods, often in direct defiance of GATT rules. Thus, in the Kennedy Round in the 1960’, the United States and other countries such as Canada and Australia made an effort to bring agriculture in to the ‘GATT’. That largely failed.”).

⁶ See generally DALE E. HATHAWAY, AGRICULTURE AND THE GATT: REWRITING THE RULES (1987).

between major trading nations over agricultural trade; only a series of last-minute settlements averted this clash.⁷

During the Uruguay Round, the United States led a push for agricultural reform.⁸ One observer described the role of agricultural issues in the Uruguay Round, stating that

agriculture was to be "centre stage" from the launch of the Round in July 1986 until November 1992, when bilateral negotiations between the United States and the EC resulted in the Washington Accord. Indeed, over this period, the success or failure of the Round as a whole appeared to hinge on a settlement on agriculture.⁹

The Agreement on Agriculture (AoA) was one result of the Uruguay Round. The objective of the AoA is to reform trade in sectors and to make policies more market-oriented.¹⁰ How to manage agricultural related matters has been a complex and contentious issue from the Uruguay Round to the Doha Round.¹¹ Nevertheless, the establishment of the AoA is only a beginning, providing a path for future negotiations.¹²

⁷ Paul C. Rosenthal and Lynn E. Duffy, *Reforming Global Trade in Agriculture*, in, THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, 146 (Terence P. Stewart ed., 1996).

⁸ Jackson, *supra* note 4, at 314. ("U.S. officials were joined by a number of other agricultural producing countries of the world (many of them combined in the so-called Cairns group, which included countries such as Canada, Australia, New Zealand, Brazil, Argentina, etc.) These mounted an almost do or die effort to make sure that the Uruguay Round would finally succeed in bringing agricultural under the trading rule system.").

⁹ Rayner et al., *supra* note 1.

¹⁰ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 410. [hereinafter AoA], preamble. ("*Having decided* to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration."). WTO, UNDERSTANDING THE WTO: THE AGREEMENTS, Agriculture: fairer markets for farmers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm.

¹¹ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS, 583 (2005)

¹² Jackson, *supra* note 8.

A. GENERAL INTRODUCTION

The Uruguay Round conclusion of the Agreement on Agriculture (AoA) was a significant move towards free international markets in agriculture. The AoA for the first time provides clear coverage of agricultural products within the GATT framework,¹³ and provides a certain measure of fairness to the agricultural trading system.¹⁴ Present rules on agricultural goods in the AoA can be broken up into three parts: market access,¹⁵ domestic support,¹⁶ and export subsidies.¹⁷ The focus here is on the AoA regulation of subsidies, but it is to briefly introduce the market access aspects of the AoA, and its focus on domestic support and export subsidies.

The market access provisions of the AoA are designed to replace quotas with tariffs.¹⁸

Prior to the AoA, Members applied quotas and other non-tariff measures to restrict agricultural

¹³ AoA, *supra* note 10, art. 2. (“This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products.”). AoA, *supra* note 10, Annex I lists. (“1. This Agreement shall cover the following products:

- (i) HS Chapters 1 to 24 less fish and fish products, plus*
- (ii)

HS Code	2905.43	(mannitol)
HS Code	2905.44	(sorbitol)
HS Heading	33.01	(essential oils)
HS Headings	35.01 to 35.05	(albuminoidal substances, modified starches, glues)
HS Code	3809.10	(finishing agents)
HS Code	3823.60	(sorbitol n.e.p.)
HS Headings	41.01 to 41.03	(hides and skins)
HS Heading	43.01	(raw furskins)
HS Headings	50.01 to 50.03	(raw silk and silk waste)
HS Headings	51.01 to 51.03	(wool and animal hair)
HS Headings	52.01 to 52.03	(raw cotton, waste and cotton carded or combed)
HS Heading	53.01	(raw flax)
HS Heading	53.02	(raw hemp)

2. The foregoing shall not limit the product coverage of the Agreement on the Application of Sanitary and Phytosanitary Measures.

*The product descriptions in round brackets are not necessarily exhaustive.”)

¹⁴ Rosenthal and Duffy, *supra* note 7, at 152.

¹⁵ AoA, *supra* note 10, art. 4.

¹⁶ *Id.* at art. 6, 7, and Annex 2.

¹⁷ *Id.* at art. 9,10, and 11.

¹⁸ *Id.* at art. 4. (“1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein. 2. Members shall not maintain, resort to, or revert to

imports from other countries.¹⁹ With the AoA, only tariffs are allowed as a tool to restrict market access.²⁰ *Tariffication* is thus used to convert quotas into tariffs.²¹ The following table demonstrates the targeted reduction for agricultural products from 1995 to 2004.

Table 9. Agreed Reductions in Agricultural Subsidies (Uruguay Round)²²

	Developed Countries From 1995-2000	Developing Countries From 1995-2004
Tariffs		
Average cut for all agricultural products	-36%	-24%
Minimum cut per product	-15%	-10%
Domestic support		
Total AMS cuts for sector	-20%	-13%
Export subsidies		
Value of subsidies	-36%	-24%
Subsidized quantities	-21%	-14%

Some exceptions to tariffication are allowed in the AoA.²³ They are listed in Article 5 and Annex 5. Article 5 allows Members to employ special safeguards on tariffied products if imports rise too rapidly or import prices fall too low.²⁴ Annex 5 permits special treatment for products

any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5.”)

¹⁹ World Trade Organization, *Understanding The WTO: The Agreements, Agriculture: fairer markets for farmers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm.

²⁰ *Id.*

²¹ *Id.* (For example, if the previous policy meant domestic prices were 75% higher than world prices, then the new tariff could be around 75%. You can find more details on the “tariffication” process in AoA).

²² *Id.*

²³ AoA, *supra* note 18.

²⁴ *Id.* at art. 5 para. 1. (“Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol “SSG” as being the subject of a concession in respect of which the provisions of this Article may be invoked, if:

- (a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in paragraph 4; or, but not concurrently:
- (b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned.”). Rosenthal and Duffy, *supra* note 7, at 146.

that meet certain conditions.²⁵ Tariffication is a central feature of the AoA, and eliminating non-tariff barriers is important to Members' agricultural exports.²⁶

B. SUBSIDIES UNDER THE AOA

The sensitive nature of agricultural subsidies is reflected by the fact that rules governing subsidies in the SCM Agreement are not fully applicable to agricultural subsidies.²⁷ In the Uruguay Round, countries became persuaded to take a first step, and the liberalization of agricultural trade continues in the Doha Round. Agricultural subsidies are large and complex, and the Doha Round talks have expanded discussion under the Agreement.²⁸ Member cooperation is essential to reform the regulation of agricultural subsidies.

²⁵ *Id.* at Annex 5 para. 1. ("The provisions of paragraph 2 of Article 4 shall not apply with effect from the entry into force of the WTO Agreement to any primary agricultural product and its worked and/or prepared products ("designated products") in respect of which the following conditions are complied with (hereinafter referred to as "special treatment"):

- (a) imports of the designated products comprised less than 3 per cent of corresponding domestic consumption in the base period 1986-1988 ("the base period");
- (b) no export subsidies have been provided since the beginning of the base period for the designated products;
- (c) effective production-restricting measures are applied to the primary agricultural product;
- (d) such products are designated with the symbol "ST-Annex 5" in Section I-B of Part I of a Member's Schedule annexed to the Marrakesh Protocol, as being subject to special treatment reflecting factors of non-trade concerns, such as food security and environmental protection; and
- (e) minimum access opportunities in respect of the designated products correspond, as specified in Section I-B of Part I of the Schedule of the Member concerned, to 4 per cent of base period domestic consumption of the designated products from the beginning of the first year of the implementation period and, thereafter, are increased by 0.8 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period.")

World Trade Organization, *supra* note 19. ("Four countries used "special treatment" provisions to restrict imports of particularly sensitive products during the implementation period, but subject to strictly defined conditions, including minimum access for overseas suppliers. The four were: Japan, Republic of Korea, and the Philippines for rice; and Israel for sheep meat, whole milk powder and certain cheeses. Japan and Israel have now given up this right, but Republic of Korea and the Philippines have extended their special treatment for rice. A new member, Chinese Taipei, gave special treatment to rice in its first year of membership, 2002.")

²⁶ Rosenthal and Duffy, *supra* note 7, at 155. (Take U.S. for example, "the USDA estimates that in 1993, approximately \$8 billion in U.S. agricultural products went to markets that imposed some form of trade-distortive non-tariff barriers.")

²⁷ Bossche, *supra* note 11, at 584.

²⁸ Paul Wolfowitz, *Everyone Must do More for Doha to Succeed*, Financial Times, 24 Oct. 2005, at 13, available at

1. Historical Background

Developed countries, in particular the European Union and the United States, have long employed subsidies as measures to support domestic agriculture.²⁹ For this reason, the GATT 1947 stipulated that domestic agricultural subsidies are basically legal.³⁰ GATT Article XVI provides that an agricultural export subsidy is acceptable as long as it

shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.³¹

In the Uruguay Round, agricultural subsidies were one of the most controversial issues. Many countries called for the reform of agricultural subsidy rules in GATT, especially the United States. But many countries, at that time, still employed domestic regulations to protect their own agricultural interests, including the United States.³² The European Community was reluctant to adopt any changes to its agricultural support program, and in particular to the

<http://www.thailandwto.org/Doc/News/1946.pdf> (Former World Bank President Paul Wolfowitz observes, “It is trade, not aid, that holds the key to creating jobs and raising incomes. It is trade that will allow poor countries to generate growth; forgiving debt alone will not do that. It is trade that has helped 400 million Chinese escape poverty in the last 20 years (1985-2005) and the same can happen elsewhere...Above all, there is a moral argument [for liberalizing trade]. How can we justify spending \$280 billion on support to agricultural producers in developed countries—nearly the total gross domestic product of Africa and four times the total amount of overseas aid? How can we justify imposing barriers on the poorest 2 billion people that are twice as high as on everyone else? How can we accept a system in which Africa’s share of world exports has fallen from 3.5 percent to less than 2 percent in the past 30 years?”).

²⁹ Bossche, *supra* note 27.

³⁰ GATT, *supra* note 2, art. XVI paragraph 1. (“If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, *the contracting party granting the subsidy shall*, upon request, *discuss with the other contracting party or parties concerned*, or with the CONTRACTING PARTIES, *the possibility of limiting the subsidization.*”)

³¹ GATT, *supra* note 2, art XVI.3.

³² Rosenthal and Duffy, *supra* note 7, at 149, footnote 21. (“Both the United States and Canada, for example, provided protection for certain agricultural industries through the use of quotas.”)

notorious Common Agricultural Policy (CAP).³³ The conflicts were mostly between the United States and the European Community (which later became the European Union).³⁴ The US proposed that agricultural subsidies should be cut down greatly, but the EC opposed this suggestion.³⁵ Even the US approach, however, would have allowed subsidies much higher than other Contracting States considered appropriate.³⁶ In order to reach a conclusion, the EC and US agreed to concessions.³⁷ These concessions resulted in the AoA language which allows agricultural subsidies, but also sets out an agreement to reduce domestic agricultural subsidies.³⁸

Agricultural subsidies have been historically indispensable to many developed-countries, such as the EU. At the same time, they clearly cause harm to other Member states.³⁹ While the SCM Agreement lays out the fundamental principles governing subsidies in general, agricultural subsidy rules prevail over the rules of the SCM Agreement.⁴⁰

The AoA groups agricultural subsidies into two types:

- (1) agricultural export subsidies; and

³³ *Id.* (“The CAP rests on three basic principles: common pricing, which attempts to set a single level of price support for each commodity; community preference, which ensures that EU products retain a competitive advantage over imported products; and common financing, a mechanism requiring the EU to fund all CAP activities via a community-wide value-added tax and import levies” The CAP resulted into trade-distortive effects and gives EU competitive advantages in grains, milk and milk products, meat, and sugar. Before the CAP had been implemented, “the EU was a net importer of wheat, but by 1985, it had become a net exporter, accounting for about 18 percent of world wheat exporters.”). See also U.S. CONGRESSIONAL BUDGET OFFICE, *THE GATT NEGOTIATIONS AND U.S. TRADE POLICY*, 84 (1987). See also Al J. Daniel, *Agricultural Reform: The European Community, the Uruguay Round, and International Dispute Resolution*, 46 Ark. L. Rev. 873, 876 (1994).

³⁴ *Id.* at 148.

³⁵ Lo, *supra* note 3, at 353.

³⁶ Rosenthal and Duffy, *supra* note 34.

³⁷ *Id.* at 149. (“A bilateral dispute between the E.U. and the United States over oilseeds eventually provided the opportunity to formulate a compromise that would clear a path towards a final resolution. This dispute was resolved in Washington, and is known as the ‘Washington Accord,’ or more informally, the ‘Blair House Agreement,’ in recognition of the location of the signing of the accord.”)

³⁸ *Id.* (“Under the Blair House Agreement, the E.U. and the United States agreed to require a 20 percent reduction in the average level of internal support across commodities, as determined by an Aggregate Measure of Support (AMS) based on the 1986-88 period. The two parties also committed to reduce the volume of subsidized exports by 21 percent and to reduce the value of export subsidies by 36 percent using a base period of 1986-1990. Finally, both countries agreed that certain internal support measures and export subsidies that conform to Uruguay Round commitments would not be countervailable under GATT subsidy rules.”)

³⁹ Bossche, *supra* note 27.

⁴⁰ AoA, *supra* note 10, art. 21.1. (“The provision of this GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.”)

(2) agricultural domestic subsidies.

Generally speaking, both export subsidies and domestic subsidies are legal, but they are subject to reduction.⁴¹ On the one hand, the AoA's regulations towards subsidy measures are more lenient than the SCM Agreement's, because export subsidies are allowed on agricultural products.⁴² On the other hand, the AoA's regulations are stricter than those in the SCM Agreement, because agricultural subsidies may be forbidden even though they generate no adverse effects.⁴³

2. Agricultural Export Subsidies

While the policy in the SCM Agreement is to eliminate all export subsidies, there is an exception for agricultural products. The SCM Agreement prohibition on export subsidies applies to agricultural export subsidies, except as provided otherwise in the AoA.⁴⁴ Thus, laws regulating export subsidies in the AoA are different from those in the SCM Agreement. Export subsidies are absolutely forbidden in goods trade, but there is a distinction in examining agricultural subsidies.⁴⁵ That distinction is between agricultural products that are specified in Section II of Part IV of a Member's GATT Schedule of Concessions; and agricultural products that are not specified in that section.

⁴¹ Lo, *supra* note 3, at 353.

⁴² *Id.*

⁴³ Lo, *supra* note 3, at 354.

⁴⁴ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 14. [hereinafter the SCM Agreement], art. 3.1. (“*Except as provided in the Agreement on Agriculture*, the following subsidies, within the meaning of Article 1, shall be prohibited....”). Bossche, *supra* note 27.

⁴⁵ *Id.*

Agricultural export subsidies defined in the AoA are not absolutely prohibited but are subject to a reduction commitment.⁴⁶ WTO Members can subsidize agricultural exports, but only if they have made commitments to reduce those subsidies.⁴⁷ Those without commitments cannot subsidize their agricultural exports at all. The subsidies subject to reduction commitments are:

- (a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;
- (b) the sale or disposal for export by governments or their agencies of noncommercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;
- (c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;
- (d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;

⁴⁶ AoA, *supra* note 10, art. 9.1. (“The following export subsidies are subject to reduction commitments under this Agreement....”).

⁴⁷ *Id.* at art. 8. (“Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.”)

- (e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments; and
- (f) subsidies on agricultural products contingent on their incorporation in exported products.⁴⁸

Currently, there are 25 Members who have committed to reduce subsidies. The following table lists those countries, with the numbers in brackets indicating the number of products for which each country has committed to reductions:

Table 10. Number of Export Subsidy Reduction Commitments by Member and Product Amounts⁴⁹

Australia (5)	Brazil(16)	Bulgaria (44)
Canada (11)	Colombia (18)	Cyprus (9)
Czech Republic (16)	EU (20)	Hungry (16)
Iceland (2)	Indonesia (1)	Israel (6)
Mexico (5)	New Zealand (1)	Norway (11)
Panama (1)	Poland (17)	Romania (13)
Slovak Republic (17)	South Africa (62)	Switzerland
Liechtenstein (5)	Turkey (44)	United States (13)
Uruguay (3)	Venezuela (72)	

Developed-countries agreed to reduce export subsidies by an average of 36% by value (budgetary outlay) and 21% by volume (subsidised quantities).⁵⁰ Budgetary outlay is defined as the revenue foregone.⁵¹ For the developing countries, the required cuts are 14% over 10 years with respect to volume, and 24% over the same period with respect to budgetary outlays.⁵² The AoA allows special and differential treatment for developing countries and least-developed

⁴⁸ *Id.* at art. 9.1.

⁴⁹ Special Session, *WTO Secretariat background paper Export subsidies*, [TN/AG/S/8](#) (April, 9, 2002).

⁵⁰ AoA, *supra* note 10, art. 15 para. 2. (“Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.”) World Trade Organization, *Agriculture: Explanation: Export competition/subsidies*, http://www.wto.org/english/tratop_e/agric_e/ag_intro04_export_e.htm. Bossche, *supra* note 27.

⁵¹ AoA, *supra* note 10, art. 1(c).

⁵² *Id.* art. 15 para. 2. (“Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.”) World Trade Organization, *supra* note 50. Bossche, *supra* note 27.

countries (LDC). Developing countries had ten years to implement the reduction commitment while LDCs were not required to reduce commitments at all.⁵³

With the AoA regime in place, there are now only four situations in which agricultural export subsidies are allowed. They involve:

- (1) export subsidies subject to product-specific reduction commitments within the limits specified in the schedule of the WTO Member;⁵⁴
- (2) any excess of budgetary outlays for export subsidies or subsidized export volume over the limits specified in the schedule which is covered by the downstream flexibility provision;⁵⁵

⁵³ AoA, *supra* note 52.

⁵⁴ *Id.* art. 9.1.

⁵⁵ *Id.* art. 9.2. (“(a) Except as provided in subparagraph (b), the export subsidy commitment levels for each year of the implementation period, as specified in a Member's Schedule, represent with respect to the export subsidies listed in paragraph 1 of this Article:

- (i) in the case of budgetary outlay reduction commitments, the maximum level of expenditure for such subsidies that may be allocated or incurred in that year in respect of the agricultural product, or group of products, concerned; and
 - (ii) in the case of export quantity reduction commitments, the maximum quantity of an agricultural product, or group of products, in respect of which such export subsidies may be granted in that year.
- (b) In any of the second through fifth years of the implementation period, a Member may provide export subsidies listed in paragraph 1 above in a given year in excess of the corresponding annual commitment levels in respect of the products or groups of products specified in Part IV of the Member's Schedule, provided that:
- (i) the cumulative amounts of budgetary outlays for such subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in the Member's Schedule by more than 3 per cent of the base period level of such budgetary outlays;
 - (ii) the cumulative quantities exported with the benefit of such export subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative quantities that would have resulted from full compliance with the relevant annual quantity commitment levels specified in the Member's Schedule by more than 1.75 per cent of the base period quantities;
 - (iii) the total cumulative amounts of budgetary outlays for such export subsidies and the quantities benefiting from such export subsidies over the entire implementation period are no greater than the totals that would have resulted from full compliance with the relevant annual commitment levels specified in the Member's Schedule; and
 - (iv) the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 per cent and 79 per cent of the 1986-1990 base period levels, respectively. For developing country Members these percentages shall be 76 and 86 per cent, respectively.”)

- (3) export subsidies consistent with the special and differential treatment provision for developing country Members;⁵⁶ and
- (4) export subsidies other than those subject to reduction commitments provided that they are in conformity with the anti-circumvention disciplines of Article 10 of the AoA.”⁵⁷

3. Agricultural Domestic Support – Amber/Blue/Green Box System⁵⁸

The AoA requires that Members reduce their domestic supports regarding agricultural products.⁵⁹ The method for calculating domestic supports is called an Aggregate Measurement of Support (AMS). The AMS is “the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general.”⁶⁰

The term “basic agricultural product” is defined as “the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material.”⁶¹ This calculation must exclude the types of support specified in Annex 2 of the AoA.⁶² The following table provides an example of how to calculate AMS:

⁵⁶ *Id.* art. 9.4. (“During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) and (e) of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments.”)

⁵⁷ World Trade Organization, *supra* note 50.

⁵⁸ *See generally* Committee on Agriculture Special Session, *Domestic Support: Background Paper by the Secretariat*, TN/AG/S/4 (March, 20, 2002).

⁵⁹ Rosenthal and Duffy, *supra* note 7, at 166.

⁶⁰ AoA, *supra* note 10, art. 1(a).

⁶¹ *Id.* art. 1(b).

⁶² AoA, *supra* note 10, art. 1(a). (“Aggregate Measurement of Support” and “AMS” mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:

Table 11. Example of Calculating Current Total AMS⁶³

Member X (developed country), Year Y

Wheat	<ul style="list-style-type: none"> • Intervention price for wheat = \$255 per tone • Fixed external reference price (world market price) = \$110 per tonne • Domestic production of wheat = 2,000,000 tonnes • Value of wheat production = \$510,000,000 • Wheat AMS (AMS 1) (\$255-\$110) x 2,000,000 tonnes = \$290,000,000 <p>de minimis level=\$25,500,000</p>
Barley	<ul style="list-style-type: none"> • Deficiency payments for barley = \$3,000,000 • Value of barley production = \$100,000,000 • Barley AMS (AMS 2) = \$3,000,000 <p>de minimis level=\$5,000,000</p>
Oilseeds	<ul style="list-style-type: none"> • Deficiency payments for oilseeds = \$13,000,000 • Fertilizer subsidy = \$1,000,000 • Value of oilseeds production = \$250,000,000 • Oilseeds AMS (AMS 3) = \$14,000,000 <p>de minimis level=\$12,500,000</p>
Support not specific to products	<ul style="list-style-type: none"> • Generally available interest rate subsidy = \$ 4,000,000 • Value of total agricultural production = \$860,000,000 • Non-product-specific AMS (AMS 4) = \$4,000,000 <p>de minimis level=\$43,000,000</p>
Current total AMS	(AMS 1 + AMS 3) = \$304,000,000

Developed countries agreed to cut their AMS support by 20% from 1986 to 1988.⁶⁴ This gave developing countries the flexibility to implement reduction commitments over a period of up to 10 years while no reduction commitments were required of LDC Members.⁶⁵ Members agree not to provide agricultural supports in excess of what they promised in their commitments.⁶⁶

-
- (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
- (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.")

⁶³ World Trade Organization, *Agriculture: Explanation, Domestic support*, http://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm.

⁶⁴ Bossche, *supra* note 11, at 585.

⁶⁵ AoA, *supra* note 10, art. 15(2).

⁶⁶ AoA, *supra* note 10, art. 3.2. ("Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.").

Generally speaking, all domestic supports are subject to the reduction.⁶⁷ These trade-distorting domestic supports are considered Amber-Box subsidies.⁶⁸ However, there are two exceptions to this principle. They are: Green-Box subsidies (AoA Annex 2) and Blue-Box subsidies.⁶⁹ These exceptions are introduced in the following paragraphs.

a. Amber-Box Subsidies This category signifies the “domestic support for agriculture considered to distort trade and therefore subject to reduction commitments.”⁷⁰ It includes direct payments and price supports to farmers.⁷¹

Existing Amber-box Subsidy Categories

Generally, amber-box subsidies are domestic supports that do not belong to either Blue or Green Box subsidies.⁷² The value of these measures must be reduced.⁷³ Without these reduction commitments, Members should keep their domestic supports under the *de minimis* level. The definition of *de minimis* subsidies is “minimal amounts of domestic support that are allowed even though they distort trade – up to 5% of the value of production for developed countries, 10% for developing.”⁷⁴ *De minimis* subsidies are considered to be Amber-box subsidies.

⁶⁷ *Id.* art. 6.1. (“The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement. The commitments are expressed in terms of Total Aggregate Measurement of Support and ‘Annual and Final Bound Commitment Levels’.”).

⁶⁸ Rosenthal and Duffy, *supra* note 59. World Trade Organization, *Agriculture Negotiations: Backgrounder, Phase I: Domestic support – amber, blue and green boxes*, http://www.wto.org/english/tratop_e/agric_e/negs_bkgmd07_domestic_e.htm.

⁶⁹ Bossche, *supra* note 11, at 586. World Trade Organization, *supra* note 68.

⁷⁰ World Trade Organization, *Glossary Term: Amber-Box*, http://www.wto.org/english/thewto_e/glossary_e/amber_box_e.htm.

⁷¹ RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE*, 92 (2007).

⁷² World Trade Organization, *Agriculture Negotiations: Background Fact Sheet, Domestic Support In Agriculture: The boxes*, http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm.

⁷³ AoA, *supra* note 67.

⁷⁴ World Trade Organization, *Glossary Term, De Minimis*, http://www.wto.org/english/thewto_e/glossary_e/de_minimis_e.htm.

Because they cause only minimal distortion, Members are allowed to maintain these supports.⁷⁵

Moreover, the AoA includes different minimal levels for developed and developing countries.⁷⁶

Thirty WTO Members committed to reducing their domestic supports. They are listed in the following table:

Table 12. Total AMS Commitments by Members, 1995-2001⁷⁷

Argentina	Australia	Brazil
Bulgaria	Canada	Colombia
Costa Rica	Cyprus	Czech Republic
EU	Hungary	Iceland
Israel	Japan	Jordan
Korea	Mexico	Morocco
New Zealand	Norway	Papua New Guinea
Poland	Slovak Republic	Slovenia
South Africa	Switzerland-Liechtenstein	Thailand
Tunisia	United States	Venezuela

⁷⁵ Bhala, *supra* note 71, at 90. *See also* World Trade Organization, *supra* note 70. (“Any support that would normally be in the amber-box, is placed in the blue-box if the support also requires farmers to limit production.”).

⁷⁶ AoA, *supra* note 10, art. 6.4. (“(a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:

- (i) product-specific domestic support which would otherwise be required to be included in a Member’s calculation of its Current AMS where such support does not exceed 5 per cent of that Member’s total value of production of a basic agricultural product during the relevant year; and
- (ii) non-product-specific domestic support which would otherwise be required to be included in a Member’s calculation of its Current AMS where such support does not exceed 5 per cent of the value of that Member’s total agricultural production.

(b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent.”)

⁷⁷ Committee on Agriculture Special Session, *supra* note 58.

Member Proposals in the Doha Round

In 2003, a number of developed and developing countries wanted Amber-Box subsidies to be eliminated in 3 to 5 years for developed countries, and in a period up to nine years for developing countries.⁷⁸ As for the *de minimis* levels, some proposed to have a higher level for developing countries and lower levels (or abolishment) for developed countries.⁷⁹

The Modality of Amber-box Subsidies⁸⁰

Discussions on the revision of Amber-box designations have focused on the possible abolition of Amber-box subsidies, the definition of *de minimis* levels, and the calculation of AMS.⁸¹ The proposed draft concerning Amber-box subsidies can be seen in the following table, using the positions submitted at the Cancún Negotiations.

Table 13. Agricultural Proposed Reform Regarding Amber-box Subsidies⁸²

Time	Different opinions
Before Cancún Negotiations	<p>US-EU draft:⁸³ It proposes to broadly reduce trade-distorting supports by a range of percentages to be negotiated. Countries with larger distorting supports should make a greater effort. Japan's paper⁸⁴ specifies that the reductions should be on <i>total AMS</i>. <i>De minimis</i> payments would be disciplined under an overall reduction for Amber, <i>de minimis</i> and Blue-Box payments.</p> <p>G-20:⁸⁵ It proposes reductions on each product rather than for the whole agricultural sector, with additional conditions to reduce support on more heavily subsidized products, an initial downpayment cut, and larger reductions for products with more than a specified share of world exports.</p>

⁷⁸ World Trade Organization, *supra* note 72.

⁷⁹ *Id.*

⁸⁰ See generally Bhala, *supra* note 71, at 92-93.

⁸¹ World Trade Organization, *supra* note 72.

⁸² *Id.*

⁸³ Joint EC-US Paper, *Agriculture*, JOB(03)/157 (restricted) (August, 13, 2003), available at [http://wtocentre.iift.ac.in/agri/Other%20Useful%20Resources+/Job\(03\)-157%20-%20Joint%20EC-US%20Paper.PDF](http://wtocentre.iift.ac.in/agri/Other%20Useful%20Resources+/Job(03)-157%20-%20Joint%20EC-US%20Paper.PDF).

⁸⁴ Japan, JOB(03)/165 (restricted)(August, 20, 2003).

⁸⁵ Ministerial Conference, Fifth Session Cancun, 10-14 September 2003, *Agriculture-Framework Proposal: Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WT/MIN(03)/W/6 (September, 4, 2003).

Time	Different opinions
	<p>Norway:⁸⁶ It envisages larger reductions on products that are produced for export. It also proposes negotiating reductions for the Amber- and Blue-Boxes combined.</p> <p>The European-East Asian group:⁸⁷ They argue that their supports have little impact on world markets and the reductions should be negotiated together with market access and export subsidies.</p>
In Cancún Negotiations	<p>The African Union/ACP/LDC:⁸⁸ They call for substantial reductions in both Amber- and Blue-Box supports “with a view to their phasing out and elimination”.</p>

b. Blue-box Subsidies Apart from those measures included in the Green-box category, other measures are also exempted from the reduction commitment.⁸⁹ They are called Blue-box subsidy.⁹⁰

⁸⁶ Norway’s submission, *Norway’s View On The Framework Package On Agriculture*, JOB(03)/169 (August 21, 2003) (restricted), available at http://www.regjeringen.no/upload/kilde/ld/bro/2001/0010/ddd/pdfv/200663-framework_package_on_agriculture.pdf.

⁸⁷ *Agriculture - Position Of Bulgaria, Chinese Taipei, Iceland, Korea, Liechtenstein And Switzerland On The Framework Package*, JOB(03)/167(August, 20, 2003) (restricted), available at [http://wtocentre.iift.ac.in/agri/CAIRS%20Group+/Job\(03\)-167%20EE%20Asian%20Gr..pdf](http://wtocentre.iift.ac.in/agri/CAIRS%20Group+/Job(03)-167%20EE%20Asian%20Gr..pdf).

⁸⁸ Communication from Mauritius, Ministerial Conference Fifth Session Cancun, 10-14 September 2003, *Consolidated African Union/ACP/LDC Position On Agriculture*, WT/MIN(03)/W/17 (September, 12, 2003).

⁸⁹ Bossche, *supra* note 69.

⁹⁰ *Id.* (The Blue-box category has different interpretations among literature. “Blue-box’ subsidies include certain developing –country subsidies designed to encourage agricultural production, certain *de minimis* subsidies, and certain direct payments aimed at limiting agricultural production.”) Bhala, *supra* note 71, at 89-90. (Professor Raj Bhala discusses *de minimis* subsidies and Blue-box subsidies separately. He states that, “the definition of the Blue-Box in Article 6:5 of the WTO Agreement on Agriculture covers only those subsidy programs that require a limit on production. Thus, the Box essentially is a category for production ‘set asides’ (*i.e.*, payments not to produce, or to limit acreage under production.”). World Trade Organization, *Agriculture Negotiations: Background, Domestic Support: Amber, Blue And Green Boxes*, http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd13_boxes_e.htm. (The Blue-Box subsidy includes the *de minimis* subsidies, but does not include the special and differential treatment for developing countries. The definition of the Blue-Box subsidies is “an exemption from the general rule that all subsidies linked to production must be reduced or kept within defined minimal (“*de minimis*”) levels. It covers payments directly linked to acreage or animal numbers, but under schemes which also limit production by imposing production quotas or requiring farmers to set aside part of their land.”) This dissertation will follow the structure of WTO website.

Existing Blue-box Subsidy Categories

Blue-box subsidies receive an “exemption from the general rule that all subsidies linked to production must be reduced or kept within defined minimal (*de minimis*) levels.”⁹¹ This category is also described as the “Amber-Box with conditions.”⁹² The purpose of this category is to help Members reform their domestic agricultural sector. Identified in Article 6 of the AoA,⁹³ This category includes certain types of direct payments for which there is no commitment to reduce domestic support if:

- (1) such payments are based on fixed area and yields; or
- (2) such payments are made on 85 per cent or less of the base level of production; or
- (3) livestock payments are made on a fixed number of head.⁹⁴

Currently, the only Members notifying the WTO that they are using or have used the Blue-box subsidies are the EU, Iceland, Norway, Japan, the Slovak Republic, and Slovenia.⁹⁵

Member Proposals in the Doha Round

Under the AoA, if a subsidy falls within the Blue-box, there are no limits on spending supports.⁹⁶ Some countries want to abolish or reduce the use of these subsidies.⁹⁷ However, other countries insist on keeping this category.⁹⁸ The EU supports keeping Blue-box subsidies,

⁹¹ *Id.*

⁹² *Id.* (“What are the conditions in the Blue-box? The text further specifies that “conditions designed to reduce distortion.”)

⁹³ Bhala, *supra* note 71, at 90.

⁹⁴ AoA, *supra* note 10, art. 6 para.5(a).

⁹⁵ World Trade Organization, *supra* note 90.

⁹⁶ *Id.*

⁹⁷ *Id.* (These Members include: The Cairns Group (except Canada), including Argentina, Australia, Bolivia, Brazil, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand, and Uruguay.)

⁹⁸ *Id.* (“The proposing countries state that maintaining Blue-box subsidy is important “for achieving certain ‘non-trade’ objectives, and argue that it should not be restricted as it distorts trade less than other types of support.”). See also World Trade Organization, *Glossary Term: Non-Trade Concerns*, http://www.wto.org/english/thewto_e/-glossary_e/non_trade_concerns_e.htm. (Non-trade concerns are “similar to multifunctionality.” The preamble of the Agriculture Agreement specifies food security and environmental protection as examples. Also cited by members are rural development and employment, and poverty alleviation.”) The non-trade concerns have already brought

claiming that “it is ready to negotiate additional reductions in Amber-Box support so long as the concepts of the Blue and Green Boxes are maintained.”⁹⁹

The Modality of Blue-box Subsidies

Some Members propose to have grace periods before phasing out this category; five years for developed countries and the nine years for developing countries.¹⁰⁰ Therefore, the first draft on Blue-box states

Current Blue Box payments would be capped and bound. Then, they would either be halved over five years (cut 33% over 10 years for developing countries), or merged into the Amber Box (i.e. included in “current total aggregate measurement of support” or AMS) – developing countries would be allowed to delay the merger until the fifth year.¹⁰¹

In the negotiated 2004 Framework Agreement, Members agreed to have a 5 percent cap on Blue-box subsidies.¹⁰² The proposal for Blue-box subsidies is illustrated in the following table, using the positions submitted at the Cancún Negotiations:¹⁰³

members attention (Committee on Agriculture, Special Session, *Note On Non-Trade Concerns: Revised*, G/AG/NG/W/36/Rev.1 (November, 9, 2000)). Countries such as Japan (*see generally* Committee on Agriculture, Special session, *Negotiation Proposal By Japan On WTO Agricultural Negotiations*, G/AG/NG/W/91, (December, 21, 2000)), Republic of Korea (*see generally* Committee on Agriculture, Special session, *Proposal For WTO Negotiations On Agriculture*, G/AG/NG/W/98 (January, 9, 2001)) and Norway (*see generally* Committee on Agriculture, Special session, *WTO Agriculture Negotiations: Proposal by Norway*, G/AG/NG/W/101 (January, 16, 2001)) place a lot of emphasis on the need to tackle agriculture’s diversity as part of these non-trade concerns. The EU’s proposal (*see generally* Committee on Agriculture, Special session, *EC Comprehensive Negotiating Proposal*, G/AG/NG/W/90 (December, 14, 2000)) says non-trade concerns should be targeted, transparent and cause minimal trade distortion. One of the most important subjects discussed by members is food security. Members, especially developing countries, consider food security important. Some developing countries argue that they need to intervene in the agricultural trade because developed countries have no intention to cut down supports to their agricultural business. In order to protect themselves, members need to have the rights to secure their domestic food producers. See Committee on Agriculture Special Session, *Export Subsidies-Food Security Or Food Dependency?: A Discussion Paper presented by Argentina, Brazil, Paraguay and Uruguay (MERCOSUR), Chile, Bolivia and Costa Rica*, G/AG/NG/W/38 (December, 11, 2001).

⁹⁹ World Trade Organization, *supra* note 90.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Bhala, *supra* note 71, at 91.

¹⁰³ World Trade Organization, *Agriculture Negotiations: Background ‘Non-Trade’ Concerns: Agriculture Can Serve Many Purposes*, http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd17_agri_e.htm. (“As for the non-trade concerns mentioned previously, they are not discussed as a separate issue; instead, they are considered to be on a different level, the three pillars: export subsidies and competition, market access, and domestic support. Japan asks for more flexible standards in dealing with sensitive products.”). *See generally* Japan, *supra* note 84. (Also, for non-trade concerns, Japan asks for more flexible standards in dealing with sensitive products.)

Table 14. Agricultural Proposed Reform Regarding Blue-box Subsidies¹⁰⁴

Time	Different opinions
Before Cancún Negotiations	US-EU draft: ¹⁰⁵ It proposes to modify the definition of the Blue-box subsidies and limit this to 5% of the value of agricultural production by the end of the implementation period.
	G-20: ¹⁰⁶ They want the Blue-box to be eliminated. Japan ¹⁰⁷ wants it maintained but is willing to modify it.
In Cancún Negotiations	Norway: ¹⁰⁸ It proposes to give governments to option of either adopting the US-EU revised definition and limit, or halving the present Blue-box subsidies from 2000-02 levels. Israel: ¹⁰⁹ It proposes leaving the final limit open for negotiation. The African Union/ACP/LDC: ¹¹⁰ They want the Blue-box to be eliminated along with the Amber-box

c. Green-box Subsidies Green-box subsidies are described in Annex II of the AoA.¹¹¹ Because they do not have adverse effects on trade,¹¹² they are exempt from WTO Members' reduction commitments.¹¹³ Annex 2, paragraph 1 states that, "Domestic support ... shall meet the fundamental requirement that they have no ... trade-distorting effects or effects on production."

¹⁰⁴ World Trade Organization, *supra* note 90.

¹⁰⁵ Joint EC-US Paper, *supra* note 83.

¹⁰⁶ Ministerial Conference, Fifth Session Cancun, 10 -14 September 2003, *supra* note 85.

¹⁰⁷ Japan, *supra* note 84.

¹⁰⁸ Communication from Norway, Ministerial Conference Fifth Session Cancun, 10-14 September 2003, *Agriculture Amendments to paragraph 1.3 of Annex A, WT/MIN(03)/W/15* (September, 12, 2003).

¹⁰⁹ Ministerial Conference Fifth Session Cancun, 10-14 September 2003, *Communication from Israel: Agriculture Modalities Framework: Comments To Bridge The Gap, WT/MIN(03)/W/16* (September, 12, 2003).

¹¹⁰ Ministerial Conference Fifth Session Cancun, 10-14 September 2003, *supra* note 88.

¹¹¹ AoA, *supra* note 10, Annex II.

¹¹² World Trade Organization, *supra* note 72.

¹¹³ AoA, *supra* note 10, art. 7. ("1. Each Member shall ensure that any domestic support measures in favour of agricultural producers which are not subject to reduction commitments because they qualify under the criteria set out in Annex 2 to this Agreement are maintained in conformity therewith.

2. (a) Any domestic support measure in favour of agricultural producers, including any modification to such measure, and any measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement or to be exempt from reduction by reason of any other provision of this Agreement shall be included in the Member's calculation of its Current Total AMS.

(b) Where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6.

The reduction commitments are expressed in terms of a "Total Aggregate Measurement of Support" (Total AMS) which includes all product-specific support and non-product-specific support in one single figure. Members with a Total AMS have to reduce base period support by 20 per cent over 6 years (developed country Members) or 13 per cent over 10 years (developing country Members).")

Apart from having no trade-distorting effects, such domestic support should meet two requirements:

- (1) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
- (2) the support in question shall not have the effect of providing price support to producers.¹¹⁴

Green-box subsidies are only allowed while they neither cause any trade distortion nor encourage any production.

Existing Green-box Subsidy Categories

Annex 2 lists several examples of Green-box subsidies,¹¹⁵ which include:

- (1) General services.¹¹⁶

Policies in this category involve expenditures (or revenue foregone) in relation to programmes that provide services or benefits to agriculture or the rural community. They shall not involve direct payments to producers or processors. The AoA provides a non-exhaustive list explaining the examples.¹¹⁷

¹¹⁴ *Id.* Annex 2 para. 1.

¹¹⁵ AoA, *supra* note 10, Annex 2 paras. 2-13.

¹¹⁶ *Id.* para. 2.

¹¹⁷ *Id.* para. 2. (it points that general services should include,

- “(a) research, including general research, research in connection with environmental programmes, and research programmes relating to particular products;
- (b) pest and disease control, including general and product-specific pest and disease control measures, such as early-warning systems, quarantine and eradication;
- (c) training services, including both general and specialist training facilities;
- (d) extension and advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers;
- (e) inspection services, including general inspection services and the inspection of particular products for health, safety, grading or standardization purposes;
- (f) marketing and promotion services, including market information, advice and promotion relating to particular products but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers; and

(2) Public stockholding for food security purposes.¹¹⁸

This exemption includes expenditures (or foregone revenue) in relation to the accumulation and holding of stocks of products, which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme.

(3) Domestic food aid.¹¹⁹

This includes expenditures (or foregone revenue) in relation to the provision of domestic food aid to sections of the population in need.

(4) Direct payments to producers.¹²⁰

Support provided through direct payments (or foregone revenue, including payments in kind) to producers, for which exemption from reduction commitments is claimed shall meet some basic criteria.

(5) Decoupled income support.¹²¹

In this category, it is required that governmental supports should be not related to production or sales.¹²²

(g) infrastructural services, including: electricity reticulation, roads and other means of transport, market and port facilities, water supply facilities, dams and drainage schemes, and infrastructural works associated with environmental programmes. In all cases the expenditure shall be directed to the provision or construction of capital works only, and shall exclude the subsidized provision of on-farm facilities other than for the reticulation of generally available public utilities. It shall not include subsidies to inputs or operating costs, or preferential user charges.”)

¹¹⁸ *Id.* para. 3. (“For the purposes of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS.”)

¹¹⁹ *Id.* para. 4. (“For the purposes of paragraphs 3 and 4 of this Annex, the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.”)

¹²⁰ *Id.* para. 5.

¹²¹ *Id.* para. 6.

¹²² *Id.* (Annex 2, para. 6 states, “(a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period. (b)

- (6) Government financial participation in income insurance and income safety-net programmes.¹²³
- (7) Payments (made either directly or by way of government financial participation in crop insurance schemes) for relief from natural disasters.¹²⁴
- (8) Structural adjustment assistance provided through producer retirement programmes.¹²⁵
- (9) Structural adjustment assistance provided through resource retirement programmes.¹²⁶
- (10) Structural adjustment assistance provided through investment aids.¹²⁷

The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period. (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period. (d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period. (e) No production shall be required in order to receive such payments.”

¹²³ *Id.* at para. 7. (“(a) Eligibility for such payments shall be determined by an income loss. (b) The amount of such payments shall compensate for less than 70 per cent of the producer’s income loss in the year the producer becomes eligible to receive this assistance. (c) The amount of any such payments shall relate solely to income. (d) Where a producer receives in the same year payments under this paragraph and under paragraph 8 (relief from natural disasters), the total of such payments shall be less than 100 per cent of the producer’s total loss.”)

¹²⁴ *Id.* at para. 8. (“(a) Eligibility for such payments shall arise only following a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned) has occurred or is occurring; and shall be determined by a production loss which exceeds 30 per cent of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry. (b) Payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question. (c) Payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production. (d) Payments made during a disaster shall not exceed the level required to prevent or alleviate further loss as defined in criterion (b) above. (e) Where a producer receives in the same year payments under this paragraph and under paragraph 7 (income insurance and income safety-net programmes), the total of such payments shall be less than 100 per cent of the producer’s total loss.”)

¹²⁵ *Id.* at para. 9. (“(a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to facilitate the retirement of persons engaged in marketable agricultural production, or their movement to non-agricultural activities. (b) Payments shall be conditional upon the total and permanent retirement of the recipients from marketable agricultural production.”)

¹²⁶ *Id.* at para. 10. (“(a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to remove land or other resources, including livestock, from marketable agricultural production. (b) Payments shall be conditional upon the retirement of land from marketable agricultural production for a minimum of three years, and in the case of livestock on its slaughter or definitive permanent disposal. (c) Payments shall not require or specify any alternative use for such land or other resources which involves the production of marketable agricultural products. (d) Payments shall not be related to either the type or quantity of production or to the prices, domestic or international, applying to production undertaken using the land or other resources remaining in production.”)

¹²⁷ *Id.* at para. 11. (“(a) Eligibility for such payments shall be determined by reference to clearly-defined criteria in government programmes designed to assist the financial or physical restructuring of a producer’s operations in response to objectively demonstrated structural disadvantages. Eligibility for such programmes may also be based

- (11) Payments under environmental programmes¹²⁸
- (12) Payments under regional assistance programmes.¹²⁹

Members can freely increase their investments on domestic supports. Green-box subsidies basically apply to both developed and developing countries. If a Member can demonstrate that it complies with the required criteria above, its Green-box subsidies are without limits.

Member Proposals in the Doha Round

More recently, some countries have proposed a review of domestic subsidies listed by Members in the Green-box category because they believe some of them have an influence on production or prices.¹³⁰ Other countries insist that the Green-box category should not be

on a clearly-defined government programme for the reprivatization of agricultural land. (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than as provided for under criterion (e) below. (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period. (d) The payments shall be given only for the period of time necessary for the realization of the investment in respect of which they are provided. (e) The payments shall not mandate or in any way designate the agricultural products to be produced by the recipients except to require them not to produce a particular product. (f) The payments shall be limited to the amount required to compensate for the structural disadvantage.”)

¹²⁸ *Id.* at para. 12. (“(a) Eligibility for such payments shall be determined as part of a clearly-defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs. (b) The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.”)

¹²⁹ *Id.* at para. 13. (“(a) Eligibility for such payments shall be limited to producers in disadvantaged regions. Each such region must be a clearly designated contiguous geographical area with a definable economic and administrative identity, considered as disadvantaged on the basis of neutral and objective criteria clearly spelt out in law or regulation and indicating that the region's difficulties arise out of more than temporary circumstances. (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than to reduce that production. (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period. (d) Payments shall be available only to producers in eligible regions, but generally available to all producers within such regions. (e) Where related to production factors, payments shall be made at a digressive rate above a threshold level of the factor concerned. (f) The payments shall be limited to the extra costs or loss of income involved in undertaking agricultural production in the prescribed area.”)

¹³⁰ World Trade Organization, *supra* note 68. (“The G-20 framework proposes reductions on categories of Green Box subsidies (some income supports – paragraphs 5-13 of Annex 2 of the Agriculture Agreement) that the group considers to distort trade, along with additional, unspecified disciplines”). World Trade Organization, *supra* note 72.

changed since it is already satisfactory.¹³¹ Some Members argue that the Green-box category should be expanded to cover additional types of subsidies to accommodate a changing world.¹³²

The Modality of Green-box Subsidies

The paper and non-paper opinions of Members regarding the Green-box category demonstrate 2 broad questions:¹³³

(1) Is the Green Box Flexible enough?

Members are concerned about whether the current framework for Green-box subsidies is flexible enough to cover non-trade issues, such as environmental protection, rural development, animal welfare, etc.¹³⁴ Some developing countries suggest adding a development box in the Green-box category, asking for more flexibility and ability to adjust.¹³⁵

(2) Does a Green-box Subsidy distort trade?

Several Members, both developed and developing countries, believe that Green-box subsidies are causing trade-distorting effects.¹³⁶ Additionally, they want to re-examine the criteria for the current Green-box subsidy categories.¹³⁷ The first draft on Green-box subsidies would amend the AoA by

(i) adding fixed or unchanging reference periods (some Green Box provisions allow countries to base their calculations on base periods that can change);

¹³¹ World Trade Organization, *supra* note 68. *See also* World Trade Organization, *supra* note 72. (The US-EU draft says nothing about the Green Box. Japan, Norway and the European-East Asian group oppose changing or limiting the Green Box.)

¹³² World Trade Organization, *supra* note 68. (“The African Union/ACP/least-developed countries call for developed countries’ ‘trade distorting’ Green Box measures to be limited.”). World Trade Organization, *supra* note 72.

¹³³ World Trade Organization, *supra* note 90.

¹³⁴ *Id.*

¹³⁵ *Id.* (“Those developing countries include Cuba, Dominican Rep, Honduras, Nicaragua, El Salvador, Kenya, Pakistan, Sri Lanka, Zimbabwe.”)

¹³⁶ *Id.*

¹³⁷ *Id.*

- (ii) tightening rules on criteria for compensation that is allowed to be in the Green Box, and
- (iii) allowing compensation for increased costs of protecting animal welfare.”¹³⁸

d. Developmental Measures The AoA allows special and differential treatment for developing countries.¹³⁹ Activities covered in developmental measures include investment subsidies which are generally allowed for developing countries.¹⁴⁰ The rationale behind this special treatment is stated as follows:

Developing countries depend on the production and export of agricultural products for their foreign exchange earnings. In 1986, for low income developing countries, 19 percent of their Gross National Product and 60 percent of their labor force depended on agriculture. In addition, agricultural products accounted for fifty to one hundred percent of total exports by some developing countries. A very large number of agricultural exports originated from developing countries.¹⁴¹

Current proposals provide for the retention of special and differential treatment for developing countries, with possible enhancements.¹⁴² During the G-20, some countries called for expanded provisions under this Article, “with possible enhancements¹⁴³ for diversifying away from crops that are harmful for human health and for other well-targeted subsidies.”¹⁴⁴

¹³⁸ *Id.*

¹³⁹ AoA, *supra* note 10, art. 6 para. 2. (“In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member’s calculation of its Current Total AMS.”).

¹⁴⁰ World Trade Organization, *supra* note 63.

¹⁴¹ Kele Onyejekwe, *GATT, Agriculture, and Developing Countries*, 17 *Hamline L. Rev.* 77, 103 (1997)

¹⁴² World Trade Organization, *supra* note 63.

¹⁴³ World Trade Organization, *Agriculture Negotiations: Backgrounder Decision on net food-importing developing countries*, http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd15_foodimport_e.htm.

(“For detailed information on these enhancements provisions, see The Pérez del Castillo and Derbez drafts reflect this, with the Derbez text referring to “enhanced” provisions. General Council chairperson Carlos Pérez del Castillo included a draft “framework” on agriculture as Annex A of his draft Ministerial declaration, JOB(03)/150/Rev.1,

There is no doubt that the application of the AoA to subsidies is a complex matter. Nonetheless, it has provided both notable and historical achievements. The existence of a different subsidies regime in the AoA, as compared to the SCM Agreement, requires that one be aware during future negotiations of both the progress indicated by, and the difficulties raised by, the existing agricultural subsidies regime.

24 August 2003. Further negotiations in Cancún led to a second revision in the “Derbez text”, JOB(03)/150/Rev.2, 13 September 2003.”)

¹⁴⁴ World Trade Organization, *supra* note 90. Bhala, *supra* note 71, at 96. (In the G-20 PLAN FOR CUTS TO OVERALL TRADE, “it agreed developing countries should be put in separate bands and obliged to make cuts in the sum of their Amber-Box, Blue-Box, and *De minimis* support.”).

VI. SUBSIDIES IN SERVICES TRADES

On July 25, 2002, the Working Party on GATS Rules released Work Programmes outlining Members' future obligations.¹ At the beginning of the document, the Work Programmes recognized Members' freedom to conduct their negotiations regarding service subsidy regulations. The document explicitly provides for flexibility in the negotiation process, stating:

- (1) "The work programmes do not prejudice in any way the outcome of the respective negotiations on emergency safeguard measures, subsidies, and government procurement. Members will remain free to bring up any relevant issues for discussion, including the questions of feasibility and desirability, as well as the scope of the negotiations, under any of the three subjects of negotiations.
- (2) The benchmarks for submissions are indicative, with a view to encouraging Members to put forward submissions on the respective subjects as early as possible, and would be without prejudice to Members' rights to put forward further suggestions and raise relevant issues by way of submissions at any time, under any of the three subjects of negotiations.

¹ Working Party on GATS Rules, *Work Programmes*, S/WPGR/7 (July, 25, 2002).

- (3) The undertaking of individual items of work, including the question of feasibility and desirability, should be without prejudice to each other under each subject of negotiations.”²

Apart from recognizing flexibility in negotiations, the Work Programmes point out three components of service regulations: emergency safeguard measures, subsidies, and government procurement. For service subsidies, the Working Party’s mission is based on Article XV of the GATS and paragraph 7 of the Negotiating Guidelines³ and the Work Programmes list the following objectives:

- (1) “to continue discussion on subsidies on the basis of submissions from Members and materials available;
- (2) to encourage Members to put forward submissions on subsidies as early as possible before March 31, 2003, without prejudice to Members’ right to put forward further suggestions and raise relevant issues;
- (3) the Chairperson to circulate a note by June 30, 2003 to report on the progress of work; and
- (4) to prepare for the opportunity provided by the Fifth Ministerial Conference to take stock of progress made in the negotiations.”⁴

If we take a closer look at the document, it does not provide any concrete guidance for service subsidy regulations. However, it does give a positive perspective towards future

² *Id.* at para. 1.

³ Special Session of the Council for Trade in Services, *Guidelines and Procedures for the Negotiations on Trade in Services, adopted by the Special Session of the Council for Trade in Services on 28 March 2001*, S/L/93, para. 7 (29 March 2001). (“Members shall aim to complete negotiations under Articles VI:4, XIII and XV prior to the conclusion of negotiations on specific commitments.”).

⁴ Working Parties on GATS Rules, *supra* note 1, at para. 4.

negotiations on service subsidies, and acknowledges the Members' opinion that it is necessary to have regulations governing service subsidies under the GATS regime.

Moreover, if we compare the emergency safeguard measures regulation with subsidy regulation, the big difference is the time limit. The Work Programmes' wording regarding emergency safeguard measures states that "the Working Party will organize its work on emergency safeguard measures (ESM) as follows: ... (e) to finalize the negotiations under Article X by 15 March 2004."⁵ (emphasis added).

This text could indicate why the Members' present negotiations mainly focus on the emergency safeguard measures instead of subsidies. In the Work Programmes, the deadlines on the regulations are not mentioned in any paragraph on subsidies or government procurement. Due to the complexity of these two categories, both involving government participation, we can see that the Working Party does not want to rush Members to make any extensive changes. However, the drawback is that Members have thus far made no significant progress in these two areas.

A. THE IMPORTANCE OF SUBSIDY RESTRICTIONS IN SERVICES

Subsidies sometimes can be an efficient method to carry out public policies and to ensure the greater good.⁶ GATS is a relatively complex agreement compared to other agreements under the

⁵ Working Parties on GATS Rules, *supra* note 1, at para. 3.

⁶ BERNARD M. HOEKMAN AND MICEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND*, 270 (2001).

WTO. Some scholars propose that service subsidy guidelines are not necessary because existing GATS rules sufficiently address subsidy issues.⁷

While it is true that some existing regulations indeed enforce restrictions upon service subsidies, current rules cannot cover certain situations, which I will discuss later in this chapter. According to the future market access required by GATS, Members will require service-specific laws. The fact that current regulations *seem* sufficient cannot diminish the importance of establishing service subsidy parameters.

In this chapter, I will discuss whether it is necessary to regulate service subsidies where even GATS Article XV has recognized distortive effects of subsidies on trade in services; I will also discuss whether the current GATS structure is sufficient to deal with service subsidies. I conclude that it is necessary to have a specific system for subsidies in services.

1. Trade-Distortive Effects of Subsidies

Article XV states that “Members recognize that...subsidies may *have distortive effects* on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such *trade-distortive effects*...”⁸ (emphasis added) Obviously, the main concern regarding subsidies is that they result in trade distortion. Therefore, it is important to understand what distortion is under the WTO.

⁷ See generally 楊光華, 服務補貼規範展必要性之初探, 政大法學評論 i, Guang-hua Yang, *Discussion on the Necessity to Have Service Subsidy Regulations in WTO*, Chengchi Law Review, 231-290 (2004).

⁸ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1999, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS], art. XV.

a. What Is Distortion? Distortion is “[w]hen prices and production are higher or lower than levels that would usually exist in a competitive market.”⁹ As Prof. Benitah explains,

A subsidy is seen as a practice that distorts the natural allocation of scarce resources by the market inside a national economy, because it gives a wrong signal to the recipient firm about its real production costs... We thus have a welfare loss for the national economy of the subsidizing country, as well as a welfare loss for the world economy insofar as subsidized services prevent the use and thus the production of similar services produced in a more efficient way in other countries.¹⁰

But there is one concept to which we must pay more attention - *not all subsidies are bad*.

It is true that subsidies affect the allocation of resources, but sometimes these effects on economic activity are socially desirable, such as constructing facilities in rural areas.¹¹ Therefore, economists offer no general objection to the use of subsidies.¹²

Distortion does not equal discrimination. Suppose Country A gives a subsidy to its domestic telecommunications industry, but does not grant subsidies to foreign-owned telecommunication firms. People may quickly assume that this has a distortive effect on the industry because a discriminatory subsidy exists.

Professor Benitah points out that the above conclusion is misleading because the discrimination should fall under the NT principle category.¹³ He suggests that we need to follow a two-stage process:¹⁴

⁹ World Trade Organization, *Glossary Term: distortion*, http://www.wto.org/english/thewto_e/glossary_e/distortion_e.htm.

¹⁰ Marc Benitah, *Subsidies, Services and Sustainable Development*, ICTSD Programme on Trade in Services and Sustainable Development, at. 10 (2005), available at <http://www.tradecapacitypakistan.com/pdf/ICTSD%20Paper%20Services%20GVA%20JUL%202005.pdf>.

¹¹ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM*, 294 (1997). (“[I]t must be recognized that subsidies are exceedingly important, even crucial tool of national governments in facilitating their sovereign capacity to promote legitimate government policies to serve their constituents.”).

¹² Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, John M. Olin Law & Economics Working Paper No. 186, 6 (2003), available at <http://www.law.uchicago.edu/Lawecon/index.html>.

¹³ Benitah, *supra* note 10, at 11.

¹⁴ *Id.*

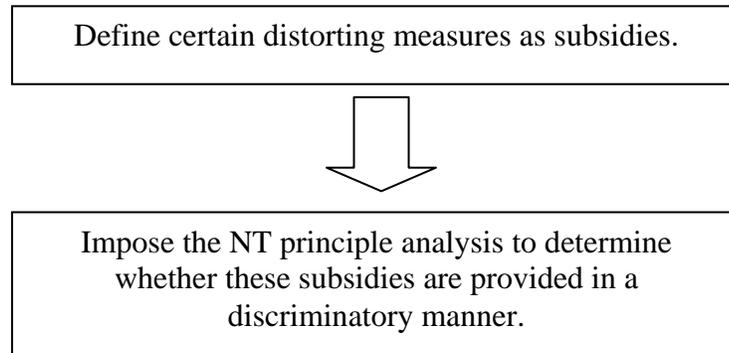


Figure 9. Benitah Two Stage Process

As we can see from these two stages, the first stage only has to do with the definition of what a distorting subsidy is. To determine whether this subsidy is discriminatory or not takes place only in the second stage.

b. Simple v. Sophisticated Definition of Distortion A generally accepted understanding of distortion is that “any interference with the allocation of resources by the market inside a national economy leads to a disturbance of international economic relations by interfering with the principle of comparative advantage.”¹⁵ This is the simple version of the distortion definition.

Many scholars are trying to argue that it is necessary to go beyond the simple view.

Professor Jackson states that,

Not just any ‘distortion’ should suffice for the international system to take action. In some sense, every governmental action that impinges on the economy creates a ‘distortion’.... However, it is a legitimate choice for a national sovereign to accept to lower economic welfare in order to promote certain societal and governmental objectives (such as redistribution of income, or support for the handicapped). As long as the government’s actions are taken in such a way that the costs are borne only by that society, it seems inappropriate for other nations in the world to complain.¹⁶

Additionally, scholars believe that under some circumstances it is unclear whether distortion is a result of subsidies because

¹⁵ Benitah, *supra* note 10.

¹⁶ Jackson, *supra* note 11, at 298.

For a payment to have this effect, it must lead the (subsidized) firm either to increase the quantity of goods offered or to decrease the price it charges in (foreign) markets. Because the recipient firm will produce until marginal revenue equals marginal cost, a payment will only have such a detrimental impact if it either decreases the marginal cost (curve) of the foreign producer or increase its marginal revenue. Unless this occurs, the government payment may increase the profits of (the subsidized) firm, but no need for a countervailing duty exists.¹⁷

Many scholars suggest adopting the complex definition of distortion, but such complexity is hard to define, enforce, and regulate. It shifts the burden of determining the extent and cause of distortion on a case-by-case basis to WTO panelists and the Appellate Body, and they will most likely be accused of becoming legislators without the expertise required for this kind of judgment.¹⁸

WTO Members are still opting for the simple definition of distortion. The simple version obviously prevails at the current stage. Take the United States as an example. The U.S. Final Rule relating to countervailing duties stipulates that,

[I]f there is a financial contribution and a firm pays less for an input than it would otherwise pay in the absence of that financial contribution (or receives revenues beyond the amount it otherwise would earn), that is the end of the inquiry insofar as the benefit element is concerned... The Department *need not consider* how a firm's behavior is altered when it receives a financial contribution that lowers its inputs costs or increases its revenues (emphasis added).¹⁹

The simple version of distortion has two criteria: (1) specificity; and (2) the fact that it provides to its recipient a benefit not available on the free market.²⁰ These criteria are important in Chapter 7 when we discuss the subsidy definition for services.

¹⁷ Diamond R., *Economic Foundation of Countervailing Duty Law*, Virginia Journal Of International Law, Volume 29, 784-785 (1989).

¹⁸ Benitah, *supra* note 10, at 12.

¹⁹ Countervailing Duties: Final Rule. 63 Federal Register, 65361 (1998).

²⁰ Benitah, *supra* note 10, at 10.

2. Global Awareness of Subsidies in Services

The importance of subsidy regulations is also supported by the world's attitude towards service subsidy issues. In OECD countries, and likely in most others as well, the vast majority of subsidies overall are granted in non-service industries such as steel, shipbuilding, and mining.²¹ Still, subsidies in the services trade are common in some 31 developed and developing countries, mostly focusing on four main services: audiovisual services, air transport or maritime transport services, tourism, and banking.²² Audiovisual service subsidies are usually found in developed countries, while tourism subsidies are found in developing countries.²³ As for transport services and banking, they can be found in both developed and developing countries.²⁴

It is important to consider both international agreements and regional regulations when determining the importance of regulating service subsidies. If Members consider service subsidies to be an important issue, they should incorporate service subsidies regulations into their laws.

²¹ Robert Ford and Wim Suyker, *Industrial Subsidies in the OECD Economics*, Department of Economics and Statistics Working Paper No. 74, OECD, Jan. 1990.

²² Working Party on GATS Rules, *WTO Secretariat, Subsidies for Service Sectors: Information contained in WTO Trade Policy Reviews*, S/WPGR/W/25, 2 (January, 26, 1998).

²³ *Id.*

²⁴ *Id.*

a. International Agreements Agreements signed by economic entities can guide global awareness. Sometimes it is easier for countries to sign a treaty bilaterally instead of multilaterally. By ratifying treaties between countries, a rule can be enforced and applicable between the signatories. This also indicates that countries understand the necessity of having such a rule. Therefore, I am providing the following examples to illustrate the importance of incorporating service subsidy regulations into the GATS.

The WTO Secretariat offers an overview on current agreements relating to services, and concludes that among 24 agreements notified under GATS Article V, 13 contain disciplines on subsidy practices relating services.²⁵ Moreover, among those 13 agreements, 11 are signed between the European Communities (now the European Union) and other European countries.²⁶

Other examples are the Protocol on Trade in Services to the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and the Revised Treaty of Chaguaramas establishing the Caribbean Community (CARICOM) including the Single Market and Economy.²⁷

ANZCERTA contains a provision stating that, “The Member States *shall not introduce new, or expand existing, export subsidies, export incentives and other assistance measures having a direct distorting effect on trade between them in services* and shall work towards the elimination of any such measures by 30 June 1990.”²⁸ (emphasis added).

²⁵ Working Party on GATS Rules, *Overview of Subsidy Disciplines Relating to Trade in Services in Economic Integration Agreement*, S/WPGR/W/46 (November, 12, 2003) (RESTRICTED).

²⁶ *Id.*

²⁷ *Id.* at paras. 10, 11.

²⁸ Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations -Trade Agreement. (Canberra, 18 August 1988), Australian Treaty Series 1988 No. 20, available at http://web.me.com/jane_kelsey/Trans-Pacific_Partnership_FTA/Australia_files/ANZCERTA%20services%20protocol.pdf.

The Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy,²⁹ states that, “The Member States shall harmonize national incentives to investments in the industrial, agricultural and *services sectors*.”³⁰ (emphasis added).

In addition to the aforementioned agreements, some other agreements have incorporated components of GATS Article XV. The European Free Trade Association (EFTA) provides that, “The Member States shall review the scope of application of this Chapter with a view to *extending the disciplines with respect to State aid to the field of services*, taking into account international developments in the sector. The reviews shall take place at yearly intervals.”³¹ (emphasis added).

The Free Trade Agreement between the EFTA States and Mexico provides that, “[s]ubsidies related to trade in services shall not be covered under this Section. The Parties shall pay particular attention to any disciplines agreed under the negotiations mandated by Article XV of the GATS with a view to their incorporation into this Agreement.”³² Moreover, the Agreement between New Zealand and Singapore on a Closer Economic Partnership states that,

The Parties shall review the issue of disciplines on subsidies related to trade in services in the context of the reviews of this Agreement provided for in Article 68. They shall pay particular attention to any disciplines agreed under Article XV of GATS with a view to their incorporation into this Agreement.³³

²⁹ This Agreement was ratified by the following WTO Members: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

³⁰ Revised Treaty Of Chaguaramas Establishing The Caribbean Community Including The Caricom Single Market And Economy [hereinafter Chaguaramas], available at http://www.caricom.org/jsp/community/revised_treaty-text.pdf, art. 69, para. 1.

³¹ *Id.* art. 16, para. 3.

³² *Id.* at art. 19, para. 5.

³³ *Id.* at art. 23, para. 2.

The next paragraph in the agreement states that “[t]he Parties shall consult on appropriate steps in regard to subsidies related to trade in services where any subsidies issues arise in bilateral services trade under this Agreement.”³⁴

The Singapore-Australia Free Trade Agreement provides that “[t]he Parties shall consult on appropriate steps in regard to subsidies related to trade in services where any subsidies issues arise under this Chapter.”³⁵

These economic integration agreements between Members have been reported to the WTO Secretariat under GATS Article V since May 20, 1996. They are organized into the following Table:³⁶

Table 15. Economic Integration Agreements Between WTO Members

Economic Integration Agreement	Date of Notification	Document reference	Where Relevant Provisions can be found
EC-Slovak Republic	27 August 1996	S/C/N/23	Article 64
EC-Hungary	27 August 1996	S/C/N/24 and S/C/N/Corr.1	Article 62
EC-Poland	27 August 1996	S/C/N/ 25 and S/C/N/25/Corr.1	Article 63
EC-Czech Republic	9 October 1996	S/C/N/26	Article 64
EC-Romania	9 October 1996	S/C/N/27	Article 64
EC-Norway, Iceland, Liechtenstein	10 October 1996	S/C/N/28	Article 61-64, Protocol 27
EC-Bulgaria	25 April 1997	S/C/N/55	Article 64
New Zealand- Australia	21 October 1997	S/C/N/66	Article 11
EFTA-Mexico	22 August 2001	S/C/N/166 and S/C/N/166/Corr.1	Article 19
New Zealand-Singapore	19 September 2001	S/C/N/169	Article 23
EC-Latvia	11 February 2002	S/C/N/187	Article 64
EC-Estonia	11 February 2002	S/C/N/188	Article 63
EC-Lithuania	11 February 2002	S/C/N/189	Article 64
EC-Slovenia	11 February 2002	S/C/N/190	Article 65
EFTA	3 December 2002	S/C/N/207	Article 16
CARICOM	19 February 2003	S/C/N/229	Article 69
Singapore-Australia	1 October 2003	S/C/N/233	Article 21

³⁴ *Id.* at art. 23, para. 3.

³⁵ *Id.* art. 21, para. 2.

³⁶ Working Party on GATS Rules, *supra* note 25, Annex.

This table shows that Members have begun to recognize the importance of service subsidy regulations. This recognition is not just on the international level, as indicated by the following discussion.

b. Regional Regulations Article 87 of The Treaty on European Union (hereinafter TEU) provides a general outline for state aid, stating:

*Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.*³⁷ (emphasis added).

Additionally, Article 107 of Treaty on the Functioning of the European Union contains similar language.³⁸

European Union Members have entered into other treaties with provisions similar to Article 87.³⁹ Moreover, the Agreement establishing the European Economic Area (EEA), concluded between the European Union and Norway, Iceland, and Liechtenstein, also has substantive disciplines on state aids.⁴⁰

As seen from both the international agreements and the regional agreements, the importance of service subsidies catch the attention of many countries. Because of the distortive effects resulting from subsidies, I believe there is a need to regulate subsidies in service areas.

³⁷ Treaty on European Union, Feb. 7, 1992, Oj. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU], art. 87, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.

³⁸ Treaty on the Functioning of the European Union, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>, art. 107, para. 1. (“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”)

³⁹ Working Party on GATS Rules, *supra* note 36.

⁴⁰ *Id.* at para. 8.

B. CURRENT DISCUSSIONS UNDER THE WTO

Before I go into the development of service subsidy regulation, it is important to first examine Members' discussions and suggestions on GATS service subsidy rules. This type of analysis allows for the identification of the core questions regarding service subsidy regulation.

1. Information Exchange Required By GATS

GATS Article XV requires that Members "exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers." After the Uruguay Round, however, the negotiations on subsidies did not progress smoothly. Not only was no development on service subsidies made, but just 5 out of 151 members submitted their domestic subsidy information to the WTO. Those 5 countries are Hong Kong,⁴¹ Switzerland,⁴² Poland,⁴³ Norway,⁴⁴ and New Zealand.⁴⁵

The WTO Secretariat prepared the questionnaire based on the subsidy definition in the SCM Agreement because of the absence of a subsidy definition in the GATS. Since the GATS entered into force in 1995, Members have had 16 years to fulfill this obligation. But, to date,

⁴¹ Working Party on GATS Rules, *Submission from Hong Kong, China: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.3 (July, 23, 1999).

⁴² Working Party on GATS Rules, *Submission from Switzerland: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.5 (December, 22, 2005).

⁴³ Working Party on GATS Rules, *Submission from Poland: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.4 (March, 2, 2000). S/WPGR/W/16/Add.4/Suppl.1 (September, 20, 2000).

⁴⁴ Working Party on GATS Rules, *Submission from Norway: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.1 (June, 23, 1997).

⁴⁵ Working Party on GATS Rules, *Submission from New Zealand: Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate*, S/WPGR/W/16/Add.2 (July, 23, 1997).

only five Members have come forward with their domestic service subsidy programs. The following tables catalogue their submissions.

Table 16a. Working Party on GATS Rules: Hong Kong⁴⁶

Program	Object	Method	Amount	Duration	Impact	
Financial Services	Regional derivative warrants and convertible bond	All investors, local and overseas	Stamp duty exemption	For 1997: HK\$2,031,504	No time limit.	Since its introduction, there have been 17 regional derivative warrants listed on the SEHK with an average daily turnover of \$20.8 million, or 0.2% in terms of the total turnover of the Exchange
	Stock lending and borrowing	All stock borrowers and lenders (local and overseas) who are essentially brokerage houses and institutional investors	Stamp duty exemption	Data not available	No time limit.	Since the introduction of the stamp duty exemption, the number of transaction of local stock lending and borrowing has grown substantively
	Hedging transactions by stock options market makers	Market makers (local and overseas) for stock options.	Stamp duty exemption	1996.6.1~1997.11.30: HK\$284,239,484	No time limit.	Since then, the number of stock options has grown from 1 to 17 with turnover in terms of number of contracts traded grown by 48% over the same period
Tourism	The Government provides a loan to the HKTA, and is not targeted at any specific sectors or enterprises	Different types of financial support	Data not available	5 years credit period	Data not available	
The Services Support Fund (SSF)	Non-profit-making in nature, except for the projects' long-terms self-sufficiency.	In the form of grants or loans.	Average funding support for each project is HK\$1.83 million	No specific time limits. But based on past experience, the duration ranges from 1-2 years	Data not available	

⁴⁶ *Id.*

Table 16b. Working Party on GATS Rules: Poland⁴⁷

Program		Object	Method	Amount	Duration	Impact
Resources (loans) for restructuring investments and for “hedging” purposes”		(1) State owned enterprises; (2) Companies which stock is owned by the Treasury; (3) Companies which stock is owned by the Treasury and the employees (4) Companies which stock is owned by the Treasury (5) Companies which stocks have been contributed as a share in Sugar Partnerships	Grant and investment loan	In the year of 1997: transport – PLN 7.2 million in loans typography – PLN 1.9 million in loans construction – PLN 1.4 million in grants, PLN 4.0 million in loans In the year of 1998: transport – PLN 3.0 million in grants, PLN 8.4million in loans construction – PLN 0.2 million in grants, PLN 2.0 million in loans heating supply – PLN 2.0 million in loans	The agreement between the International Bank for Reconstruction and Development and the government of Poland assumed extending of adaptation loans for the enterprises and financial sector in three tranches: 1st Tranche : USD 125 million; 2nd Tranche : USD 100 million; 3rd Tranche : USD 125 million The 1st tranche was made available in 1994. The 2nd tranche was received by the Treasury in April 1995. Approximately 86 per cent of the EFSAL funds was consumed by the end of 1998. The Polish Side has resigned from applying for the 3rd tranche.	The program does not directly impact the foreign trade
Direct Grants for Extra Charges to Products and	Grants for the meals sold in milk bars	Above-mentioned milk bars apply margin not exceeding 25 per cent of the value of used food products	Grant and investment loan	For 1997: 13.9 million For 1998: 17 million For 1999: 18.3 million	Grants from the state budget	There are no effects on the foreign trade

⁴⁷ Working Party on GATS Rules, *supra* note 52.

Program		Object	Method	Amount	Duration	Impact
Services	Grants for railway passenger domestic transport	Direct grants for railway passenger transport were awarded for the transport: within urban agglomeration, regional (local), inter-regional (long distance) by means of regular passenger trains, speeded-up trains, excluding passenger transport by means of express, Inter-City, Euro-City and Euronight (hotel) trains in domestic and international communication		For 1997: 710 million For 1998: 560 million For 1999: 537.7 million		
	Grants for passenger bus transport	Grants for bus passenger transport were awarded for the regular domestic inter-city transport		For 1997: 193.4 million For 1998: 164 million For 1999: 148.2 million		
	Grants for publication of specialized school and university books	These grants are awarded for publishers of school and university books: 1. For teaching specialized subjects in vocational schools; 2. For schools of national minorities; 3. For special schools; 4. For university books.		For 1997: 11 million For 1998: 11.6 million For 1999: 10.8 million		

Program	Object	Method	Amount	Duration	Impact
Assistance for Restructuring of the Banking Sector	Banking sector	Grants, loans, tax incentives	For 1997: Cooperative banking sector: PLN 137.5 million, including the assistance provided in the form of: Treasury bonds: 69.3 million PLN; Loans extended by NBP: 45.2 million PLN; Tax incentives: 23 million PLN. For 1998: No state aid granted For 1999: No assistance granted	According to the conditions of the Treasury bonds issue, being the main component of the assistance provided within the scope of the above-mentioned program, the buy-out of the bonds will be terminated in the year 2009	The program does not directly impact the foreign trade

Table 16c. Working Party on GATS Rules: Switzerland⁴⁸

	Program	Object	Method	Amount	Duration	Impact
Horizontal Measure	Investment promotion and guarantees for mountainous regions (including implementation measures)	Regions, communities, private and public corporations	The investment assistance consists of loans or at most direct transfer (contributions to interest payments)	Investment aid: For 2004: 44,7 million CHF; no data available for 2006 Guarantees: For 2004: 2,5 million CHF; preliminary estimate for 2006: 2,8 million CHF Implementation measures: For 2004: 7 million CHF; preliminary estimate for 2006: 7 million CHF	There are no specific time limits	
	Government aid for economically endangered regions	Privat institutions: SMEs	Financial assistance (tax concessions, debt guarantees, contribution to interest charges)	For 2004: 6,3 million CHF. Preliminary estimate for 2006: 9 million CHF	The measure was planned to be limited. But so far, the measure has been extended by the parliament several times	
	INTERREG III	SMEs, private organizations	Direct transfer of funds (financial assistance)	For 2004: 5,9 million CHF. Preliminary estimate for 2006: 5,9 million CHF	The program runs from 2000 to 2006. The subsidies are granted in line with the allotted budget	
Business service	Cancer study	Support of the experimental and applied cancer research	Direct transfer of funds	For 2004: 4.95 million CHF. Preliminary estimate for 2006: 5,1 million CHF.	The financial assistance is granted for a period of four years. After that, a new request has to be submitted.	

⁴⁸ Working Party on GATS Rules, *supra* note 51.

Program		Object	Method	Amount	Duration	Impact	
	Swiss National fund		Swiss National fund	Financial compensation	For 2004: 359 million CHF. Preliminary estimate for 2006: 435 million CHF	No specific time limit.	
	Swiss Academies for Natural Sciences / Humanities / Medical Sciences / Technical Sciences		These four academies are recognized by the federal government for the promotion of research.	Direct transfer of funds	For 2004: Natural Sciences: 5,4 million CHF Humanities: 6,2 million CHF Medical Sciences: 1,5 million CHF Technical Sciences: 1,4 million CHF Preliminary estimate for 2006 (for all academies together): 23,5 million CHF	The financial assistance is granted for a period of four years.	
	Contribution to research on animal diseases		Research projects on animal diseases and animal welfare are supported.	Financial assistance	For 2004: 0,524 million CHF Preliminary estimate for 2006: 0,534 million CHF.	Annual credit	
Communication Services	Audio Services	Public Film Funding	Promotion of the quality and diversity of films Spreading of film culture and the deepening of understanding of films Promotion of the film festival Indexing and restoration of films Cooperation of the different sectors of the branch of trade International cooperation in the area of trade Promotion of the formation and future education of film professionals	Financial assistance in form of non refundable payments, interest grants, guarantees and conditional refundable loans	Film funding: For 2004: 22,4. million Preliminary estimate for 2006: 23.4million CHF. Film culture: For 2004: 4,2 million CHF. Preliminary estimate for 2005: 4,7 million CHF Formation and further education of film professionals: For 2004: 2,5 million CHF. Preliminary estimate for 2006: 2,3 million CHF	Annual credit	

Program		Object	Method	Amount	Duration	Impact
	Radio and Television Services	The national radio and television company SRG receives the largest part of the television license fees.	Mandatory fees	For 2003: Approximately 1100 million CHF of mandatory fees	No time limits	
Tourism and Travel Related Services	Swiss Tourism	Only the public cooperation "Swiss Tourism"	Direct transfer of funds	For 2004: 40,4 million CHF. Preliminary estimate for 2006: 46 million CHF	Credit approved by the Parliament for the period 2005 – 2009. Hereafter a new approval will be necessary.	
	Documentation and advisory center of the Swiss Tourist Association	The documentation and information center of the Swiss Tourist Association	Financial assistance	For 2004: 0,1 million CHF. Preliminary estimate for 2006: 0,1 million CHF	Annual credit	
	Promotion of innovation and cooperation in the area of tourism	To promote innovation and cooperation in tourism (Various private institutions)	Direct transfer of funds	For 2004: 8,8 million CHF. Preliminary estimate for 2006: 6,9 million CHF.	No specific time limits	
Recreational, cultural and sporting services	Library, archives, museum and other cultural services	Pro Helvetia	As first recipient only the foundation "Pro Helvetia". As second recipients: private institutions.	Financial assistance	For 2004: 34,7 million CHF. Preliminary estimate for 2006: 33,1 million CHF	No specific time limits. The amount of financial aid is always calculated for a period of four years; afterwards a new federal resolution is necessary.
		Support of cultural organization	Private institutions	Annual financial assistance.	For 2004: 3,8 million CHF. Preliminary estimate for 2006: 3,3 million CHF	Limited to one year, hereafter a new request has to be submitted
		Bibliomedia	Only the foundation "Bibliomedia"	Financial assistance	For 2004: 2 million CHF. Preliminary estimate for 2006: 1,5 million CHF	No specific time limit. The parliament decides on the financial aid for a certain period of time.

Program		Object	Method	Amount	Duration	Impact	
		Landesphonothek	Only the Swiss association: Landesphonothek	Financial assistance	For 2004: 0,99 million CHF, Preliminary estimate for 2006: no data available.	No time limit	
		Memoriav	Only the association: Memoriav	Direct transfer of funds	For 2004: 1,3 million CHF. Preliminary estimate for 2006: 2,9 million CHF.	No specific time limit. The parliament decides on the financial aid for a period of four years	
		Museum of Transport (“Verkehrshaus”)	Only the Museum of Transport in Lucerne	Financial assistance	For 2004: 1,58 million CHF. Preliminary estimate for 2006: 1,6 million CHF	The parliament has decided to grant financial aid for the period of 2004 - 2007. Afterwards a new approval is necessary.	
		Promotion of literature for young people and children	Five organizations that promote literature for young people and children	Annual financial assistance	For 2004: 0,963 million CHF. Preliminary estimate for 2006: 0,97 million CHF	Annual credit	
	Sporting and other recreational services	Promotion of gymnastics and sports organization	Private institutions: gymnastics and sport organizations	Direct transfer of funds	For 2004: 5,5 million CHF. Preliminary estimate for 2005: 5,7 million CH	Annual credit.	
		Promotion of int'l sport events	Private Institutions: Organizers of World or European Championships or similar international sport events.	Guarantee for a limited coverage of a possible deficit	For 2004: 0,49 million CHF. Preliminary estimate for 2006: 0,5 million CHF	Annual credit	
		Construction of sport facilities	Sponsorship of sport facilities	Financial assistance	For 2004: 7,2 million CHF. Preliminary estimate for 2006: 0,1 million CHF	Credit duration of four years	

Program		Object	Method	Amount	Duration	Impact
		Extracurricular youth work	About 130 youth organizations and sponsorship of extracurricular youth work	Direct transfer of funds	For 2004: 6,6 million CHF. Preliminary estimate available for 2006: None	Annual credit.
		Foot paths and hiking trails	Two specialized organizations, the ARF and the SAW	Direct transfer of funds	For 2004: 1,5 million CHF. Preliminary estimate for 2006: 2,3 million CHF	None
Transport Services	Transport Services by railway	Compensation of the combined traffic	The Swiss Federal Railways (state owned company) and other transport companies with a concession	Compensation	For 2004: 203 million CHF. Preliminary estimate for 2006: 220 million CHF	Annual credit
		Investment in combined traffic	Private institutions (entreprises)	Financial assistance (loan, non refundable payments)	For 2004: 49,1 million CHF. Preliminary estimate for 2006: 40 million CHF	Annual credit
		Technical upgrades and changeover of the operation	Transport companies with a concession	Financial assistance in form of a loan, non refundable payments or participation	For 2004: 159,1 million CHF. Preliminary estimate for 2006: 168,2 million CHF	No time limit is intended
		Connection tracks	Enterprises (owner of the connecting tracks)	Direct transfer of funds (financial assistance)	For 2004: 17,1 million CHF. Preliminary estimate for 2006: 22 million CHF	Annual credit
		Transport of accompanied motor vehicles	Transport companies (through the Lötschberg, the Furka, the Oberalp and the Albula)	Financial assistance	For 2004: 3,2 million CHF Preliminary estimate for 2006: 3,4 million CHF	Annual credit

Program		Object	Method	Amount	Duration	Impact
	Compensation for the regional transport	Swiss Federal Railways and transport companies with concession	Compensation	For 2004: 1'196 million CHF. Preliminary estimate for 2006: 1'304 million CHF	The federal council decides on the contribution for the regional transport four years in advance in line with the estimate of cost and the fiscal planning	
	Price reduction for the wagonload traffic's lines	Transport companies	Financial assistance	For 2004: 66,3 million CHF. Preliminary estimate for 2006: 20 million CHF	Limited to the period from 2000 to 2010	
	Infrastructure investment of the Swiss Federal Railways	The Swiss Federal railways (state-owned enterprise)	Compensation in form of a loan or non refundable payments	For 2004: 517,3 million CHF. Preliminary estimate for 2006: 476,2 million CHF	The service level agreement has to be renewed after four years. The current service level agreement is valid from 2003 to 2006	

Table 16d. Working Party on GATS Rules: New Zealand⁴⁹

Program		Object	Method	Amount	Duration	Impact
Education	Tertiary Education	Education sector	Grant	Annual 7 million	None	Total number: 15,000 TOP trainees
	Training Opportunity Program(TOP)	Education sector		Annual 186 million	None	2,600 private tertiary students
	Industry Training	Education sector		Annual 57 million	None	30,000 industry trainees

⁴⁹ Working Party on GATS Rules, *supra* note 54.

Program	Object	Method	Amount	Duration	Impact
Broadcasting	Producers of television and radio program.	Grant. (Contractual conditions apply)	The total amount of public broadcasting fee revenue collected by the Broadcasting Commission is around NZ\$87 million. Of this total, about 50% is spent on television programming	Time limits for each project are determined by the Broadcasting Commission in negotiation with the producer and are set down in contract	The effect of Broadcasting Commission funding, where an overseas sale is made, is relatively revenue neutral: the seller of the program cannot therefore exploit the grant for the purposes of obtaining a more favorable export position
Film Production	Approximately 50 film producers and writers were eligible for assistance in 1995/96	Grant	11,220 million(until 6.30.1996)	No data is available	No data is available
Land Transport	Land transport sector	Grant	Annual cost is estimated at 30 million NZ	The contract between the transport operator and the Regional Council will be for a specific period(one year)	No data is available
Air Transport	Air services sector. About 7 airports, out of 24, receive deficit funding.	The support takes the form of deficit funding by local authorities	Total funding was \$156,000 (until 6.30.1996)	No data is available	No data is available
Business Development	All sectors	Grant	Total of 2,657 projects were approved to a total of NZ\$8.6 million. (7.1.1996 ~ 2.28.1997) During the same period NZ\$4.3 million was paid out in grants	An application for a grant must be made before any costs have been incurred, and the applicant must then uplift the grant within twelve months of approval. An extension of up to	No data is available

Program	Object	Method	Amount	Duration	Impact
				three months is available.	
Tourism	<p>Tourism sector. Private sector partners may include the following types of organizations involved in marketing a tourism product overseas:</p> <ul style="list-style-type: none"> (1) Any company or commercial undertaking; (2) Any state-owned enterprise; (3) Any regional, local authority or regional tourism organization; (4) Any organization that is not directly funded by the NZ Government. 	It does not provide any direct grants or loans.	20 million NZ. (until 6.30.1997)	Each contract must specify a time frame for expenditure, including installment payment dates where appropriate	No data is available
Tradenz Joint Action Group (JAG) Funding	The current focus is on the following sectors: consultancy services, publishing services, aviation services and audio-visual (film and television) services	Grant	\$400,000 (until 6.30.1997)	There are no prescribed time limits, although all funding is dependent on annual budgetary allocations made by the Government	No data is available

Table 16e. Working Party on GATS Rules: Norway⁵⁰

Program	Object	Method	Amount	Duration	Impact
Industrial R&D program and projects	All firms are eligible, regardless of branch, region or size	Grants	N/A	Starting date: 1991. Duration has not been specified	Support is granted to a variety of projects and sectors. Statistical data showing the trade effects of the subsidy are not available
Public Research and Development Contracts	A public R&D contract is an agreement between a Norwegian enterprise and a public authority that asks for the development of a new product or process.	Grants	N/A	Starting date: 1968. Duration has not been specified	
Industrial R&D Contracts	R&D cooperation projects between private enterprises (a major customer and a subcontractor)	Grants	N/A	Starting date: 1994. Duration has not been specified	
Regional Investment Grants	Enterprises located in assisted areas for regional policy. All sectors except primary production in agriculture, forestry and fishing. Oil extracting or refining activities are also excluded	Grants or loans (few cases).	N/A	Starting date: 1966. Duration has not been specified	
Regional Grants for the Development of Business and Industry	Enterprises located in assisted areas for regional policy. All sectors except primary production in agriculture, forestry and fishing. Oil extracting or refining activities are also excluded	Grants or loans (few cases).	N/A	Starting date: 1983. Duration has not been specified	
Scheme for Restructuring in Regions Dependant of a Single Industry	Available to enterprises in municipalities dependent on a single industry or on a single enterprise	Grants	N/A	Starting date: 1987. Duration has not been specified	

⁵⁰ Working Party on GATS Rules, *supra* note 53.

Program		Object	Method	Amount	Duration	Impact
The Norwegian Corporation for Industrial Estates and Development (SIVA)		SMEs (Maximum 250 employees is one out of three criteria). Primarily manufacturing industry located in assisted areas.	Grants	Maximum subsidy is 50 per cent of eligible cost	Starting date: 1992. Duration has not been specified	
Trade effects of the subsidy		Mainly SMEs (Maximum 250 employees is one out of three criteria) in private sector located in assisted areas.	Grants	N/A	Starting date: 1986. Duration has not been specified	
Funds for restructuring of the Community of Rana		Enterprises located in the Community of Rana.	Grants		Starting date: 1988. Duration has not been specified	
Funds for restructuring of the Community of Sor-Varanger		Available to enterprises located in Sor-Varanger, Finnmark County.	Grants		Starting date: 1991. Duration has not been specified	
Viking Business Development A/S		Enterprises located in Askim in Østfold County and economically viable	Grants		Starting date: 1.12.1991. Duration has not been specified	
Assistance to Small and Medium Sized Companies	Development Grants	Scheme is primarily intended for SME. The scheme is available for all sectors except insurance, banking and finance, shipping, oil and gas exploration, public administration and public sector commercial enterprises, but primarily	Grants	Conditions applying from 01.04.1995: Subsidy allowed to SMEs (1) maximum 50 per cent of costs eligible under the notion of "soft aid" (2) maximum 35 per cent of costs eligible for applied research and development projects and (3) maximum 7,5 per cent to physical investment	Starting date: 1993. Duration has not been specified	

Program		Object	Method	Amount	Duration	Impact
	The Public Advisory System	TI and VINN provide SMEs with technical competence and knowledge. BRT give general assistance	Services free/partly free of charge.	The institutions only subsidy services directed towards SMEs with less than 100 employees and mainly companies with less than 20 employees. The legal maximum aid level to a enterprise is 50,000 ECU over a 3-year period. The average level however is only NOK 10,000.	The public advisory system was reorganized in 1988. Duration has not been specified	
Export promotion	The Export Campaign, the Strategy Program and The Program for Export Development in SME	Conditions applying from 01.04.1995: Available to SMEs (maximum 250 employees is one out of three criteria). Costs covered; expenditures when attending trade fairs, expenditures for market research/surveys, seminars, training, consultancy fees.	Grants	Maximum aid intensity 50 per cent. Average intensity is 25 per cent.	Starting date: 1969, 1986 and 1989 for the Export Campaign. The Program for Export Development in SME and The Strategy Program respectively. Duration has not been specified	
Subsidies to the Fishery Sector		Private persons, firms and research institutions can apply for subsidies. Main projects demands 50 per cent economic participation from private persons and firms.	Grants	N/A	Starting date: 1994. Duration has not been specified	Limited means, and special demands for private participation, make the trade effects very small if at all existing.
Tax reimbursement scheme for seafarers		Approximately 9000 seafarers employed in some 300 companies on board 500 vessels	Grant.	The total amount will depend on the number of eligible applicants, but as an indication NOK 414 million has been set aside in the budget year 1997.	Duration has not been specified	Statistical data showing the trade effects of the subsidy are not available

This information was voluntarily submitted by these five Members and was based on the Members' own judgment on service subsidy programs. As of 2011, no other Members had updated their information exchange. The mandate to exchange information has been a big issue in a series of Members' negotiation rounds. Members are urged to complete the information exchange and express their concerns.

The Chairperson of the GATS Working Party "noted the lack of significant progress in the information exchange,"⁵¹ and the fact that "most members are reluctant to contribute to the Article XV information exchange."⁵² The delegate from Hong Kong, China, recalled "the importance of fulfilling the mandate to provide information on all subsidies related to trade in services, and he wondered why many Members were not able to provide such information based on their own definition."⁵³ Additionally, the delegation from Switzerland indicated that "Article XV contained a clear legal obligation to exchange information concerning all subsidies related to trade in services, and [t]his obligation existed since 1995 and its fulfillment had therefore been long overdue."⁵⁴

The delay in information exchange does cause obstacles in creating a legal framework for service subsidies, but it should not excuse Members from achieving the Article XV mandate: to create disciplines on service subsidies.

⁵¹ Working Party on GATS Rules, *Report Of The Meeting Of 1 October 2003: Note by the Secretariat*, S/WPGR/M/44, para. 40 (October, 28, 2003).

⁵² Working Party on GATS Rules, *Negotiations On Subsidies: Report by the Chairperson of the Working Party on GATS Rules*, S/WPGR/10, para. 16 (June, 30, 2003).

⁵³ Working Party on GATS Rules, *supra* note 60, at para. 46.

⁵⁴ Working Party on GATS Rules, *Report Of The Meeting Of 24 November 2004: Note by the Secretariat*, S/WPGR/M/50, para.16 (January, 17, 2005).

2. Members' Opinions in Relevant Meetings

Members' communications are also important to consider when discussing Article XV obligations. It is necessary and useful to observe Members' points of view on how to facilitate more progress.

The following table contains Members' submissions regarding Article XV from 2000 to 2005.⁵⁵

⁵⁵ This table is organized by author.

Table 17. Summary of Members' Opinions on Service Subsidies

Document/Time	Country	Submissions/Suggestions
S/WPGR/M/29, 9 October 2000 ⁵⁶	Poland	<ul style="list-style-type: none"> • Supports the idea of information exchange, and urges members to conform to such obligations.
	Brazil	<ul style="list-style-type: none"> • Suggests including a reference to the possible need for additional GATS disciplines to avoid trade-distortive effects and includes the appropriateness of countervailing duties.
	Canada	<ul style="list-style-type: none"> • Supports the Chairperson's proposal to have a more structured discussion on subsidies and agrees to convey strong views on these issues.
S/WPGR/M/38, 26 July 2002 ⁵⁷	Secretariat	<ul style="list-style-type: none"> • Declares that the initial demand for the information exchange never attempted to propose whether a given subsidy was trade-distortive or not. It was up to Members to judge. • Clarifies that TPR Reports were based on any information available. They didn't distinguish between trade-related or trade-distortive subsidies.
	Chile	<ul style="list-style-type: none"> • Recalls the primary objective was to increase transparency in the area of subsidies. Together with Argentina, Hong Kong, presents a simplified questionnaire (S/WPGR/W/16). • States that the information exchange under Article XV covers all subsidies, not only trade-distortive ones. • States that it is up to each Member to decide whether to reply to the simplified questionnaire.
	Republic of Korea	<ul style="list-style-type: none"> • Supports the simplified questionnaire. • Says the TPR reports could be considered as information exchange in Article XV.
	Hong Kong, China	<ul style="list-style-type: none"> • Supports the idea to have a simplified questionnaire.
	Canada	<ul style="list-style-type: none"> • Says that the simplified questionnaire proposed did not seem to make it less difficult for Members to report relevant subsidies in services. A fundamental question, how to define a subsidy, remained. • Proposes the question on whether governmental assistance to services was trade-distortive. • Suggests Members keep in mind the distinction between trade-related and trade-distortive subsidies.
	United States	<ul style="list-style-type: none"> • Says the purpose of the discussion was to look for any possible new disciplines to address trade-distortive effects of subsidies. • Asks how to distinguish trade-distortive/non trade-distortive effects of subsidies. Thinks that it is necessary to differentiate these two in collecting information exchange. Otherwise the undifferentiated information was not really helpful for the discussion.
	Mexico	<ul style="list-style-type: none"> • Supports the idea of simplified questionnaire.
	Uruguay	<ul style="list-style-type: none"> • Suggests two sources of subsidy information: (1) the information in the TPR; (2) information provided by Members. • Contemplates whether the replies to the simplified questionnaire would be given on a voluntary basis.

⁵⁶ Working Party on GATS Rules, Report Of The Meeting Of 27 September 2000: Note by the Secretariat, S/WPGR/M/29 (October, 9, 2000).

⁵⁷ Working Party on GATS Rules, Report Of The Meeting Of 15 July 2002: Note by the Secretariat, S/WPGR/M/38 (July, 26, 2002).

Document/Time	Country	Submissions/Suggestions
	Argentina	<ul style="list-style-type: none"> • Explains that the purpose of a simplified questionnaire was to comply with the information exchange, not to decide whether or not subsidies were trade-distortive.
S/WPGR/M/44, 28 October 2003 ⁵⁸	Poland	<ul style="list-style-type: none"> • Notes their interest in further discussion on multilateral disciplines on subsidies in services, as well as in greater transparency. • Thinks that discussing the definition of subsidy was a logical starting point and it can contribute to the information exchange. • Considers that delegations could provide information on the basis of their own definition. • Points to two key issues for further discussion: (1) the broad definition of subsidy; (2) possible exclusions from such a broad definition. • Thinks that the broad definition of subsidies could be built on answers to 4 questions: Who was granting the subsidy, to whom, what was the form of the subsidy, and possibly, what were the benefits to the recipient of the subsidy. • Agrees that the definition in Article I:3(a) was sufficient, but wanted to draw attention to this issue. A more important issue was concerned with Article I:3(c). Where private suppliers of medical or education services would operate alongside public providers, they considered that Article I:3(c) would not be sufficient in order to address the question of to whom the subsidy was granted. • Thinks that co-existence without competition between private and public services was the exception rather than the rule. In their view, Article I:3(c) would not appear to be sufficient for the purpose of subsidy disciplines, and this issue would need to be addressed more.
	Chile	<ul style="list-style-type: none"> • Recognizes the contribution from Poland, Argentina and Hong Kong, China. It clearly suggested that a common basis for working on a definition was emerging. Members should thus have the necessary elements to develop a consensus definition. • Points out the efforts to obtain information exchange had not been fruitful. Members could work on a list of examples of measures. However, such examples should be submitted on a voluntary basis. For example, Chile could provide information on subsidies which affected its private sector, without identifying the Member providing the subsidy. • Recalls members to respond to the questionnaire on subsidies prepared by the Secretariat. • Suggests Members could, on a voluntary basis, provide information on subsidies that they themselves were providing or on the subsidies provided by others that affected their service suppliers.
	Hong Kong, China	<ul style="list-style-type: none"> • Agrees that a definition of subsidies is needed, but emphasized that agreeing on such a definition should not be a pre-condition for proceeding with the information exchange. • Clarifies that they were not envisaging an explicit listing of entities and agreed with Poland that this would be a difficult exercise. • Recalls the importance of fulfilling the mandate to provide information on all subsidies related to trade in services. • Asks why many Members were not able to provide such information based on their own definition.

⁵⁸ Working Party on GATS Rules, *supra* note 60.

Document/Time	Country	Submissions/Suggestions
		<ul style="list-style-type: none"> • Stresses that the purpose of information exchange was not to target the practices of certain Members, but to evaluate the scale and types of subsidies in existence. • Expresses support for Chile's proposal and suggests Working Party should remain open to other sources on subsidies. • Stresses that the information would be provided on a voluntary basis and that it should be up to Members to draw from their own and preferred sources of information. • Does not agree that discriminatory subsidies would be outside the scope of Article XV simply because they would be subject to scheduling under Article XVII. The concept of discriminatory subsidies was not entirely clear in the context of export subsidies.
	United States	<ul style="list-style-type: none"> • Is interested in considering whether it was possible or desirable to develop rules to govern these various instruments. • Considers Poland's contribution a useful basis. In particular, to whom the subsidy was granted. • Asks why Article I:3(c) would not be adequate in that regard and expresses interest in hearing more from other delegations on this issue. • Considers it is important to address the question of scope and definition of services subsidies because this would help to define the type of information to put in a list of examples.
	Argentina	<ul style="list-style-type: none"> • Does not foresee significant difficulties in coming to an agreement on a definition for subsidy, especially for purpose of the exchange of information.
	Colombia	<ul style="list-style-type: none"> • Agrees that similarities existed between the elements of a definition identified in the contributions from Poland, Argentina, and Hong Kong, China. • Thinks Secretariat should explore more with some international agreements, such as OECD, the World Bank, on related information. • Contemplates whether Secretariat could analyze the notification made by Members.
	Australia	<ul style="list-style-type: none"> • Considers that one of the problems with using the SCM AGREEMENT definition was that the principle of territoriality could not be applied directly to a service. • Considers the contributions from Argentina and Hong Kong alluded to possible ramifications of subsidy disciplines for public services, education, health and related social services. However, due to GATS Article I:3(b), these activities should not be an issue. Still, such sensitivities should be kept in mind for developing countries. • Agrees that not all subsidies were trade-distorting, therefore, the definition of measures should be limited to those that actually distorted trade in services. • Suggests that services had to be treated differently given the importance of regulatory structures and public services.
	Cuba	<ul style="list-style-type: none"> • Emphasizes the need to look into other possible sources of information, such as UNCTAD and the OECD.
	Switzerland	<ul style="list-style-type: none"> • Agrees that the work on the definition of subsidies and the exchange of information could very be well carried out simultaneously.

Document/Time	Country	Submissions/Suggestions
		<ul style="list-style-type: none"> • Asks whether those Members that had scheduled limitations regarding subsidies could elaborate on the scope of such limitations.
	Brazil	<ul style="list-style-type: none"> • Contemplates whether Members would agree, and whether the Secretariat would think it possible, to prepare a note on subsidy disciplines pertaining to services contained in RTAs reported under Article V of the GATS. • Confirms that UNCTAD, after having finished its study, was invited not only to circulate but also to present the study in this Working Party.
	Indonesia	<ul style="list-style-type: none"> • Thinks that some more work could be done so as to further clarify and crystallize agreement. Propose that Members should spell out more explicitly areas of agreement would be helpful in that regard.
	Republic of Korea	<ul style="list-style-type: none"> • Considers it useful to exchange views on subsidies, including those that might be trade distortive, although this should not prejudice any position. • Welcomes the suggestion by Chile and thought it was important to maintain the anonymity of the source of the subsidy. • Is open to discuss classification suggestions, including legitimate policy objectives such as environment or cultural protection or restructuring of domestic services industries. • Thinks the GATS Article I:3 already provided answers with regard to who was granting the subsidies. • Considers the definition found in the SCM AGREEMENT was sufficient, excluding any regulatory measures. However, they had doubts about income and price support. • Suggests that rather than determining beforehand what might be trade distortive, it would be preferable to concentrate on basic issues such as the definition of subsidies and information sharing.
	Thailand	<ul style="list-style-type: none"> • Considers it useful to further discuss the definition of subsidies and emphasize that there was a clear mandate in the GATS to develop disciplines on subsidies. • Acknowledges that the SCM AGREEMENT could provide a very useful starting point for the definition of subsidy in services.
	Singapore	<ul style="list-style-type: none"> • Indicates that it was important to be clear about what Article XV did not cover. In this regard, discriminatory subsidies were governed by the national treatment obligation, and they were consequently not covered by Article XV. Also, subsidies granted in the context of services supplied in the exercise of governmental authority would fall outside the scope of Article XV. One would also expect subsidies granted to achieve such legitimate objectives to be carved-out from Article XV. • Considers that the SCM AGREEMENT might not be readily applicable in a GATS context. • Refers to implicit subsidies, which some might associate with certain regulations or lack thereof. Did not think that the SCM AGREEMENT covered such subsidies nor that GATS disciplines should do so.
	Mauritius	<ul style="list-style-type: none"> • Thinks the issue needs to be approached with caution and that the work to be undertaken by the Secretariat should be factual rather than analytical.

Document/Time	Country	Submissions/Suggestions
S/WPGR/M/45 18 December 2003 ⁵⁹	Chile	<ul style="list-style-type: none"> • Believes that even in the present occasion, there is no need yet to discuss subsidies relating to air transport and maritime transport services, but it seemed important to discuss them in the future. • Thanks delegations for their comments on the communication. And underscores that its delegation did not want to limit the list of examples to those that were most clearly distortive, such as export subsidies. • Raises the point concerning the subsidies available to foreign suppliers having established a commercial presence in the territory, pursuant to Mode 3. Thinks this also needed to be carefully considered. Such subsidies might have a trade-distortive effect when the recipients supplied services outside the territory of the Member granting the subsidy.
	Hong Kong, China	<ul style="list-style-type: none"> • Observes that a significant number of economic integration agreements had been reported since the previous Secretariat Note on the subject, over half of which contained disciplines on subsidies in services sectors. It would be useful if those Members that were parties to the agreements could. <ol style="list-style-type: none"> (1) explain what was the motivation or intention for including subsidy disciplines in the agreements; (2) elaborate on the coverage of these disciplines, as many may seemed to apply to both services and goods. (3) explain how they operationalize them, including how they address the issue of definition of subsidy and how they determine the appropriate criteria for invoking such disciplines. • Interested to see how the Chile's examples would be treated under the subsidy disciplines of economic integration agreements referred to. • Thinks it might be important to discuss other types of subsidies that were, by their nature, less trade distortive and could, because they related to public policy objectives, be regarded as tolerable or non-actionable. Discussions on both types of subsidies could take place contemporaneously. • Considers the question of whether certain areas or forms of government support should be considered as non-actionable under any disciplines to be developed. Believes that similar considerations would apply to the example listed by Chile pertaining to scientific research and technology transfers. • Invites other delegations to come forward with additional anonymous examples so as to highlight the types of subsidy programs in existence and the types of problems they might cause.
	India	<ul style="list-style-type: none"> • Gives concerns for cases where a subsidy targeted a service embodied in a physical good, and whether this would be considered as a subsidy relating to a good or a service, especially in light of the examples given for tourism.
	United States	<ul style="list-style-type: none"> • Thinks it might be easier if Members had put forward their own subsidy programs as examples. • Thinks that while the absence of a definition of subsidy did not necessarily mean other elements of Article XV needed to be sidestepped, a piecemeal approach might be more appropriate.
	Brazil	<ul style="list-style-type: none"> • Thinks the communication from Chile represents a useful way to focus discussions.
	Canada	<ul style="list-style-type: none"> • Notes that the range of examples provided by the delegation of Chile underlined the difficulties in defining what a subsidy in the service trade was. Tries to decide which subsidies were distorting and determines that to discipline them would be a significant challenge. • Considers whether certain subsidy programs had distortive effects. It is important to determine the extent to

⁵⁹ Working Party on GATS Rules, *Report Of The Meeting Of 2 December 2003: Note by the Secretariat*, S/WPGR/M/45 (December, 12, 2003).

Document/Time	Country	Submissions/Suggestions
		which existing GATS obligations, especially national treatment, could help in addressing potential effects of subsidies.
	Japan	<ul style="list-style-type: none"> • Believes that Chile's examples were helpful and encourages other Members to provide additional real, but anonymous examples. • Points out the question that under GATS, how would Members address issues arising from subsidies to a specific service sector when the levels of commitments for such a sector varied across the membership.
	New Zealand	<ul style="list-style-type: none"> • Considers Chile's communication to be useful and believes that limited inferences could be drawn from the treatment of subsidies in the goods context. • Supports Hong Kong, China's call for participation of a greater number of delegations, including in the information exchange and the discussion of the examples put forward by Chile. • Notes that the Protocol on Trade in Services of the Australia-New Zealand Closer Economic Relations Trade Agreement created substantially free trade and investment conditions in services between the two countries on a negative list basis with very few exceptions. Does not recall that trade distortive subsidies had been identified in the field of services.
	Switzerland	<ul style="list-style-type: none"> • Believes that the communication by Chile constituted a very good contribution to the work of the Working Party. • Highlights that it is sensible to discuss the issue of definition contemporaneously with the examination of substantive issues such as those suggested in the communication from Chile. • Hopes to solve the chicken-and-egg dilemma, which had prevented progress in the past.
	Australia	<ul style="list-style-type: none"> • States that it is possible to consider subsidy rules for services in a manner which might parallel and be based on rules already applying to subsidies in goods.
	Chinese Taipei	<ul style="list-style-type: none"> • Considers that the paper from Chile was helpful in facilitating the discussions of the Working Party. • Observes that subsidies granted to service providers were sometimes associated with goods and could thus be governed by the SCM AGREEMENT. • Thinks that all established suppliers could benefit from the subsidy in the examples of the infrastructure program. It might be therefore be difficult to identify trade-distortive effects.
S/WPGR/M/50 17 January 2005 ⁶⁰	Chile	<ul style="list-style-type: none"> • Wishes to provide some information on domestic support programs relating to services. Reiterates that the primary objective of the delegation in this area was to increase transparency so as to comply with the mandate in Article XV and paragraph 7 of the Guidelines and procedures for the Negotiations on Trade in Services. • Wishes to mention some activities that received government support in Chile. The three programs concerned fulfilled public policy goals and did not distort trade. Here are the three examples: <ul style="list-style-type: none"> a. Development Fund for Telecommunications, enshrined in Law 18.168 (General Telecommunication Law) b. The program of Rural Electrification for Poor Families 1994 c. In the area of maritime transportation
	United States	<ul style="list-style-type: none"> • Recognizes the concerns expressed by some delegations regarding the information exchange, as well as fears

⁶⁰ Working Party on GATS Rules, *supra* note 63.

Document/Time	Country	Submissions/Suggestions
		<p>of getting bogged down in definitional issues.</p> <ul style="list-style-type: none"> • Notes that one way of approaching the analysis could be to explore a few services sectors and consider how the definition of subsidy contained in the SCM AGREEMENT might apply. Those questions include, would government support of health care and education to be captured in this definition? What about subsidies that supported mass transit or those underpinning universal access to telecommunications, electric power or postal services? How would the specificity test in the SCM AGREEMENT affect the scope of services subsidies that could be captured by a definition? <u>Because the SCM AGREEMENT had been negotiated in the context of trade in goods, it should not necessarily be assumed that its definition would be entirely appropriate for services.</u> • States that another question to consider is whether any aspects of the SCM AGREEMENT definition need to be adapted to better correspond to the context of trade in services. • Agrees that it is important to keep in mind the ideas expressed in the past on the issue of the definition of subsidy so as to not repeat the same discussion.
	Singapore	<ul style="list-style-type: none"> • Recalls that the SCM AGREEMENT definition could serve as a starting point for such discussions as it had already argued in the Working Party in the past. The Secretariat had also done a useful background paper in 1996, S/WPGR/W/9. It might be useful to revisit this and discuss how such concepts as the “existence of a financial contribution”, “government or any public body”, “any form of income or price support”, or the “conferral of a benefit to the supplier,” which were used in the SCM AGREEMENT, could apply in the services context. • Considers the following issues: <ul style="list-style-type: none"> (1) Would disciplines resulting from the negotiations under Article VI:4 be sufficient to address issues relating to regulatory measures? (2) Should the WPGR avoid creating overlapping disciplines relating to such measures? (3) While the term “benefit” was not defined in the SCM AGREEMENT, it had been discussed and clarified in the jurisprudence. For instance, the Appellate Body had clarified that a “benefit to the recipient” meant that the recipient must be a natural or legal person. • Contemplates whether it would be appropriate for the Working Party to consider such jurisprudence even if it did not relate to trade in services. • Stresses that the statistical and measurement difficulties in services trade had to be recognized as work proceeded in the negotiations, even if such difficulties should be no reason to ignore the mandate in Article XV. • Considers that other provisions in the GATS, in addition to Article VI, VIII, IX, might also address certain aspects of subsidies. Believes that national treatment and Article XXIII:3 might be also relevant.

Document/Time	Country	Submissions/Suggestions
	Hong Kong, China	<ul style="list-style-type: none"> • Contemplates whether distinctions could be made between domestic and foreign services on the basis of particular modes of supply. Also wonders how the issue of public policy objectives should be treated in the development of disciplines. Could certain subsidies granted in pursuance of some public policy objectives, possibly in certain specific sectors, be defined as tolerated or non-actionable even if they had certain trade distortive effects? • Looks forward to the upcoming contribution from the United States and agrees that it would be useful to examine a few services sectors. Concur that the SCM AGREEMENT definition provided a useful starting point for the purpose of comparison. • Thinks that no delegation disputed that the information exchange had to be done. However, the issue of how to carry it out remained.
	Switzerland	<ul style="list-style-type: none"> • Recalls that Article XV contained a clear legal obligation to exchange information concerning all subsidies related to trade in services. This obligation existed since 1994 and its fulfillment is, therefore, long overdue. • Supports the idea to set up a timeframe for negotiations, and to have the Secretariat prepare a composite note on issues to be considered for a definition of subsidy.
	Canada	<ul style="list-style-type: none"> • Thinks that there had not been many substantive comments on the issue of definition; this could not, however, be seen as implying any kind of agreement on definition. The Note should be allowed to be updated to incorporate any further comments.
	European Communities	<ul style="list-style-type: none"> • Notes that the Chairperson had in the past produced a checklist of issues which touched upon the definition of subsidy. A possibility might be to update that document. • Cautions that most of the interventions on the definition of subsidy were limited to raising questions, rather than providing answers.
S/WPGR/M/51 18 March 2005 ⁶¹	United States	<ul style="list-style-type: none"> • Recognizes the obligation to exchange information concerning all subsidies relating to trade in services provided to domestic suppliers, and this is not tantamount to having to provide all possible information in advance of the negotiations. • Concerned that the submission of a large amount of information in an unfocused manner could create a significant burden without yielding useful results. It would slow down work and be counterproductive for those having particular interests in these negotiations. • Suggests the Working Party might thus want to discuss which sectors could provide a useful starting point. Tourism could be considered because this was a sector of importance to a wide range of Members, although did not want to preclude other sectors. • Notes that many of the suggestions put forward seemed to be more about defining what a subsidy was not. Wonders whether it could be inferred from the synthesis that Members were not foreseeing any particular type of subsidy as problematic. It would be good to have a better idea of the types of subsidies that Members thought should be disciplined, so as to get a sense of their prevalence. This would help to determine the nature of the problem at hand, which in turn would help in crafting an appropriate definition. • Contemplates whether there were any particular types of subsidies that actually presented a significant

⁶¹ Working Party on GATS Rules, *Report Of The Meeting Of 7 February 2005: Note By The Secretariat*, S/WPGR/M/51(March, 18, 2005).

Document/Time	Country	Submissions/Suggestions
		problem in the services context. Consequently, it seems more prudent to use a broad definition, at least from the outset.
	Hong Kong, China	<ul style="list-style-type: none"> • Contemplates whether the sector of tourism had particular problems with subsidies as compared to other sectors such as transport or construction. Does not think that agreement of all delegations on a sector was needed before proceeding further; it could be left to individual Members to choose the sectors they thought would be useful for the purpose of information exchange. • Suggests that it was now time to act upon the information exchange rather than talk about it.
	Japan	<ul style="list-style-type: none"> • Considers it was useful to narrow the scope of the information exchange by focusing on certain sectors. However, the delegation was not convinced by the choice of the tourism sector. Considers that tourism was in certain regards quite different from other sectors, where the main focus was on how to supply services abroad.
	Thailand	<ul style="list-style-type: none"> • Thinks that the suggestion to focus on relevant sectors was useful. Does not mind starting with tourism, although exploring subsidy schemes in infrastructural services such as telecommunications or transport could also be quite relevant.
	Pakistan	<ul style="list-style-type: none"> • Welcomes efforts by the United States to suggest paths towards a constructive information exchange. • Supports the proposal to invite UNCTAD to present its study in services subsidies.
	Chinese Taipei	<ul style="list-style-type: none"> • Asks whether the United States wished to develop a provisional definition of subsidy before proceeding with the information exchange or, alternatively, develop a definition on the basis of the information gathered on a sectoral basis. • Makes some comments on the Singapore communication: <ol style="list-style-type: none"> (1) The notion of price or income support should be included in a definition of subsidy in services so as to cover all relevant situations. (2) Subsidy-like effects of regulatory measures should not form part of a definition, but be covered by other provisions of the GATS. (3) On the basis of benefits, inadequate statistics, as well as the complexity associated with multiple modes of supply, made the measurement of benefits conferred on recipients particularly challenging.
	Republic of Korea	<ul style="list-style-type: none"> • Sympathizes with concerns that too broad a definition might make the information process too burdensome; the SCM AGREEMENT definition constituted a good basis. • Agrees with idea to focus on tourism at first then moves to other sectors.
	Chile	<ul style="list-style-type: none"> • Supports Hong Kong, China's determination that Article XV contained an obligation to provide information on all subsidies. While agreement on a provisional definition might be useful, this was not a prerequisite for exchanging information. • Thinks other sectors like construction or transport might be more relevant. • Wishes to make several comments with regard to the Singapore's communication: <ol style="list-style-type: none"> (1) Thinks that the various elements forming a financial contribution in the SCM AGREEMENT would also capture the reality of service. (2) Does not think that there was a direct relationship between negotiations under Article XV and those under Article VI:4.

Document/Time	Country	Submissions/Suggestions
		<p>(3) Hopes that Singapore could elaborate more on the term “benefit,” and possibly provide some concrete examples.</p> <p>(4) Thinks it would be appropriate to consider the “traffic-light” approach in the context of services.</p>
	Switzerland	<ul style="list-style-type: none"> • Regarding the Article XV mandate, notes that it was up to each Member to decide how it wanted to fulfill that mandate. Members do not have to proceed in the same manner. • Thinks that the subsidy definition used in the SCM AGREEMENT provided a good basis for work on subsidy disciplines in services.
	India	<ul style="list-style-type: none"> • Asks about the choice of tourism as a focal sector and asks if the United States considers that it caused particular trade-related problems. • Notes that the suggestion to focus on subsidies directly linked to exports might be a useful starting point.
	Colombia	<ul style="list-style-type: none"> • Believes that the mandated information exchange concerned all subsidies, not solely some of them. • Thinks that distortive effects were much more significant concerning the proposal to start with tourism.
	Singapore	<ul style="list-style-type: none"> • Says that even though the Working Party had discussed this topic for the last 10 years, little progress had been made. Its communication raised a number of questions that were relevant to the discussion, but did not aim to provide answers.
	Indonesia	<ul style="list-style-type: none"> • Agrees with the United States that the scope of the information exchange might need to be narrowed by focusing on selected sectors, which needed to be chosen with care. • Thinks a suitable timeframe for developing countries is needed.
	Canada	<ul style="list-style-type: none"> • Believes that there is no guarantee, even with a provisional definition, that Members would rush to provide information. • Suggests it would be useful if Members that had been adversely affected could come up with specific sectoral examples.
	Australia	<ul style="list-style-type: none"> • Notes that these negotiations involved complex technical issues. • Agrees that Members needed to arrive at a provisional definition of subsidy, for which the SCM AGREEMENT provided a good starting point. • Supports the suggestion to start with the tourism sector, as this was a sector of interest to a wide range of Members. Such a sectoral discussion should be of a generic nature rather than Member-specific.
	European Communities	<ul style="list-style-type: none"> • Reiterates that the best way to obtain information for the negotiations would be for those Members that considered themselves adversely affected by subsidies of others to share their experience in that regard.
	South Africa	<ul style="list-style-type: none"> • Suggests that it was more important to have disciplines on subsidies that had a trade-distortive effect than trying to examine a large amount of subsidies that might not be useful for the Working Party’s purpose at this juncture.
	Mexico	<ul style="list-style-type: none"> • Believes that the mandate on information exchange contained in Article XV was clear. It concerned all subsidies. Thinks that the suggestion to develop a provisional definition might facilitate the exchange of information, but it should not prejudice the final outcome of disciplines to be developed. • Thinks it might be best to start with sectors other than tourism. • Believes that Article XV:2 was independent from Article XV:1 and is not a substitute for the information

Document/Time	Country	Submissions/Suggestions
		exchange foreseen concerning the intervention by the European Communities.
	China	<ul style="list-style-type: none"> • Thinks US suggestion might be a practical way forward. However, further consideration was needed.
S/WPGR/M/57 ⁶²	Hong Kong, China	<ul style="list-style-type: none"> • Thinks that this might link up with the parallel track of discussion in the Working Party on the question of definition of subsidy concerning concerns about how the information gathered would be used. • Hopes that the Secretariat Note could provide incentives for Members to be forthcoming and take this area of the negotiations forward. • Notes that in past discussions some Members had expressed an interest in looking at what might be permissible subsidies.
	Switzerland	<ul style="list-style-type: none"> • Observes that no definition was necessary to collect and exchange information because Table 1 (in the Secretariat Note) highlighted that Members tend to grant subsidies in many sectors. These constituted a good basis for those Members that had not yet fulfilled their obligations of information exchange. • Encourages Members to provide greater information and relevant information on subsidies in five sectors.
	Canada	<ul style="list-style-type: none"> • Thinks that delegation needed to focus on government assistance to trade in services, and not simply government assistance to services sectors generally. • Demandeurs should be able to demonstrate if they had been adversely affected by subsidies to trade in services that might exist.
	Mexico	<ul style="list-style-type: none"> • Wishes to highlight that the communication should not be seen as a negotiating proposal, but rather as a tool to stimulate a substantive discussion between delegations.
	United States	<ul style="list-style-type: none"> • Believes that communication might be premature. It asks many important questions but the delegation did not have answers for many of them. • Asks whether the issues raised by the sponsors were exhaustive or merely illustrative. • Thinks that it is not clear that there was even the beginning of an agreement among Members as to the nature of any possible multilateral disciplines in this area or on the definition of a service subsidy. • Discusses whether subsidies needed to be in a green or red category; it was necessary to understand the nature of the disciplines from which these would be included or excluded.
S/WPGR/M/58 ⁶³	Switzerland	<ul style="list-style-type: none"> • Wishes to share some views on what constitutes permissible/non-actionable subsidies. • Wishes to recall the delegation's views on export subsidies. Such measures distort competition and put in question market access commitments. Wishes to continue work on both these aspects.
	China	<ul style="list-style-type: none"> • Believes that some of the government activities mentioned in the Secretariat Note might not be considered as subsidies. • States that the word "subsidies" in the title of the Note should, therefore, be qualified by quotation marks since there is no definition on subsidies yet.

⁶² Working Party on GATS Rules, *Report Of The Meeting Of 19 April 2007: Note By The Secretariat*, S/WPGR/M/57(May, 9, 2007).

⁶³ Working Party on GATS Rules, *Report Of The Meeting Of 4 July 2007: Note By The Secretariat*, S/WPGR/M/58 (July, 17, 2007).

Document/Time	Country	Submissions/Suggestions
S/WPGR/M/59 ⁶⁴	United States	<ul style="list-style-type: none"> • Asks how Members could possibly analyze whether any particular action should be a green-lighted subsidy if the nature of the disciplines from which they were being exempted was unknown. • Thinks that the communication raises interesting issues, but the discussion was premature. • Says that the delegation would have reservation about inviting an outside speaker to address the Working Party. This might be done in seminars, but not in the current context.
	Thailand	<ul style="list-style-type: none"> • Notes that UNCTAD had done research on subsidies in the last years and proposed to have an UNCTAD representative make a presentation at the next meeting. China supported this proposal.
	Mexico	<ul style="list-style-type: none"> • Notes that the delegation had significant interest in further discussions on the topic of subsidies.
	India	<ul style="list-style-type: none"> • Thinks it seems premature to get into substantive discussions at this stage since papers for both subsidies and ESM are forthcoming.
S/WPRG/M/60 ⁶⁵	Mauritius	<ul style="list-style-type: none"> • Notes that they had relied on research from only two organizations. This is insufficient as even in research there might be an element of bias depending on which organization has conducted the work. • Encourages UNCTAD to look specifically at how subsidies were used in developing countries as well as how special and differential treatment could be ushered in for the interest of developing countries.
	Hong Kong, China	<ul style="list-style-type: none"> • Finds the work conducted by UNCTAD to be comprehensive and useful for discussions in the WPGR. • Proposes that the analysis has also illustrated how certain domestic policy objectives, such as for development, environmental protection or rescue situations, might merit the use of subsidies.
	Mexico	<ul style="list-style-type: none"> • Finds the presentation to be comprehensive and noted the importance of highlighting the relationship between the trade-distorting effects of some subsidies and development objectives. • Asks for further details on the empirical work envisaged by UNCTAD in his area.
	United States	<ul style="list-style-type: none"> • Notes that the individually authored papers did not represent UNCTAD's view of the issue o that of the UNCTAD Secretariat. • Believes the issue goes beyond academic interest and would need to be discussed and defined in more precise terms since subsidies have been mandated for negotiations by WTO Members. • Notes that the papers would inform thinking on the issue and appreciates that it had been brought to the general attention of the WPGR.
	China	<ul style="list-style-type: none"> • Finds the main findings and research methodologies to be very useful. • Observes that distinguishing between goods and services subsidies was particularly difficult. This is the one of the problems that would need to be addressed.
	European Community	<ul style="list-style-type: none"> • Notes that, while the delegation appreciated the academic value of the work, it is not certain that it could be used in the discussions in the WPGR. • Thinks that it would be useful to focus future work on subsidies to services suppliers meeting the selective criteria.

⁶⁴ Working Party on GATS Rules, *Report Of The Meeting Of 17 September 2007: Note By The Secretariat*, S/WPGR/M/59 (October, 2, 2007).

⁶⁵ Working Party on GATS Rules, *Report Of The Meeting Of 29 November 2007: Note By The Secretariat*, S/WPGR/M/60 (January, 17, 2008).

Document/Time	Country	Submissions/Suggestions
S/WPRG/M/62 ⁶⁶	Hong Kong, China	<ul style="list-style-type: none"> • Notes that efforts had been made by the delegation to facilitate discussions in this area. • Proposes that it might be helpful if the OECD, which had also undertaken some research in the area of subsidies in services, could be invited to present their work. • Notes that the Secretariat (note?) on subsidy disciplines relating to trade in services in economic integration agreements could be updated.
	European Communities	<ul style="list-style-type: none"> • Supports the proposal by Hong Kong, China to invite the OECD.
	United States	<ul style="list-style-type: none"> • Requests further information on the study so as to see if it would be a useful and acceptable addition to the Working Party's discussion.
	China	<ul style="list-style-type: none"> • Supports the proposal to invite the OECD to present its study on subsidies to the Working Party.
S/WPGR/M/63 ⁶⁷	Switzerland	<ul style="list-style-type: none"> • Notes that OECD presentation demonstrated that it was possible to collect information on subsidies, especially on export subsidies. • Notes that the definition of subsidy contained in the SCM AGREEMENT could serve as a provisional working definition for the information exchange mandate in Article XV.
	Hong Kong, China	<ul style="list-style-type: none"> • Agrees with Switzerland that the SCM AGREEMENT can serve as a possible reference for further deliberation on the possible definition of subsidy. • States that, in the delegation's view, the current global financial crisis may give rise to even more examples of subsidies in services.
	China	<ul style="list-style-type: none"> • Highlights that in reality, some subsidies may be directed at achieving other policies. • Highlights that the report indicated that mode 1 and 2 are perhaps the most relevant for identifying export subsidies. However, believes that in mode 3, information is insufficient. Mode 3 accounts for the major proportion of world trade in services, and in the view of the delegation, subsidies granted under this mode should be reviewed in the future.
	Brazil	<ul style="list-style-type: none"> • Highlights that the OECD study identified export subsidies but did not deal with their economic impact on services exports. • Notes that when the program was discussed at the OECD, a number of methodological problems had arisen on how to measure trade barriers in services.
	Pakistan	<ul style="list-style-type: none"> • Notes the difficulties with defining subsidies in services, especially in terms of modes 2, 3, and 4.
	India	<ul style="list-style-type: none"> • Stresses the importance of starting serious discussions on subsidy disciplines, commencing with the mandated information exchange.
S/WPRG/M/64 ⁶⁸	Korea	<ul style="list-style-type: none"> • Emphasizes the importance of Article XV negotiations as many governments face economic difficulties with increasing and unregulated use of subsidies in services.

⁶⁶ Working Party on GATS Rules, *Report Of The Meeting Of 2 December 2008: Note By The Secretariat*, S/WPGR/M/62 (January, 28, 2009).

⁶⁷ Working Party on GATS Rules, *Report Of The Meeting Of 30 March 2009: Note By The Secretariat*, S/WPGR/M/63 (June, 11, 2009).

⁶⁸ Working Party on GATS Rules, *Report Of The Meeting Of 22 June 2009: Note By The Secretariat*, S/WPGR/M/64 (September, 25, 2009).

Document/Time	Country	Submissions/Suggestions
	Hong Kong, China	<ul style="list-style-type: none"> • Concurs with the Chairman on moving beyond a conceptual discussion of a definition for subsidies and to examine some practical effects in a specific manner. • Believes that the provisional definition that it provided a few years ago could still be relevant and would welcome any efforts from other delegates.
	Mexico	<ul style="list-style-type: none"> • Notes that it had co-sponsored proposals on this subject and encouraged Members to reinitiate discussions on the definition of subsidies as well as possible trade-distortive effects.
	Colombia	<ul style="list-style-type: none"> • Notes the OECD's further work may shed more light on the relevant criteria and elements for a provisional definition of subsidies in services.
	India	<ul style="list-style-type: none"> • Supports Hong Kong, China's intervention on the need to reinitiate discussions by focusing on trade-distortive effects and in this connection, a provisional definition of subsidies. • Urges Members that had been calling for disciplines on subsidies in services, similar to those in the goods area, to come forward and support discussions in the Working Party.
S/WPRG/M/65 ⁶⁹	Switzerland	<ul style="list-style-type: none"> • Makes a distinction between the exchange of information and the development of disciplines to avoid the trade-distortive effects of subsidies in services. • Feels regrettable that information exchange was not being fulfilled by Members. • Highlights that in the case of export subsidies, the nature of the distortion was inherent to the measure. It is clear to Switzerland that since these subsidies are aimed at creating distortion there should be disciplines on their use. • Refers to Switzerland's proposal submitted years ago, and points out the idea has not been rejected by any delegation. Some delegations had, at that time, said that it was not a problem as they did not have export subsidies. However, should this be the case, it would be easier to agree that such subsidies will never be used. • Suggests that by focusing on export subsidies, questions on the nature of the distortion and the definition of subsidies become irrelevant, since a prohibition would cover all such practices, whatever definitions are used. • Proposes the distortion is built-in since the very aim of the measure is to distort.
	Mexico	<ul style="list-style-type: none"> • Believes that the definition submitted in its previous proposal with Hong Kong, China could provide a good basis for the exchange of information and for further technical discussion. • Urges other Members to comment on the proposals that were on the table, and referred specifically to the communication from Hong Kong, China and Mexico.
	Hong Kong, China	<ul style="list-style-type: none"> • Feels that there has been a lack of interest in the subsidy negotiations. • Clarifies that the five sectors would be self-selected. The idea was to limit the information exchange exercise so as to encourage greater participation.
	Pakistan	<ul style="list-style-type: none"> • Notes that while it concurred that export subsidies should be disciplined, it would be even more important to have an agreed definition on measures that would fall under the scope of such disciplines.

⁶⁹ Working Party on GATS Rules, *Report Of The Meeting Of 6 October 2009: Note By The Secretariat, S/WPGR/M/65* (November, 5, 2009).

Document/Time	Country	Submissions/Suggestions
	United States	<ul style="list-style-type: none"> • Notes that on some issues there had either been a lack of engagement or interest. • Feels that there had been a lack of interest from some of the most important players in this particular discussion. • Points out that there have been proposals explaining which type of subsidy programs would not be subject to disciplines, but no indication had been given of the disciplines to which subsidies would be subjected. • Underscores that the lack of interest did not mean that subsidies did not exist but that they do not seem to be causing significant trade effects. • Reminds delegation that WTO Members are meant to address significant trade problems and not to discuss hypothetical problems. • Observes that there has been very little discussion on what distortive effects are produced by subsidies. There has not been any empirical evidence that subsidies in services are trade-distorting. • Believes that a definition of export subsidies would be relevant to identifying distortions.
	India	<ul style="list-style-type: none"> • Recalls that the distorting effects of subsidies on trade in services had been recognized by all Members • Considers Members should be moving forward rather than backward in their discussions since both the concept of distortion and the need to negotiate disciplines has already been settled. • Disagrees with the suggestion that since the private sector had not complained, a problem did not exist. It is pointed out that there are similarly no complaints in respect to market access in a number of sectors but Members are still discussing the matter.

It is good to hear from many voices around the world, but it can sometimes also produce an overwhelming loss of focus. Everyone knows it is difficult to build a perfect law, let alone have over 100 countries agree on this law. Some Members are cautious about the notion that too many questions have been asked, but no action has been taken. The EU cautioned that most of the interventions on the definition of subsidy were limited to raising questions, rather than providing answers.⁷⁰ The US expressed concern that the submission of too much information in an unfocused manner could create a significant burden without yielding useful results.⁷¹

A review of Members' discussions and submissions raises both useful questions and suggestions. I turn now to addressing both in the context of the system that may be possible.

C. THE NEED TO HAVE A SPECIFIC SYSTEM FOR SUBSIDIES IN SERVICES

After establishing the importance of regulating service subsidies, the next question is: how are we going to carry out a legal mechanism to manage service subsidies? Do we need a distinct rule to cover this? Or can we simply apply the existing rules on subsidies, including those found in the SCM Agreement and AoA, and integrate them into the service area? I believe the foremost question to be whether there is any situation where service subsidies cannot be resolved by applying the current GATT subsidy rules.

⁷⁰ Working Party on GATS Rules, *supra* note 63, at para. 27.

⁷¹ Working Party on GATS Rules, *supra* note 70, at para. 4.

1. Why Not Just Apply the SCM Agreement to Regulate Subsidies In Services?

Because of the development of societies and technologies, many laws today need to change in order to consider and adapt to these developments. Take cyber laws, for instance. Cyber law has adopted many concepts from existing contract rules in determining when and how an online transaction can be formed.⁷²

The SCM Agreement currently is the most commonly-used legal mechanism for dealing with subsidies. For this reason, people may ask why we should not just apply the SCM Agreement to service subsidies. I am not proposing that the principles embodied in the SCM Agreement are not applicable to the service subsidies. Instead, my point is that applying the SCM Agreement directly to service subsidies is not appropriate. The following discussion will explain why simply applying the whole SCM Agreement to services does not work.

a. Differences between Goods and Services Before the GATS, Members presented a way to incorporate trade in services into the existing rules on trade in goods⁷³—to incorporate service regulations into GATT. This idea was discussed when thoughts of regulating trade in services first appeared. There was even a proposal to change the framework of GATT so as to cover

⁷² See generally Juliet M. Moringiello and William L. Reynolds II, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2006-2007*, Business Lawyer, Vol. 63, p. 219, 2007, available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1438&context=fac_pubs&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fgcx%3Dc%26sourceid%3Dchrome%26ie%3DUTF-8%26q%3DRichard%2BD.%2BDiamond%23sclient%3Dpsy-ab%26hl%3Den%26source%3Dhp%26q%3Dsurvey%2Bof%2Bthe%2Blaw%2Bof%2Bcyberspace%3A%2Bcase%2B2006-2007%26pbx%3D1%26oq%3Dsurvey%2Bof%2Bthe%2Blaw%2Bof%2Bcyberspace%3A%2Bcase%2B2006-2007%26aq%3Df%26aqi%3D%26aql%3D1%26gs_sm%3De%26gs_upl%3D30324133516101337641151141010101241200613.9.211410%26bav%3Don.2%2Cor.r_gc.r_pw.%2Ccf.osb%26fp%3D4d90baad82b9465%26biw%3D1366%26bih%3D643#search=%22Richard%20D.%20Diamond%22. See also Saami Zain, *Regulation Of E-Commerce By Contract: Is It Fair To Consumers?*, 31 U. West. L.A. L. Rev. 163 (2000).

⁷³ WTO LAW – FROM A EUROPEAN PERSPECTIVE, 284-285 (Birgitte Egelund Olsen ed., 2006).

“goods and services” rather than just “goods.”⁷⁴ However, this proposition was rejected.⁷⁵ The differences between trade in goods and trade in services are so significant that it is impossible to regulate them together through just one single agreement, for the following reasons:

- (1) The most significant reason is that services are intangible, perishable and non-storable.⁷⁶ Also, services are simultaneously provided and consumed.
 - (2) There are several modes of supply of services, which is not the case for trade in goods.⁷⁷ For example, if a Taiwanese programmer received a subsidy from the Taiwan government, and then he traveled to the US to provide his services, then he, himself, is a provider of services.
 - (3) International trade in services often requires the movement of one or more of the factors of production.⁷⁸
 - (4) National regulations for trade in services are more extensive and diverse than those for trade in goods.⁷⁹
 - (5) The atypical role of “territory” in production of services is a distinctive element.
- In subsidy examples involving trade in services, the benefit conferred by a

⁷⁴ *Id.* at 285.

⁷⁵ *Id.*

⁷⁶ Aly K. Abu-Akeel, *Definition Of Trade In Services Under The Gats: Legal Implications*, 32 GW J. Int'l L. & Econ. 189, 2 (1999). See also Phedon Nicolaides, *Economic Aspects of Services: Implications for a GATT Agreement*, 23 J. World Trade 125, 126 (1989) (it includes the discussion on difference in goods and services.).

⁷⁷ Akeel, *supra* note 84. (The author suggests to see Gary P. Sampson & Richard H. Snape, *Identifying the Issues in Trade in Services*, 8 World Economy 172, 172-75 (1985) for the discussion on the classification of international transactions in services based on the proximity of supplier and consumer.).

⁷⁸ *Id.* at footnote 10. (“The fact that trade in services would usually require movement of capital and/or labor was always recognized, and it accounted for GATT’s reluctance to expand into the services area, as it would involve investment issues, an area traditionally beyond the reach of the GATT.”)

⁷⁹ *Id.* at footnote 11. (“A classification of barriers by country/sector to international trade in services can be found in UNCTAD & World Bank Study, *supra* note 2, at 20-24. It is evident from this study that most barriers are not designed to restrict trade in services but merely to regulate the service sectors in the national economy. They are nevertheless perceived as having the effect of discouraging entry into the local market by foreign services suppliers. See Joel P. Trachtman, *Trade in Financial Services Under GATS, NAFTA, and the EC: A Regulatory Jurisdiction Analysis*, 34 Colum. J. Transnat'l L. 37, 46 (1995).”).

subsidy to a service firm is not necessarily confined to the territory of the government providing the subsidy.⁸⁰

b. Differences between the GATT and the GATS One difficult conceptual question about the negotiation on services is whether the well-established and well-known principles regarding trade in goods apply by analogy to trade in services. The GATS architecture is very different from the GATT in ways that affect the ability of governments to grant subsidies, hence the refusal of GATS negotiations to simply transpose GATT subsidy rules to services.⁸¹

These differences include the MFN treatment and NT principles, and the concept of market access through *scheduled concessions* that are reciprocally negotiated.

The Most-Favoured-Nation Principle in the GATT and the GATS Article II(1) of GATS provides that, “[w]ith respect to any measure covered by this Agreement, each Member should accord immediately and unconditionally to services and service suppliers of any other Member treatment *no less favourable* than that it accords to like services and service suppliers of any other country.”

The same principle is found in GATT Article I:

With respect to customs duties and charges of any kind imposed on ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country *shall be accorded immediately and unconditionally to the like product* originating in or destined for the territories of all other contracting parties. (emphasis added)

The main difference between the MFN obligation in the GATT and the MFN obligation in the GATS is its applicability in subsidy issues. The GATT regulates trade in goods, and its MFN

⁸⁰ Benitah, *supra* note 10, at 14.

⁸¹ European Service Network Policy Committee, *European Services Network Preliminary Views On Subsidies In Services: Final Version*, June 25, 1999, at 1, available at <http://www.esf.be/new/wp-content/uploads/2009/06/subsidie.pdf>.

principle is designed to control members' border measures, such as customs tariffs or quotas.⁸² Thus, the MFN principle in the GATT does not apply to measures affecting the process of production of goods within a Member's territory, such as subsidies.⁸³ The situation in the GATS is different because the MFN principle in the GATS applies to any measure "affecting trade in services." Thus, the MFN obligation is applicable whenever a service subsidy is granted on a discriminatory basis.⁸⁴

As such, the MFN principle is applicable as long as Country A grants subsidies to service providers from Country B, instead of Country C. It is possible, however, that a Member State may still decide not to grant a subsidy within its territory to foreign service suppliers. In this situation, there is no application of the MFN principle.

National Treatment in the GATT and the GATS

The NT principle adopted in the GATS is also different from the one included in the GATT. The NT principle of the GATT is stated as follows:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than *that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.* The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.⁸⁵

The GATS NT principle provides that,

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member should accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of

⁸² Olsen, *supra* note 81, at 281.

⁸³ Benitah, *supra* note 10, at 8.

⁸⁴ *Id.*

⁸⁵ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT], art. III (4).

services, treatment no less favourable than that it accords to its own *like services* and *service suppliers*.⁸⁶ (emphasis added).

Thus, the NT principle in the GATS not only regulates the service itself, but also the service supplier. However, such a principle can be applicable only if Members agree to be bound in that sector in their schedules.

Apparently, employing the NT principle as a restriction on Members' domestic subsidies is efficient since the NT principle requires that members accord the same treatment to foreign services and service suppliers as to domestic services and service suppliers.⁸⁷ Nevertheless, Members may differ in the process of their domestic service liberalization, resulting in differences in scheduled commitments.⁸⁸ Additionally, GATS Article XVII allows Members to put limitations on applying the NT principle.⁸⁹ And most members put such limitations in their schedules.⁹⁰ The following table, taken from Adlung and Roy,⁹¹ illustrates the limitations that Members have placed on the NT principle.⁹²

⁸⁶ GATS, *supra* note 8, art. XVII.

⁸⁷ Benitah, *supra* note 91. (The idea, of course, is that the obligation to grant a services subsidy to foreign firms inhibits the desire to grant the subsidy to national service firms.)

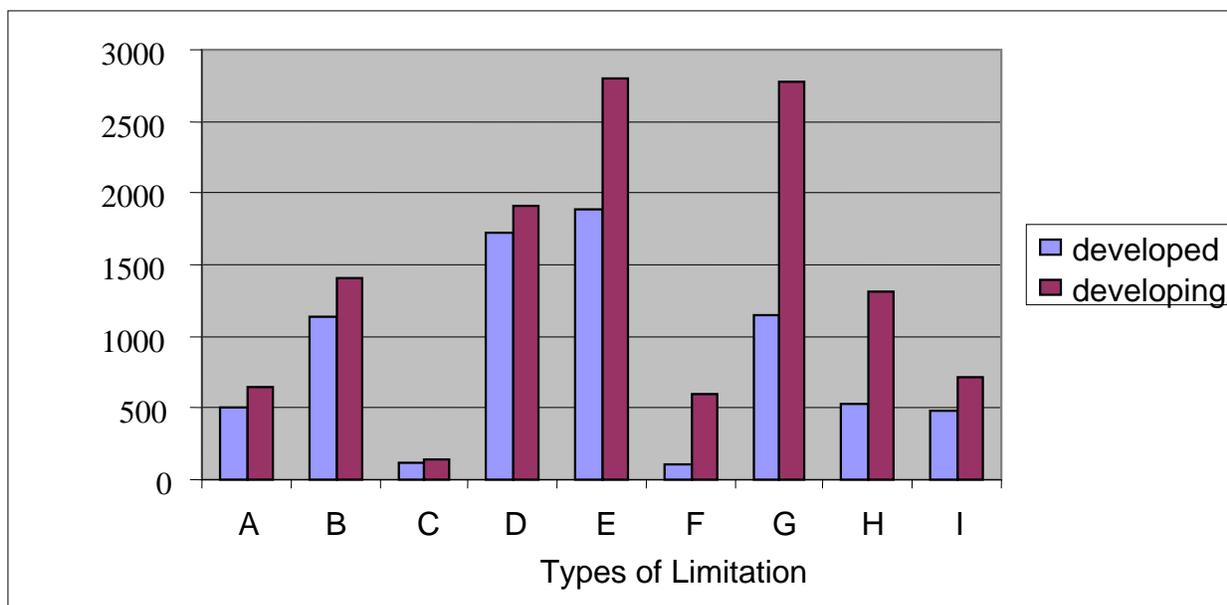
⁸⁸ *Id.*

⁸⁹ GATS, *supra* note 8, art. XVII.1. ("In the sectors inscribed in its Schedule, *and subject to any conditions and qualifications set out therein*, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers (emphasis added).") The article's wordings state that if a Member explicitly limits the application of NT principle, the article has no binding force on it.). *See also* Chapter 3.I.F in this dissertation.

⁹⁰ Benitah, *supra* note 91. *See also* Rudolf Adlung and Martin Roy, *Turning Hills Into Mountains? Current Commitments Under The Gats And Prospects For Change*, World Trade Organization Economic Research and Statistics Division, 20 (2005), available at http://www.wto.org/english/res_e/reser_e/ersd200501_e.htm (The Table 3 provides more details on how many limitations have been put in each service sectors).

⁹¹ Adlung and Roy, *supra* note 101, at 18.

⁹² *Id.*



Legend:		
A – Tax Measures	D – Nationality and Residency Requirements	G – Ownership of Property/Land
B – Subsidies and Grants	E – Licensing, Standards, Qualifications Requirements and Registration/Authorization Requirements	H – Other National Treatment Measures
C – Other Financial Measures	F – Performance Requirements (e.g., technology transfer, training)	I – Market Access Limitation

Figure 10. Total Number of National Treatment Limitations: By Level of Development

Adlung and Roy observe that “developing and developed countries display similar patterns of limitations...developing countries tend to rely somewhat more strongly on land-related restrictions, but less so on discriminatory subsidies and nationality or residency requirements.”⁹³

Despite the Article XVII requirement, the concept of the NT principle in the GATS is still unclear. The first and most obvious problem is the definition of “likeness.”⁹⁴ There is a debate over how to determine what are “like services” and “like service suppliers.”⁹⁵ Do these

⁹³ *Id.*

⁹⁴Panel Report, *European Communities – Regime of the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (22 May 1997), para. 7.322. (“Similarly, in our view, to the extent that entities provide like services, they are like service suppliers.” However, this decision was strongly criticized by scholars.)

⁹⁵ G. VERHOOSSEL, NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT – ADJUDICATING THE BOUNDRIES OF REGULATORY AUTONOMY, 61(2002). W. Zdouc, *WTO Dispute Settlement Practice Relation to the GATS*, 2 Journal

terms extend to different modes for providing services? What if a member commits in one mode and fully complies with it, but still causes some adverse effects to foreign services/service suppliers in other modes? It is not clear whether the NT principle can answer all questions resulting from its application to service subsidies.

It is true that the NT principle can be very powerful in regulating subsidies in the services trade compared with the MFN treatment principle, but because many questions exist about its application, it can also be ineffective in some subsidy circumstances.

The NT principle in the GATS is only negotiable, not mandatory as it is in the GATT. For example, in financial services it is important to protect consumers with various prudential governmental regulations. Thus, it was argued, that to apply the NT principle to financial services required considerable expertise about particular service sectors, and this could result in changes to the basic concepts of national treatment so as to effectively balance the need for trade liberalization against appropriate national government regulatory and prudential policies related to the particular services sectors- banking, insurance, brokerage, and so on.⁹⁶

Because of the differences between goods and services, in addition to the differences between the GATT and the GATS, it is obvious that simply applying the SCM AGREEMENT to service subsidies does not work. Hence, we can confirm the necessity to regulate service subsidies in another category.

of International Economic Law, 332 (1999).

⁹⁶ World Trade Organization, *Understanding The WTO: The Agreements, Services: rules for growth and investment*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.

2. Are Existing Rules Enough to Restrict Subsidies?

Member comments on services trade subsidies have done more to raise questions than to provide answers. Some scholars and Members have suggested that a possibility to avoid duplicating or overlapping disciplines needs to be taken into consideration.⁹⁷ I have a different point of view regarding the issue of overlapping regulation. We have seen that the GATS, when compared with the GATT, has more complexity in its nature and structure. But wasting time on worrying about what overlapping or duplicate rules might do does not provide a solution to the service subsidies problem. It is not uncommon in legal systems to have more than one legal mechanism to deal with the same subject matter. An action can violate more than one article in the same treaty. Pointing out that existing rules have similar effects does not diminish the importance of building up the necessary regulatory framework service subsidies.

The question we need to focus is what is the purpose of having such rules? We need these rules because of the distortive nature of subsidies, and we would like to discipline them. I will discuss the existing rules, which might have disciplinary effects on service subsidies, in the following paragraphs, and I will demonstrate that there is still a need to have a separate legal mechanism dealing with service subsidies.

a. Most-Favoured-Nation Principle Granting a subsidy to the extent that the subsidy is limited formally or in effect to a service or service supplier of one foreign origin and not to another

⁹⁷ Communication from Singapore, *An illustrative list of Definitional issues that could relate to Subsidies in Services*, JOB(04)/180 (December, 1, 2004) (the representative from Singapore stating that, “it is well known that measures affecting trade in services are generally embedded in domestic regulatory measures. Some Members have highlighted that regulatory measure could have subsidy-like effects.... In this connection, wouldn’t disciplines resulting from the Article VI:4 negotiations be sufficient to address issues relating to regulatory measures? ...shouldn’t the WPGR avoid duplication or creating overlapping disciplines relating to regulatory measures?”)

would violate the MFN principle.⁹⁸ Even though the MFN principle is an effective way to regulate a cross-sectoral subsidy, the principle is useless in certain situations. Here is one example:

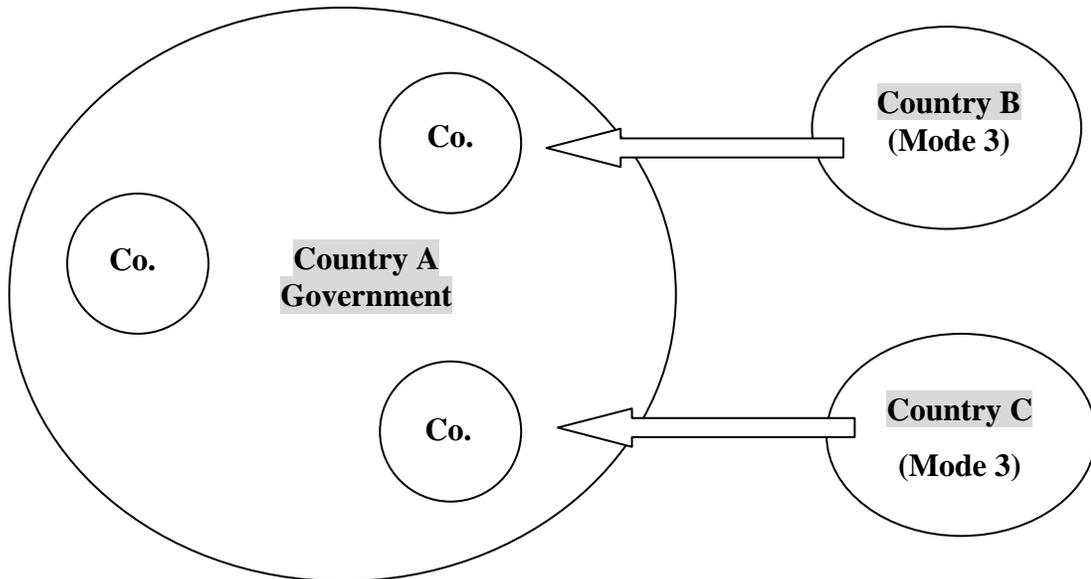


Figure 11. Most- Favoured-Nation Principle

In this example, the service industries of both Country B and Country C have their commercial presences in Country A (Mode 3 example). Country A only grants a subsidy to its local service industries. It does not grant a subsidy to the companies of either Country B or Country C, which are located within Country A's territory. This scenario does constitute discrimination, but not a violation to the MFN principle because Country A does not accord favorable treatment to the firms of either Country B or Country C.

The MFN principle is binding across all service sectors, but would not restrain most types of subsidies in services. This is because discrimination in the granting of subsidies does not usually happen among foreign firms, but between foreign and domestic firms.⁹⁹

⁹⁸ European Service Network Policy Committee, *supra* note 89, at 2.

⁹⁹ *Id.*

Additionally, Members can still create exemptions from MFN treatment. Around 380 MFN exemptions have been listed by 70 Members, and many Members listed several exemptions in the same sector.¹⁰⁰ Almost two-thirds of the exempted measures are found in communication services and in transport services.¹⁰¹ As mentioned earlier, these two categories receive the most subsidies in developed and developing countries. Thus, the lack of having specific disciplines to regulate subsidies in services can cause damage to Members.

b. National Treatment Principle The NT principle can play a strong role in disciplining service subsidies. In the example illustrated above, the MFN principle does not have an effect on the situation, but the NT principle can actually discipline the situation. It is because Country A accords favorable treatment to its own national industries.

But, the NT principle under the GATS is optional.¹⁰² Members may differ in their pace towards services liberalization under the GATS, so the obligation to implement the NT principle varies a lot among Members.¹⁰³ Therefore, limits exist in the following three ways:

- (1) *The NT principle is only applicable in scheduled sectors.* It only covers discriminatory subsidies Members have written into their Schedules. Several countries have taken across-the-board exemptions for subsidies applicable to all service sectors in their Schedules.
- (2) *The NT principle is only applicable in scheduled modes.* Members are free *not* to schedule the NT principle in any one or more of the four modes of supply. Thus,

¹⁰⁰ Aaditya Mattoo, *Shaping Future Rules For Trade In Services: Lessons From The GATS*, 16 (2000), available at http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219023021688_99396.pdf.

¹⁰¹ *Id.*

¹⁰² GATS, *supra* note 8, art. XVII para. 1.

¹⁰³ Benitah, *supra* note 91.

Members can benefit from a certain mode of supply for a certain service by not accord NT principle protection in all four modes of supply.

- (3) *The NT principle is applicable only to services or service suppliers located within a Member's territory.*¹⁰⁴ Article XVII does not require a Member to extend national treatment to a service supplier located in the territory of another Member.¹⁰⁵ Therefore, a subsidy may not apply to all service suppliers in the world. If Country A accords favourable treatment to its local industries' branches in Country B, the NT principle cannot cover such a situation.

¹⁰⁴ European Service Network Policy Committee, *supra* note 195.

¹⁰⁵ WTO Special Distribution, Group of Negotiations on Services, *Scheduling Of Initial Commitments In Trade In Services: Explanatory Note*, MTN.GNS/W/164 (September, 3, 1993), at 5

c. Market Access Market access stipulates that Members “shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations, and conditions agreed and specified in its Schedule.”¹⁰⁶ That is to say market access commitments only apply to those who have made commitments in their schedules. If a Member does not allow market access in a certain service sector, the disciplinary effects of the MFN and NT principles are *de facto* useless.¹⁰⁷

d. Monopoly Provisions GATS Article VIII prohibits monopolists to impair the MFN principle and the scheduled commitments, including NT principles.¹⁰⁸ Article VII can prevent monopolist service suppliers from engaging in cross-subsidization. But it only limits to MFN and NT covered areas and targets to monopolists.

e. Non-violation Provisions GATS Article XXIII states that,

If any Member considers that any benefit it *could reasonably have expected* to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU....(emphasis added)

This dispute resolution Article allows challenge based on both NT and the MFN principle, and also provides Members another way to challenge Member’s granting of subsidies. However, the complaining Member is required to demonstrate that such a subsidy was not anticipated at the time when specific commitments were made.¹⁰⁹ Because the disciplines on

¹⁰⁶ GATS, *supra* note 8, art. XVI para. 1.

¹⁰⁷ Benitah, *supra* note 91.

¹⁰⁸ GATS, *supra* note 8, art. VIII. (“Each Member shall ensure that any monopoly suppliers of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member’s obligations under Article II and specific commitments.”).

¹⁰⁹ Benitah, *supra* note 10, at 9.

service subsidies are still unclear right now, it is difficult to say what the future of service subsidies will be.

If we accept, as we must, the importance of regulating service subsidies, and the necessity of having specific subsidy regulations for the services trade, then something beyond the existing GATT/GATS legal framework is necessary. The next chapter considers the possibility of a special legal system to regulate service subsidies.

VII. A PROPOSED FRAMEWORK FOR SUBSIDY REGULATION IN GATS

A. DEFINING “SUBSIDY” IN THE GATS

The definition of “subsidy” is a crucial starting point for creating a multilateral framework for subsidy regulation. The WTO Secretariat has released an informal note on the definition of subsidy with the goal of summarizing the main substantive views expressed since the circulation of the original note on January 26, 2005.¹ This chapter will focus on the possible elements of a definition, and suggest a workable solution to the current stalemate on this issue.

1. “Subsidy” Defined in the SCM Agreement as A Start

In an effort to fulfill the information exchange required by GATS Article XV, many Members have suggested using the subsidy definition prescribed in Article 1 of the SCM Agreement as a starting point, because, over quite a few decades, the SCM Agreement has developed subsidy concepts that are more mature.

As introduced in Chapter 4, there are three elements in the SCM Agreement that are used to determine whether there is a subsidy. They are: the existence of a financial contribution; the

¹ Working Party on GATS Rules, *Synthesis Of Views Expressed On The Definition Of Subsidy: Informal Note by the Secretariat*, JOB(05)/4/Add.1 (March 31, 2006).

conferral of a benefit; and the fact that a government conferred that benefit.² Moreover, the concept of *specificity* is essential in determining whether a subsidy exists. In the following sections, I will discuss each element separately to evaluate their applicability.

a. Do We Really Need A Different Definition? In trying to reach an agreement on the definition of service subsidy, the progress of developing Article XV has been delayed for 15 years. Moreover, the lack of a definition has given Members an excuse for not taking part in the information exchange, which is clearly required in GATS Article XV.

Everyone seems to agree that using the subsidy definition from the SCM Agreement is a start.³ However, many concerns have been raised in regards to possible amendments.⁴ Most of those concerns offer questions, instead of concrete answers. Members have expressed their concerns, and many of them have “mentioned that the goods model was not particularly useful for defining services subsidies since both areas have different characteristics.”⁵ I disagree with this position, and suggest that using the definition of subsidy currently used in goods trade is a good model from which to start in considering trade in services.

Current Discussion

Professor Benitah has expressed his concern about the application of the goods subsidy definition in services trade.⁶ Other scholars have echoed Prof. Benitah’s concerns.⁷ One

² See Chapter 4.II.B for discussions.

³ See Chapter 6.II.B, TABLE N for Members’ opinions in each session.

⁴ Working Party on GATS Rules, *Communication From Singapore: An illustrative List of Definitional Issues that could relate to Subsidies in Services*, JOB(04)/180 (December, 1, 2004).

⁵ Working Party on GATS Rules, *Negotiations On Subsidies: Report by the Chairperson of the Working Party on GATS Rules*, S/WPGR/10, at para. 15 (June, 30, 2003).

⁶ Marc Benitah, *Subsidies, Services and Sustainable Development*, ICTSD Programme on Trade in Services and Sustainable Development, at. 14 (2005), available at <http://www.tradecapacitypakistan.com/pdf/ICTSD%20Paper%20Services%20GVA%20JUL%2005.pdf>.

⁷ Thomas Chan, *ICTSD Roundtable on Trade in Services and Sustainable Development: “Towards Pro-Sustainable Development Rules for Subsidies in Trade in Services”*, Mar. 10, 2003, available at http://ictsd.org/downloads/2008/08/background-note_final.pdf.

obvious difference between goods and services is that the concept of territory⁸ is more difficult to apply in all service modes.⁹ In sales of goods, only one mode exists: the cross-border sale. But in sales of services, Modes I and II are defined by reference to the territory of supply of services, while Modes III and IV are defined by the nationality of the service supplier.¹⁰ This creates difficulties in applying the subsidy definition from goods to services.

Despite the doubts and questions submitted by Members and scholars, there is still some positive feedback. The representative of Argentina did not foresee significant difficulties in coming up with an agreed definition for service subsidies.¹¹ The representative of Korea also thinks the SCM Agreement definition is sufficient.¹²

The representative of the United States has noted that, “[t]he synthesis also showed that, on the issue of definition alone, many topics could be explored further, possibly for an indefinite time. Many of the suggestions put forward seemed to be more about defining what was not a subsidy.”¹³

My Suggestions

My proposal is very simple and straightforward. So far, all concerns regarding the definition of subsidy are based on theories. Also, there is no reference to any service subsidy, which causes adverse effects, mostly because Members’ information is lacking. But is there a real-world example that suggests that the SCM Agreement definition for subsidy is not applicable in the service situation? In other words, can any service subsidy which causes trade-

⁸ See this Chapter I.C for discussions.

⁹ Australia also expressed this concern in S/WPGR/M/44, 29 October 2003, para. 52.

¹⁰ Chan, *supra* note 7.

¹¹ Working Party on GATS Rules, *Report Of The Meeting Of 1 October 2003: Note by the Secretariat*, S/WPGR/M/44, at para. 50 (October, 29, 2003) (restricted).

¹² *Id.* at para. 63.

¹³ Working Party on GATS Rules, *Report Of The Meeting Of 7 February 2005: Note by the Secretariat*, S/WPGR/M/51 (March, 18, 2005) (restricted).

distortive effects not be categorized as a subsidy under the SCM Agreement definition? If not, why can't we just apply the SCM Agreement subsidy definition to services?

As I mentioned before, not all subsidies are prohibited.¹⁴ Only those subsidies that have trade-distorting effects should be disciplined.¹⁵ Let us look at the definition on subsidy found in Article 1 of the SCM Agreement. Article 1 provides a general idea on what a subsidy is. Then, following the idea that trade-distortive subsidies shall be disciplined, Article 2 of the SCM Agreement comes into play. Article 2 stipulates that a subsidy must be granted specifically to an enterprise, industry, or group of enterprises or industries. A situation could be described in a two-stage analysis.

The investigating authority must first determine whether there is a subsidy. In this determination, the authority will consider: (1) whether there is a financial contribution; (2) whether such a financial contribution is made by a government/public entity; (3) whether such a financial contribution confers a benefit. Once it is determined that a subsidy exists, the authority then moves on to determine whether that subsidy has trade-distorting effects based on the specificity requirement.

For the first stage, I propose that if there is no real-world example that tells us the current definition is insufficient, it is reasonable to categorize it as a subsidy under the SCM Agreement framework.

I use the evolution of cyber laws as an example in the next paragraph to show that sometimes it is not necessary to have a different legal definition to articulate a term in different areas of law. Moreover, how to deal with legal issues arising from a new area can also be a

¹⁴ See Chapter VI of this dissertation for discussion.

¹⁵ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1999, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS], art. XV.

model for a service subsidy definition. As to the second stage regarding the specificity criterion, I will return to it in the later paragraphs.

b. Cyber Laws Development as an Example In the current era, technology development moves society into a different stage. The creation of the internet, for example, has shifted the world's perspective. While dealing with these new developments, legal reforms are always evolving over time. I believe it is useful to take these developments into consideration, and enact theoretically similar thinking with regard to service subsidies.

Cyber law development has drawn the attention of the world. As the volume of electronic contracting increases, legislators around the world are evaluating existing contract laws in light of new business practices.¹⁶ Because the United States lacks any overarching vision of how electronic contract law should evolve, it continues to rely heavily on case law developments to make incremental reforms in contract law.¹⁷ Meanwhile, the EU is trying to harmonize the law applicable to traditional and electronic commerce through legislative instruments.¹⁸

Some commentators have suggested that legal and economic institutions will have to change substantially in response to new technologies of trade.¹⁹ Still, contrary opinions exist. The U.S. Court of Appeals for the Seventh Circuit stated that, “[w]hile new commerce in the Internet has exposed country to many new situations, it has not fundamentally changed the

¹⁶ Jane Kaufman Winn and Jens Haubold, *Electronic Promises: Contract Law Reforms and E-Commerce in a Comparative Perspective*, 27(5) E.L. Rev., 1 (2002), available at http://www.law.washington.edu/Directory/docs/Winn/Electronic_Promises_Revised.pdf.

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ Avery Wiener Katz, *Is Electronic Contracting Different? Contract Law in the Information Age*, available at <http://www.columbia.edu/~ak472/papers/Electronic%20Contracting.pdf>.

principles of contract.”²⁰ Even though not all commentators agree on whether the application of traditional contract laws can apply to electronic contracting cases, it is no longer possible to complain about the absence of law or its unsettled nature.²¹

In Asia, under general contract law, there are well-established principles and rules that deal with how a legally binding contract is created. In Singapore, while the law of contracts continues to apply broadly to both the physical and electronic world, additional legal frameworks fill the gaps where the rules governing contracts in the physical world encounter new technologies.²²

New developments in technology have come with the concept of “functional equivalence.” Thus, to the extent there has been a problem addressed by law, and a new problem arises (or seems to arise), then the analytical process allows one to project from existing problems and legal solutions to developing problems or legal solutions. This is often done by considering whether in the new environment something is the functional equivalent of a situation in the “old” environment. We can apply the same theoretical thinking into regulating goods and services. If the definition of subsidy allows functional equivalence in the goods trade and in the services trade, it is reasonable to adopt the goods subsidy definition at the outset. With more Members’ cooperation in the future, we can adjust the service subsidy definition into a more functional framework.

²⁰ *Trieber & Straub, Inc. v. United Parcel Services, Inc.*, 474 F.3d 379, 385 (7th Cir. 2007), *citing* *Register.com v. Verio*, 356 F.3d 393, 403(2d Cir. 2004).

²¹ Juliet M. Moringiello and Reynolds, William L., *Survey Of The Law Of Cyberspace: Electronic Contracting Cases 2006-2007*, available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1438&context=fac_pubs, at 1

²² Goh Seow Hiong, *National E-Commerce Legislation In Asia And The Pacific: The Case Of Singapore*, in *Harmonized development of legal and regulatory systems for e-commerce in Asia and the Pacific: current challenges and capacity-building needs*, at 104, available at <http://captel.ntu.edu.sg/unescap/casesingaporepaper.pdf>.

2. Are “Financial Contributions” Listed In The SCM Agreement Exhaustive In Service Trades?

As mentioned before, Article 1.1(a)(i)-(iv) and (a)(2) in the SCM Agreement lists types of subsidies, basically covering existing forms of subsidies. Apparently, these financial contributions are considered exhaustive.²³

Starting from 1998, the Secretariat released six reports²⁴ on the trade policy reviews concerning subsidies in services. The forms of financial contributions are listed in six different categories. They are: (1) direct grants; (2) preferential credit and guarantee; (3) equity injections; (4) tax incentives; (5) duty-free inputs & free zones; and (6) other & unspecified measures. According to current information from most Members, there is no evidence showing any new kind of financial contribution example.²⁵ Therefore, we can reasonably assume that these forms can be applicable in service subsidies.²⁶

²³ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS*, 555-556 (2006). See also Panel Report, *United States-Measures Treating Export Restraints as Subsidies*, WT/DS194/R, at para. 8.65 (June, 29, 2001) (“the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies.”) *Id.* at para. 8.38. (“by introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of any government action that resulted in a benefit as a subsidy.”).

²⁴ Working Party on GATS Rules, *Subsidies For Services Sectors Information Contained In WTO Trade Policy Review: Background Note by the Secretariat*, S/WPGR/W/25 (January, 26, 1998). Working Party on GATS Rules, *Subsidies For Services Sectors Information Contained In WTO Trade Policy Review: Background Note by the Secretariat*, S/WPGR/W/25/Add.1 (May, 29, 2000). Working Party on GATS Rules, *Subsidies For Services Sectors Information Contained In WTO Trade Policy Review: Background Note by the Secretariat*, S/WPGR/W/25/Add.2, (December, 12, 2000). Working Party on GATS Rules, *Subsidies For Services Sectors Information Contained In WTO Trade Policy Review: Background Note by the Secretariat*, S/WPGR/W/25/Add.3 (September, 19, 2002). Working Party on GATS Rules, *Subsidies For Services Sectors Information Contained In WTO Trade Policy Review: Background Note by the Secretariat*, S/WPGR/W/25/Add.4 (February, 12, 2004). Working Party on GATS Rules, *Subsidies For Services Sectors Information Contained In WTO Trade Policy Review: Background Note by the Secretariat*, S/WPGR/W/25/Add.5 (March, 27, 2007).

²⁵ See Chapter 6, *supra* note 3.

²⁶ Robert Prylinski and Dariusz Mongialo, *Definition of Subsidy in the GATS*, *ICTSC Roundtable on Trade in Services and Sustainable Development “Towards Pro-Sustainable Development Rules for Subsidies in Trade in Services”*, Mar. 10, 2003, available at http://ictsd.org/downloads/2008/08/speaking-notes_dariusz-mongialo_final.pdf.

However, there are some concerns regarding the Article 1.1(a)(2) situation. It states that “any form of income or price support” is considered to be a subsidy. Scholars speculate that the form of subsidy may play an even more important role in service areas in the future, so adjustments are necessary.²⁷ Therefore, they propose to insert a list of forms of income or price supports in the definition.²⁸

It is my view that, to come up with a list of income or price supports would definitely help to address changing situations. However, how will Members come to a consensus with respect to the list? This may drag the questions back to the “chicken and egg” situation because this would go back to the information exchange stage. Members will start to argue whether the definition or domestic information should come first.

Thus, to adopt the subsidy rules from the GATT into the GATS, and to indicate that GATT examples are not exhaustive in the GATS context, is a feasible method. This method is sufficient for the world right now. We can leave it to the dispute resolution process or future negotiations to determine what comprehensive types of financial contributions should be included in the future.

3. The Notion of Territory in Service Subsidies

Another issue that arises in applying the subsidy definition of the SCM Agreement to services trade is the notion of territory.²⁹ The SCM Agreement definition provides that “a subsidy shall be deemed to exist if: there is a financial contribution by a government or any public body

²⁷ *Id.*

²⁸ *Id.*

²⁹ Benitah, *supra* note 6, at 14.

within the territory of a Member....”³⁰ (emphasis added). In brief, subsidies in the SCM Agreement are territorially bound, and the concept of territory provides a link between the financial contribution and the subsidizing Member.³¹ Consequently, subsidies granted to firms/persons outside of a Member’s territory may not be subject to discipline. For some export subsidies in Mode III or IV, they will fall outside of the territorial scope.³² Thus, “it is certainly necessary – given the modal structure of the GATS – to introduce the notion of territory.”³³

Professor Benitah has made several important observations on this issue. He focuses on the relationship between the territory and the benefit resulting from the financial contribution, and states, “the benefit conferred by a subsidy to a service firm is not necessarily confined (as it is for goods) to something unavailable on the free market of the territory of the government providing the subsidy.”³⁴ He also provides some useful scenarios to explain this statement.³⁵

A more flexible notion of territory is necessary in order to define the connection between the financial contribution and the subsidizing Member.³⁶ Members do not have to re-write the

³⁰ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 14. [hereinafter the SCM Agreement], art. 1:1.1(a)(1).

³¹ Natasha F. Ward, *Theoretical Challenges And Practical Difficulties For The Development Of Subsidies Disciplines In The General Agreement On Trade In Services*, WORLD TRADE INSTITUTE, Mile 7, Sept. 30, 2007, at 31, available at http://web65.uranus.ibone.ch/images/stories/MILE/MILE%20Theses/MILE%207/Natasha%20Ward_MILE%207.pdf?PHPSESSID=7f41ef09f5e133e08848ea72ed35570c.

³² Benitah, *supra* note 29. (“In the fields of goods, the familiar scenario is as follows: a good is subsidized by country A and then completely produced on its domestic territory. Those units of the subsidized good not consumed by country A’s residents are eventually consumed by residents of countries B, C, etc. on their respective territories. This scenario seems not to hold true in the field of services.”).

³³ Ward, *supra* note 31. (Rudolf Adlung’s communication by email on July, 30, 2007).

³⁴ Benitah, *supra* note 29.

³⁵ *Id.* (“Mode 3: let us suppose that country A provides a subsidy to a firm which then establishes a subsidiary company in Country B. Insofar as the subsidiary keeps a close link with its mother firm, one could say that the product line process takes place simultaneously on the territory of A and B. Mode 4: India grants a subsidy to an Indian computer programmer who then travels to the US to provide services to US firms. Contrary to the classical scenario for goods, the product is not entirely produced on the territory of India; at least one part of the production process of the service has to take place in a territory different from the territory of the country providing the subsidy.”)

³⁶ Ward, *supra* note 31. (In the proposed definition of a subsidy, the notion of territory as found in the ASCM definition has been discarded. The wholesale adoption of the ASCM definition of a subsidy would place some subsidies such as export subsidies for Mode 3 suppliers outside of the scope of subsidies disciplines... This notion

wording in the SCM Agreement, but just provide a flexible definition to cover the different modes of supplies. The territoriality requirement does not necessarily mean that the financial contribution must be made within a Member's territory. As long as the financial contribution is given by a Member's government, and is received by firms/persons within another Member's territory, it should be subject to the subsidy discipline.

The SCM Agreement aims at disciplining subsidies.³⁷ Allowing the definition of subsidy to exclude certain modes of services supply is contrary to the purpose of the SCM Agreement.³⁸ Moreover, when this passage is discussed, experts focus mostly on who grants the financial contribution, instead of from where and to where it is granted.³⁹ By looking into the GATS and the SCM Agreement together, giving the subsidy definition a more flexible interpretation to fit the distinct four modes of service supplies is a legitimate approach. If this flexible interpretation is adopted, then the current SCM Agreement subsidy definition can be applicable to the GATS.

4. The Application of *Specificity* to Service Subsidies

GATS Article XV mandates that "Members recognize that, in certain circumstances, subsidies may have *distortive effects* on trade in services. Members shall enter into negotiations with a

of territory would need to be flexible enough to capture the relationship between the financial contribution and the subsidizing Member.)

³⁷ World Trade Organization, *Subsidies And Countervailing Measures*, http://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

³⁸ Vienna Conventions on the Laws of Treaties, 1155 U.N.T.S. 311 (May 23, 1969), art. 31, para.1 and 2. ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.")

³⁹ World Trade Organization, *Subsidies And Countervailing Measures: Overview, Agreement On Subsidies And Countervailing Measures ("SCM Agreement")*, http://www.wto.org/english/tratop_e/scm_e/subs_e.htm. RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, 1050 (2007).

view to developing the necessary multilateral disciplines to avoid such *trade-distortive effects...*”⁴⁰ It is clear that disciplines on service subsidies should only focus on those that create *trade-distortive* effects, instead of all service subsidies.

In Chapter 6, we explain the concept of trade-distortion. Two elements needed to be fulfilled: (1) *specificity* and (2) the *conferral of benefits* not available on the free market.⁴¹ Thus, it seems logical then to ask whether the application of specificity into service subsidies is necessary. Some commentators propose that trade-distortion effects should be considered in the definition itself, or eventually in a possible countervailing procedure; while others question whether it should be directly addressed in the disciplines at all.⁴² I propose that it is necessary to put the specificity test in the determination of a service subsidy. To be more precise, I suggest utilizing the specificity test in the definitional stage, instead of the countervailing measure stage.

The reason why it is more appropriate to put the specificity criterion in the definitional spectrum is twofold:

- (1) If we put the specificity test in the application of countervailing measures, there will possibly be no test at all. It is still for members to determine whether having countervailing measures in service subsidies is appropriate. Suppose in the end Members decide countervailing measures are not appropriate in service subsidies. If so, there will be no further discussion of specificity.
- (2) If the definition does not directly require the application of a specificity test in the disciplines, the scope of subsidies covered by it will be too broad. Such a result may damage the original purpose of having the specificity test. Some subsidies

⁴⁰ GATS, *supra* note 15, art. XVI.

⁴¹ See *supra* Chapter VI.

⁴² Synthesis Report of the Discussion in the Meeting, *ICTSD Roundtable on Trade in Services and Sustainable Development: “Towards Pro-Sustainable Development Rules for Subsidies in Trade in Services”*, at para. 11, Mar. 10, 2003, available at http://ictsd.org/downloads/2008/08/synthesis-report_consolidated.pdf.

that aim to overcome market failures are very trade-distortive in nature, but could still be necessary and justified.⁴³

Poland has expressed its concern about the application of specificity in service subsidies.

The delegation stated that,

How to treat the horizontal subsidies granted in the sector which (taking into account the level of specific commitments of a given Member) is closed (or strongly limited) for the foreign suppliers? In this case a 'horizontal' subsidy is not exactly available to 'all'. However, it still may improve the competitive power of the recipients – maybe not on the domestic market (as there is no foreign competition here), but possibly in export of their services.⁴⁴

In order to determine whether the definition of a subsidy must include a specificity test, first, we need to reiterate the rationale behind the GATS. Due to some services' unique characteristics, Members have agreed upon the method of progressive liberalization in dealing with the services trade. The same moderate attitude is also taken towards in the AoA.

Taking the moderate attitude, Members can feel less pressure when opening their domestic markets to foreign service suppliers. Of course, there is never a perfect solution. Less pressure sometimes equals more freedom, and more freedom sometimes causes delays in liberalizing domestic markets. The current negotiations have been accompanied by the refusal of Members to reduce existing trade barriers.

⁴³ *Id.*

⁴⁴ Communication from Poland, *Definition of Subsidy in GATS*, JOB(02)/207, para. 12 (December, 13, 2002). See also Prylinski and Mongialo, *supra* note 26, at 4. ("The subsidy disciplines in the WTO Agreement on Subsidies and Countervailing Measures treat very seriously the matter of the specificity of the subsidy. This issue is not contained in the definition itself, but it is clear that only specific subsidies are "actionable" (Art. 1.2 of this Agreement). In fact, it is based on the assumption that the horizontal subsidies (granted upon objective criteria to all recipients, possibly including the foreign ones) do not affect competition... How to treat the horizontal subsidies granted in the sector in which (taking into account the level of specific commitments of a WTO Member concerned) market access for foreign suppliers is closed or very limited? In this case a "horizontal" subsidy is not exactly available to "all". However, this Member may still improve the competitive power of the recipients - maybe not on the domestic market (as there is no foreign competition here), but possibly in export of their services.")

Once rules are made, however, Members are bound to follow them. Progressive liberalization should be the method applicable to the GATS. Therefore, unless Members agree to open a certain service sector, it is legitimate to say that horizontal subsidies in a certain sector are permissible.

As introduced before,⁴⁵ the SCM Agreement regulates both *de jure* and *de facto* specificity. Article 2 states that, “[i]f, notwithstanding any appearance of non-specificity resulting from the application of the principles...there are reasons to believe that the subsidy may in fact be specific, other factors may be considered.”⁴⁶ Unlike Poland’s scenario, in an open service sector it is much easier to determine the specificity of a subsidy. That is to say, in an open service sector, if a general subsidy causes specific industries to profit, then it is specific.

Let us take a closer look at Poland’s concern. Poland’s situation does not fall within the purview of Article XV because it is in a *closed* service sector. If a Member does not agree to open a certain service sector, granting a subsidy in that service sector is permissible under the GATS. It is acceptable even if the subsidy improves the competitive power of the recipients. But we need to pay attention to one thing. If the Member grants a subsidy to a service sector (SERVICE A), which is closed to all foreign service providers, and in the meantime allows its domestic SERVICE A providers to *export* their services,⁴⁷ then the subsidy will be considered *specific*, and therefore subject to disciplines.

Another concern regarding specificity is whether we apply a modal perspective or a sectoral perspective.⁴⁸ Since services trades are divided into different modes and sectors in their

⁴⁵ See *supra* Chapter IV.

⁴⁶ The SCM Agreement, *supra* note 30, art. 2.

⁴⁷ See Chapter 4.II.B.4 of this dissertation. (“any subsidy falling under the provisions of prohibited subsidies shall be deemed to be specific.” In the later part of this chapter, I will propose that the prohibited subsidies in services trade should include export subsidies.)

⁴⁸ Chan, *supra* note 7, at II. (While discussing the definition of service subsidies, he points out that: “Specificity relates to the question of mode- whether modal specificity is needed for subsidies. That would require distinction of

Schedules of Concessions, it is reasonable to take mode specific and sector specific situations into consideration. As a practical matter, it may be difficult to define specificity based on modes or sectors, but Professor Benitah points out that the important issue is whether funds have been artificially channeled towards a certain group of firms.⁴⁹

B. THE SCM AGREEMENT FRAMEWORK V. THE AOA FRAMEWORK

After formulating the definition of a service subsidy, it is necessary to determine what kinds of subsidies are permissible and what kinds are not. Not all subsidies are forbidden; hence it is important to categorize service subsidies.

I have previously introduced subsidy related frameworks in the SCM Agreement⁵⁰ and the AoA.⁵¹ To consider whether we should follow the SCM Agreement or AoA subsidy framework, we should first take a look at their differences. Members differ on which framework is appropriate for service subsidies. After demonstrating the pros and cons of both frameworks, I propose a *hybrid framework*.

1. Differences between Two Frameworks

The main difference between the two frameworks is that the AoA does not forbid export subsidies while the SCM Agreement absolutely bans any export subsidy. However, this does not necessarily mean that the framework of the AoA is more lenient than that of the SCM

subsidies by mode. The fact that NT obligation is entered by mode might also call for distinction of subsidies by mode.”). Ward, *supra* note 31.

⁴⁹ Ward, *supra* note 31.

⁵⁰ See *supra* Chapter IV.

⁵¹ See *supra* Chapter V.

Agreement. Under the SCM Agreement, domestic supports are allowed as long as they are not disputed by other Members. In the case of the AoA, if the supports cannot be exempted, these supports have to be reduced even if they cause no harm.⁵²

Differences between subsidy regulations in the SCM Agreement and the AoA can be seen below:

Table 18. Differences Between Subsidy Regulations in the SCM Agreement and AoA

	Agreement on Subsidies and Countervailing measures	Agreement on Agriculture
Export subsidies	Absolute prohibition/ Complete elimination	Reduction requirement
Domestic support	Domestic substitution subsidy: Absolute prohibition/ Complete elimination	Amber-box category: Reduction requirement Green-box category: Free allowance

(This table was prepared by the author)

2. Advantages and Disadvantages of Each Framework

Professor Marc Benitah has provided a clear comparison of the advantages and disadvantages of each framework in the following table.⁵³

Table 19. Advantages and Disadvantages of the Agriculture and Goods Model for Discipline Services Subsidies

	Advantages	Disadvantages
AoA Model	<ul style="list-style-type: none"> Subsidy ceiling for the future and partially responds to the need to control distortion. There is no need to demonstrate adverse effects of subsidies. In other words, in case of a deadlock, there is still “something.” No need to demonstrate adverse effects 	<ul style="list-style-type: none"> Determine what adequate ceilings sometimes make it hard to reach a conclusion. It might be an obstacle for future negotiations. Might allow Members to “reallocate” subsidies within and among expected boxes unless complementary reductions and disciplines are included in the boxes.

⁵² 羅昌發, 國際貿易法, translated in CHANG-FA LO, THE INTERNATIONAL TRADE LAWS, 354 (2002).

⁵³ Benitah, *supra* note 6, at 35.

	<ul style="list-style-type: none"> • No need to collect specific data for specific sectors if an Aggregate Measurement of Support is adopted • Easier for members to “sit down” and negotiate Article XV 	<ul style="list-style-type: none"> • Compared with “sector-specific” method, it is more difficult to discipline. • Hard to end or continue negotiations. Based on the current AoA negotiations experience, such method is sometimes insufficient and unsatisfactory.
The SCM Agreement Model (Goods)	<ul style="list-style-type: none"> • “Sector-specific”, and easy to follow. • Targets to “in law” export subsidies. • Consistent with existing WTO legal framework based on similarities and differences between goods and services. • Easy to continue further negotiations. 	<ul style="list-style-type: none"> • Sometimes difficult to collect CVD. • Hard to prove adverse effects • Compensatory remedy could be in effective in various models. • Difficult to start negotiations. However, strict rules can allow a more effective disciplining effect.

Because service subsidies are a relatively new concern in the WTO, many countries have not yet expressed their points of view. But we can infer their opinions from their submissions and discussions. Scholars have also expressed their opinions on which structure to apply.

Singapore and Chinese Taipei prefer the SCM Agreement structure, as does. Sauvé Pierre.⁵⁴ On the other hand, it seems that the WTO Secretariat, Argentina, Hong Kong, China are support the AoA structure. Scholars at the International Center for Trade and Sustainable Development (hereinafter ICTSD) support the AoA structure.⁵⁵

I will discuss these two categorization systems in detail, indicating the positions of Members and scholars.

⁵⁴ Sauvé Pierre, *Completing the GATS Framework: Addressing Uruguay Round Leftover*, Aussenwirtschaft, Vol. 57, No. 3, 301-41 (2002), available at <http://www.cid.harvard.edu/cidtrade/Papers/Sauve/sauvegats.pdf>.

⁵⁵ David Vivas Eugui and Alex Werth, *Rediscovering Subsidies in Service Negotiations*, BRIDGES 7(6), July/August 2003, at 15, available at <http://ictsd.org/downloads/2009/03/bridges07-6.pdf>.

3. Other Proposed Approaches /Frameworks

Apart from the original AoA or the SCM Agreement approaches, scholars have also proposed several alternatives to regulate services trades. These alternatives create new approaches to the GATS, but each leaves questions unanswered. The alternatives are outlined below,⁵⁶

a. Sector-Specific Disciplines UNCTAD proposed a sector-specific approach to govern subsidies in services, noting the different types of services trades in 1993:⁵⁷

UNCTAD had proposed that the sectoral focus should be on areas where subsidies have a major impact on trade in sectors of export interest to developing countries, such as in construction and engineering services.⁵⁸ The proposal includes an examination of issues related to the different modes of delivery especially as they relate to possible benefits by corporations to allow them to compete more efficiently in trade in services.⁵⁹

The advantages and disadvantages of the UNCTAD approach are as following:⁶⁰

Advantages	<ul style="list-style-type: none">• Allows progress in addressing trade distortive subsidies in precisely those specific sectors which cause problems. Such use could curb the use of subsidies and undermine negotiated market access.• Allows the fashioning of disciplines which can more comfortably accommodate the peculiar nature of some services industries and the affected services.• Offers the opportunity to avoid or remedy the effects of trade distortive subsidies in third country markets which are almost undisciplined by the current rules.
Disadvantages	<ul style="list-style-type: none">• Includes the fact that conceptual details would need to be ironed out for each sector. It does not resolve the conceptual problems arising from the GATS, such as the definition, the notion of specificity, etc.• Creates an unevenness of disciplines between sectors whereby some subsidy practices may be subject to more stringent disciplines in some sectors than others due to the operation of political economy factors in negotiations.

Table

⁵⁶ Ward, *supra* note 31, at 55-58.

⁵⁷ UNCTAD, *The Impact of Subsidies on Trade in Services*, Geneva: UNCTAD, 1993, UNCTAD/SDD/SER/3, at 13.

⁵⁸ Chakravarthis Raghavan, *Services Subsidies Need Sector-Specific Approaches*, Jul 14, 1994, <http://www.sunsonline.org/trade/areas/services/07140094.htm>.

⁵⁹ Ward, *supra* note 31, at 55.

⁶⁰ *Id.*

Questions beyond simple advantages and disadvantages have been raised about this approach.⁶¹ Some cannot be answered until the approach is more clearly explained.

b. Partial Disciplines Approach Rajeev Ahuja⁶² proposed a partial disciplines method in the Indian Council for Research on International Economic Relations (ICRIER).⁶³ His aim is not to discipline all trade-distortive subsidies, but to discipline only the most distorting ones.⁶⁴ He lists points to consider in applying the proposed discipline:

- (1) “All firm specific subsidies in basic infrastructure sectors especially in financial and telecommunications sectors could be targeted initially;
- (2) Some discipline on subsidy practices in sectors in which higher commitments have been made such as tourism (financial and telecommunication also happens to be sectors in which higher commitments have been made);
- (3) Subsidy measures specifically targeted at firms engaged in earning foreign exchange through services export;

⁶¹ *Id.* at 56. (“Would it be tighter disciplines for the sectors which would have sectoral disciplines? And if so, what would be the policy rationales for more stringent disciplines for services?...Whether the disciplines for the targeted sectors would be conditional or unconditional...To what extent should developing countries be subject to the disciplines?”)

⁶² Economist in the Health, Nutrition, and Population unit of the World Bank, India office. Formerly, he was a senior fellow with the Indian Council for Research on International Economic Relations (ICRIER), New Delhi. Email: rahuja@worldbank.org.

⁶³ Rajeev Ahuja, *Towards Developing Subsidy Disciplines under GATS*, Indian Council for Research in International Economic Relations, Working Paper No. 174, November 2005, available at <http://www.icrier.org/pdf/WP174.pdf>.

⁶⁴ *Id.* at 35. (He stated the idea of having this approach is “...not to tackle all trade distorting public support program in services sectors but to advance discussions on only those programs that are perceived to be most trade distortionary. The literature dealing with developing subsidy disciplines in GATS deals with the whole gamut of issues that are to be dealt with in developing full-blown subsidy framework in case of services. The need for such a framework is not denied. But many members favour taking a piecemeal approach, making a modest beginning, rather than developing full framework. While subsidy disciplines in services will no doubt enable member countries to achieve greater progress under GATS by making greater commitments, the present need for having subsidy disciplines is necessitated by the undermining of market access commitments when a member country subsidise service supplied in the third country market. The need for subsidies disciplines is also heightened by the relatively low ability of developing country members to subsidise services especially in areas in which they have a comparative advantage. Lack of information on the subsidies that are being given by different member countries to different services sector is acting as a major stumbling block in achieving even this limited objective. However, the discussion on the framework can continue alongside such modest beginning. For taking a small step, the definition of subsidies in GATT is considered to be a good starting point by the member countries.”)

- (4) Consumption support that is tied to a service supplier could be disciplined;
- (5) Certain kinds of subsidies that take the form of export guarantees and export credit/loans extended to any service sector would most certainly be trade distortionary and should be restricted; likewise benefits accorded to outbound foreign direct investment could be disciplined;
- (6) Transport sector receives significant level of support from government but its trade distortionary potential remains to be established;
- (7) Social sectors such as health and education that have attracted minimal commitments and in which there is a strong public policy rationale can be ignored initially.”⁶⁵

With respect to the limited discipline approach, there are also advantages and disadvantages:⁶⁶

Advantages	<ul style="list-style-type: none"> • Allows progress in addressing trade-distortive subsidies in precisely those specific sectors which cause problems. Such use could curb the use of subsidies in undermine negotiated market access. • Allows the fashioning of disciplines which can more comfortably accommodate the peculiar nature of some services industries and the affected services. • Offers the opportunity to avoid or remedy the effects of trade distortive subsidies in third country markets which are almost undisciplined by the current rules.
Disadvantages	<ul style="list-style-type: none"> • There should be flexibility in firm specific subsidies in basic infrastructure for developing countries. Also, in the case of market failures and government intervention, social goals which are intended to cure problems should be allowed. • Includes the discipline of discriminatory consumption subsidies, which is a new element in regulating subsidies. This suggestion would create conditions which are attached to subsidies granted to consumers.

Table 20. Limited Discipline Approach: Advantages and Disadvantages

While this method provides the same advantages as the sector-specific approach does, it also includes some disadvantages, such as stringent disciplines. Members’ unwillingness in negotiating on service subsidies resulted from the complexity of service subsidies and the fear of

⁶⁵ Ahuja, *supra* note 63, at 37.

⁶⁶ Ward, *supra* note 31, at 57.

too many limitations. Narrowing the current negotiating framework, focusing either on sectors or on the most distortive effects, can seem attractive to Members in the beginning. In the longer run, Members would discover the outcome of possible stringent disciplines. This potential concern should be taken into consideration while developing the GATS subsidy framework.

c. The European Union Approach The European Union has its own approach in terms of dealing with distortion in its internal market. This approach is called the *Competition Policy Approach*.⁶⁷ Under the EU approach,

the core issue is whether [a] subsidy, referred to as state aid in the EC treaty, distorted competition, and not just whether it distorted trade. As a general principle subsidy is banned in EC because it distorts competition by giving some enterprises an advantage over others. The controls in the EC treaty focus only on financial assistance to firms, and only “in cases where some subset of firms is treated differently from the way firms are treated in the country as a whole.”⁶⁸

Suppose an EU Member State provides a state aid.⁶⁹ It would be considered incompatible with the common market, but it does not necessarily mean that such aid is prohibited. The European Commission can examine whether the said aid qualifies for an exemption.⁷⁰ However, the EU approach also poses some problems. Two main problems are,

⁶⁷ Ward, *supra* note 31, at 58.

⁶⁸ Ahuja, *supra* note 63, at 17-18.

⁶⁹ *Id.* at 18. (He further explains the definition of state aid. “EC rules on state aid are applicable to goods and services alike. The definition of state aid is similar to that of subsidies in case of ASCM. For any measure to be regarded as state aid, it must qualify the following four conditions:

- (i) lead to transfer of resources from state (including national, regional or local authorities, public banks and foundations, etc.)
- (ii) would constitute an economic advantage that the undertaking would not have received in the normal course of business
- (iii) is selective and thus affect the balance between certain firms and their competitors.
- (iv) must have a potential effect on competition and trade between member states.

Note that it is selectivity that differentiates State aid from so called general measures (e.g. most nation-wide fiscal measures). Potential effect of small levels of state aid (de minimis level) is considered limited and therefore kept outside the scope of the definition of state aid.”)

⁷⁰ *Id.*

- (a) An EU-modeled regime would severely curtail the flexibility that Members currently enjoy and would therefore be politically unacceptable.⁷¹
- (b) There is no corresponding entity within the WTO to the European Commission, which could meaningfully determine whether the subsidy qualifies to be one of the exceptions. Moreover, such a framework could create more stringent multilateral disciplines for subsidies in services than those that apply to goods and agriculture. No legitimate reasons could justify such a tighter regulation.⁷²

A plurilateral approach has been suggested by Rudolf Adlung.⁷³ His key focus is on “whether it would be possible to motivate a critical mass of governments that have a joint-fiscal and economic policy-interest in protecting themselves from subsidy-related temptations.”⁷⁴ This approach does not create many incentives for Members.⁷⁵ Thus, I will discuss only the two existing subsidy-regulating frameworks in this Chapter, and present a new Proposal for the regulation of service subsidies.

C. IS IT APPROPRIATE TO APPLY THE SCM AGREEMENT TRAFFIC-LIGHT FRAMEWORK TO SERVICE SUBSIDIES?

Before pointing out the advantages and disadvantages of the two existing system, it is important to understand two types of norms in the creation of laws. The first type of norm prohibits a certain behavior, while the second type prohibits a certain behavior only if it produces an

⁷¹ Ward, *supra* note 67.

⁷² Ward, *supra* note 67.

⁷³ Senior economist, Trade in Services Division, WTO Secretariat. E-mail: rudolf.adlung@wto.org.

⁷⁴ Rudolf Adlung, *Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story?*, Journal of International Economic Law, Vol. 10 Issue 2, 235-265 (2007). Ward, *supra* note 67.

⁷⁵ Ward, *supra* note 67.

undesirable effect.⁷⁶ As for the second type, legal tests are necessary to demonstrate that the undesirable effects indeed took place.⁷⁷ Both the SCM Agreement and the AoA involve the application of each of these two types of norms.

As I introduced above, when people refer to the *traffic-light* system in the SCM Agreement, it means three kinds of subsidies (only two now remain). There are prohibited subsidies (red-light subsidies), actionable subsidies (yellow-light subsidies), and non-actionable subsidies (green-light subsidies).⁷⁸ Non-actionable subsidies no longer exist.

1. The SCM Agreement Rationale for a Traffic-Light Framework

As mentioned above, the SCM Agreement is a huge step forward in dealing with subsidies internationally. The *traffic-light* concept was based on the premise that some subsidies were trade distorting *per se* while others were benign or even noble, and that subsidies ranged from prohibited red at one end of the spectrum to non-actionable green at the other.⁷⁹

The SCM Agreement combines the two types of norms introduced earlier. Prohibited subsidies are considered the most trade-distorting subsidies. Export subsidies and domestic substitute subsidies are two main targets to be regulated. In regards to these two types of subsidies, the specific behaviour is simply prohibited (the first type of norm). Therefore, once a Member is found to engage in such behaviour, that behaviour must be avoided.

⁷⁶ MARC BENITAH, *THE LAW OF SUBSIDIES UNDER THE GATT/WTO SYSTEM*, KLUWER LAW INTERNATIONAL, 11 (2001)

⁷⁷ *Id.*

⁷⁸ For detailed information on these categories, please refer to Chapter 4 of this dissertation.

⁷⁹ European Commission Directorate-General for Trade, *EC Submission in DDA Negotiations: Agreement on Subsidies and Countervailing Measures*, Brussels, 19 November 2002, Ref. 492/02-Rev.3, at 2, available at http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_112234.pdf.

On the other hand, actionable subsidies fit regulation by the second type of legal norm. This kind of subsidy is not directly prohibited, but is used to prohibit the effect resulting from the act. Therefore, the system must provide a process for determination of any *adverse effects* produced by this type of subsidy.⁸⁰ This second type shifts the burden of proof to the defendant country to rebut the accusation of *serious prejudice*.⁸¹

2. Current Discussions

We can start with Members' submissions to see relevant discussions. These will include the communications from Mexico, Chile, Singapore, and Chinese Taipei.

In Singapore's submission, there are several questions concerning how to adapt the SCM Agreement structure (traffic-light category) to the GATS Article XV disciplines.⁸²

Chinese Taipei also uses the SCM Agreement structure in its submission to classify subsidies.⁸³ Those subsidies are tested using three questions: (1) What is the form of the subsidy? (2) Who is the beneficiary of the program? (3) What are the effects of the program and are these effects distortive?

Some scholars do not mention explicitly what structure they prefer, but they do utilize the SCM Agreement structure in their discussion.⁸⁴ Piere Sauv  discusses the possibility of using the SCM Agreement structure as a model. He believes that the current SCM Agreement

⁸⁰ The SCM Agreement, *supra* note 30, art. 5 and 6.

⁸¹ Benitah, *supra* note 76, at 32

⁸² Working Party on GATS Rules, *supra* note 4.

⁸³ Working Party on GATS Rules, *The Separate Customs Territory Of Taiwan, Penghu, Kinmen And Mastu: Definition Of Subsidies In Services*, JOB(04)/78 (June, 17, 2004).

⁸⁴ David Vivas Eugui, *Negotiations in WTO on the Rules of the General Agreement on Trade in Services: the case of Venezuela*, in UNCTAD Commercial Diplomacy Programme, UNCTAD/DITC/TNCD/6, 7 February 2001, at 20-28., available at <http://www.unctad.org/en/docs/poditctncd6.en.pdf>. Pierre, *supra* note 54, at 327.

definition of “green-light” subsidy may provide a workable basis for services trade.⁸⁵ He suggests that the green-light subsidy can be maintained and might need to include more sectors.⁸⁶ However, he also raises many questions about applying the SCM Agreement structure, including whether it is realistic to analogize some regulations from goods to services.⁸⁷ David Vivas Eugui also applies the SCM Agreement classification in his discussion of the subsidy classification system.⁸⁸

3. Sub-conclusion

The SCM Agreement structure represents the most comprehensive discipline for subsidies. It categorizes subsidies into groups, and requires Members to eliminate export subsidies and domestic substitute subsidies.

⁸⁵ *Id.* at 328. (“In the SCM Agreement, “green-light” subsidies encompass four types of activities: generally available subsidies (i.e., subsidies not specific within the meaning of the SCM Agreement), research and pre-competitive development activities (R&D), regional development aid, and certain environmental subsidies (i.e., assistance for the adaptation of existing plants to new environmental requirement) It is interesting to note that each of these activities can constitute service sectors in their own rights. If WTO members collectively deemed it appropriate in the Uruguay Round to protect such practices in the context of trade in goods, should the same reasoning not extend to services trade and investment?”)

⁸⁶ *Id.* at 329. (“In addition to the above listed activities, it might be necessary to examine the possible ramifications for social services (education, health, and related social services) In principle, subsidies to these types of activities should not be at issue because they typically involve services rendered in the exercise of governmental authority, which are carved out under Art. I:3(b) of the GATS. However, some of these sectors represent commercially readable services, already listed in some countries’ schedules. There is little doubt that this issue raises particular sensitivities in many jurisdictions that will likely require specific and careful attention in developing any acceptable subsidy disciplines. The creation of an SCM-like “green box” (or non-actionable) approach to subsidies which are granted for the pursuit of recognized social or non-economic objectives (e.g. environmental protection, provision of services in remote or disadvantaged areas) could be considered in this regard.”)

⁸⁷ *Id.* at 329-330. (“export subsidies” in each mode. For mode 1, he thinks “it’s roughly comparable to trade in goods, and the theoretically the same prohibition could well be applicable.” For mode 2, “the scenario is reversed because the consumer travels to the supplier’s territory to consume a service. How then might an export subsidy be applicable?” For mode 3, “it is unlikely that a domestic government would provide a subsidy to a firm that is considering relocating or establishing a commercial presence in another jurisdiction.” For mode 4, he questions that “is it realistic for governments to provide a subsidy for persons leaving the country?”)

⁸⁸ Eugui, *supra* note 83, at 25. (He made several comments on drawing up a classification system for subsidies. And he provides suggestions for developing countries if they want to include a list of non-actionable subsidies.)

In my view, it would be perfect for Members to agree on this structure; however, it seems impossible. First, the complexity of the GATS is well-recognized. It is difficult to provide satisfactory answers to all Members concerns. If Members refuse to accept this proposal, but reject it by raising more questions, the difficulty of regulating services subsidies will only increase.

Second, the red light category obliges Members to eliminate all related subsidies. Such a requirement creates governmental burdens on Members to gather information, and then remove those subsidies at once. Under the progressive liberalization method of the GATS, Members would be reluctant to commit to market access. Without such commitments, the GATS goal of progressive liberalization cannot be achieved.

D. IS IT APPROPRIATE TO APPLY THE AOA FRAMEWORK TO SERVICE SUBSIDIES?

The AoA contains a different structure than the SCM Agreement. It only applies to agricultural products. As for non-agricultural products, the rules of the SCM Agreement apply. The AoA provides simple distinctions by allocating agricultural products subsidies into the Green/Blue Box and all others to the Amber-Box.

1. The Rationale for the AOA System

It has been mentioned previously that agricultural subsidies have traditionally been a common practice among developed and developing countries. They have been a major agenda issue in

both the Uruguay Round and the Doha Round. The sensitivity of agricultural subsidies is unquestionable.

Because agricultural export subsidies and domestic subsidies are indispensable instruments to a country, and many countries' trade interests and economic development are severely affected by these subsidies,⁸⁹ several provisions relating to agricultural export subsidies or domestic subsidies still contain many effect-based norms (the second type). That is to say, it would be rare to find a situation where a practice is completely prohibited.⁹⁰ This greater flexibility undoubtedly stems from recognition on the part of negotiators of the widespread use of governmental supports.⁹¹

2. Current Discussions

Argentina and Hong Kong, China are pro-AoA countries. In a report made by the GATS Secretariat, it seems that they also favor the AoA approach for two reasons:⁹²

First, in contrast to the SCM Agreement, emphasis was placed on a commitment to reduce subsidy levels, in addition to establishing rules on the legal acceptability of various subsidy practices via the green box/blue box approach. Arguably, where the overall reduction commitments apply, they obviate the need to identify carefully the nature and impact of each and every subsidizing intervention -- an arduous task in the face of inadequate information. Secondly, restraints on the use of remedies against subsidies formed part of the package involving subsidy reduction commitments. It may be that subsidy disciplines structured in this manner fit well into a framework that envisages *progressive liberalization*, which is a defining feature of the AoA. The question here is whether there might be a place for comparable step-by-step arrangements in the case of services.⁹³

⁸⁹ Bossche, *supra* note 23, at 84.

⁹⁰ Benitah, *supra* note 6, at 18.

⁹¹ Paul C. Rosenthal and Lynn E. Duffy, *Reforming Global Trade in Agriculture*, in, THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, 171 (Terence P. Stewart ed., 1996).

⁹² Working Party on GATS Rules, *Subsidies And Trade In Service: Note by the Secretariat*, S/WPGR/W/9, at 7 (March, 6, 1996).

⁹³ *Id.*

Members have also expressed the opinions that a gradual method should be used to reduce subsidies. Hong Kong, China and Argentina have stated that,

[i]t can be argued that the way to deal with subsidies *is not through an (aggressive) approach*, such as countervailing measures but rather on a gradual basis, possibly by a similar approach to that in agriculture and TRIMS: ie. a programme under which Members agree: to cap the current levels of subsidies; and to reduce their subsidies (in a range of sectors to be agreed multilaterally). Discussion of the experiences of New Zealand and Australia on the prohibition of new and expanded export subsidies and the elimination of existing export subsidies might in instructive-as might discussion of the experience of the EU in containing and reducing state aid that distorts international competition.⁹⁴

Some scholars also think applying the AoA structure is more appropriate for the gradual liberalization in the GATS. Additionally, this structure gives developing countries more advantages.⁹⁵ Prof. Benitah states that the philosophy of the AoA (standstill/reduction model) seems more appropriate and would provide a practical solution for a highly technical issue.⁹⁶

In one ICTSD publication, scholars suggested a series of actions for adopting the AoA structure into the GATS:

- (1) agreement on a definition for subsidies in services;
- (2) mandatory notification of all services subsidies;
- (3) stand-still commitment (i.e. freezing of existing subsidies levels);
- (4) reduction of commitments of existing non-exempt subsidies to be implemented in a sequential manner; and
- (5) eventual phase out of all non-exempt support⁹⁷

⁹⁴ Working Party on GATS Rules, *Communication From Argentina And Hong Kong, China: Development of Multilateral Disciplines Governing Trade Distortive Subsidies in Services*, S/WPGR/W/31, at 5 (March, 16, 2000).

⁹⁵ Jean-Francois Bellis, *Lack of clear regulatory framework of safeguards, government procurement and subsidies in The WTO and Global Convergence in Telecommunication and Audio-visual Services*, in, *The WTO And Global Convergence In Telecommunications And Audio-Visual Services*, 300-301 (Damien Geradin ed., 2004)

⁹⁶ Benitah, *supra* note 6, at 1.

⁹⁷ Eugui and Werth, *supra* note 55, at 16.

3. Sub-conclusion

It seems that scholars are more inclined to adopt the AoA structure than the SCM Agreement structure because the AoA fits the progressive liberalization principle under the GATS. It puts less pressure on Members and makes them more willing to conduct negotiations. However, there is one thing we need to pay attention to: the current status of the AoA.

The AoA has always been a central issue during WTO negotiation rounds. In September 2003, the Cancun Negotiation Round met its deadlock on agricultural issues.⁹⁸ Later, in March 2004, the negotiation was re-opened.⁹⁹ In 2005, Members made a new negotiation package at the Hong Kong Ministerial Conference.¹⁰⁰ However, Members met another deadlock in 2006, while discussing market access on agricultural products, domestic supports, and NAMA.¹⁰¹ WTO Chief of the Ministerial Conference, Pascal Lamy, announced the stop of all negotiations on July 24, 2006.¹⁰²

The Doha Negotiation Round was resumed on February 7, 2007.¹⁰³ Even though Members have reached a consensus on some issues, the negotiation remains stalled.¹⁰⁴

It is worth noting that the AoA structure allows Members to sit down and talk at the beginning. But, the subsequent reduction of their commitments depends greatly upon Members' cooperation and enthusiasm. Adopting the AoA structure in the services trade will mean that

⁹⁸ Chung-Hua Institute for Economic Research, *New Negotiation Rounds – Agriculture*, http://taiwan.wtocenter.org.tw/issue/issuenego_AG.asp?id=30.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* See also Anup Shah, *WTO Doha “Development” Trade Round Collapse*, July 28, 2006, <http://www.globalissues.org/article/663/wto-doha-development-trade-round-collapse-2006>. Lori Wallach and Deborah James, *Why the WTO Doha Round Talks Have Collapsed and a Path Forward*, August 14, 2006, <http://www.commondreams.org/views06/0814-33.htm>.

¹⁰² Chung-Hua Institute for Economic Research, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

future deadlock is possible. So we need to ask ourselves whether we are ready to assume the potential consequence of its application.

E. IS IT APPROPRIATE TO APPLY A “HYBRID” APPROACH TO SERVICE SUBSIDIES?

Both the SCM Agreement and the AoA structures have advantages and disadvantages in dealing with service subsidies. In order for Members to reach a consensus, I propose a third alternative for consideration.

1. The Rationale for a Hybrid System for GATS

The idea of an approach other than those in the SCM Agreement and the AoA has been suggested by others. The Chairmen of the Working Party on GATS Rules suggested this approach when he said,

...work on subsidies is affected by the “chicken and the egg” syndrome and very limited progress has been made on technical issues.... I would also like to encourage Members to submit new proposals – formal or informal – taking into account the specificities of the GATS. I do not underestimate the role of the Agreement on Subsidies and Countervailing Measures in stimulating our deliberations, but I think *that an approach more closely related to the GATS framework is needed in order to advance work on the core issues.*¹⁰⁵

Switzerland proposed a Draft Annex on Export Subsidies in 2004, and it targeted the disciplines on export service subsidies.¹⁰⁶ The structure to regulate service subsidies that

¹⁰⁵ WTO Working Party on GATS Rules, *Negotiations on Subsidies: Report by the Chairperson of the Working Party on GATS Rules*, WTO S/WPGR/20, at para. 19 (June, 30, 2003).

¹⁰⁶ 林彩瑜, 《「有關新加坡及瑞士所提服務補貼文件之法律意見」》, 台大法律學院 WTO 研究中心, translated in, Tsai-Yu

Switzerland discussed is close to the AoA structure because it adopted stand-still commitments¹⁰⁷ and progressive phase-outs.¹⁰⁸ But it developed a connection with Members' commitment lists regarding service sectors.¹⁰⁹ Under the Swiss proposal, stand-still commitments and progressive phase-out would only apply to the service sectors that Members have agreed to open.¹¹⁰ This example shows that a new way of disciplining service subsidies, in order to accommodate its complexity, is no stranger to Members.

2. Future Development

In this section, I propose a combination of the SCM Agreement and AoA structures.

a. Traffic-light Classification It is widely agreed that the classification of subsidies in the SCM Agreement is very clear and reasonable. Hence, applying the three-category traffic-light approach to the GATS by dividing subsidies into (1) semi-prohibited subsidies (semi-red light subsidies), (2) semi-actionable subsidies (semi-yellow light subsidies), and (3) non-actionable subsidies (green light subsidies) should be clear as well.

I propose semi-prohibited subsidy classifications for services trade, instead of the prohibited subsidy as described in the SCM Agreement, in order to combine the SCM and AoA approaches. As mentioned in the previous chapters, subsidies are mostly implemented to achieve social purposes, and to consider what is essential to public interests. Therefore, my

Lin, *Legal Opinions On Singapore's And Switzerland's Submissions Regarding Service Subsidies*, National Taiwan University-WTO Research Center, at 10 (Jan. 2005).

¹⁰⁷ *Id.* (citing Switzerland, Draft Annex on Export Subsidies (2004/12), art. 4(2)).

¹⁰⁸ *Id.* (citing Switzerland, Draft Annex on Export Subsidies (2004/12), art. 4(1)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing Switzerland, Draft Annex on Export Subsidies (2004/12), art. 3).

proposed classification recognizes recognize the importance of having a non-actionable category in service subsidies.

b. Stand-still Commitments and Progressive Phase-out in the Semi-Red light Subsidy

Members are reluctant to discuss subsidies not only because of their complexity, but also because of their sensitive nature. There is no doubt that WTO Members are pressured internally to implement subsidies on service sectors domestically. In order to fulfill their obligations for information exchange, Members will need to invest a lot of resources. However, the information exchange is only the first step, and Members have shown reluctance to take that first step. This leaves the establishment of further disciplines also without a concrete path.

First, it is important to create incentives and increase Member enthusiasm for dealing with service subsidies on a global level. Of course, the topic is listed in the agenda, so Members are obliged to address it. Nevertheless, I propose combining the ceiling restrictions from the AoA with the SCM Agreement prohibited subsidy categorization.¹¹¹ This means that, in this category, Members are not allowed to implement these subsidies. But Members do not have to eliminate all such existing subsidies at once. Instead, they can progressively reduce subsidies in this category. This is why I call this category a semi-red light subsidy.

The SCM Agreement prohibits both export subsidies¹¹² and domestic substitution subsidies.¹¹³ The reason to highlight these two types of subsidies is because they result in the most trade-distortive effects, and should, therefore, be eliminated. There is no reason why we cannot apply the same theory to services trade. I therefore propose in service subsidies that these two subsidies should be *prohibited* as well.

¹¹¹ The SCM Agreement, *supra* note 30, art. 3.

¹¹² *Id.* art. 3.1(a).

¹¹³ *Id.* art. 3.1(b).

As discussed earlier, the Members' biggest concern is whether there will be realistic examples regarding export and domestic subsidies in all four modes. Due to the limit of statistical evidence, no comprehensive report can demonstrate the existence of all such subsidies in the services sector. In addition, compared to goods trade, market access to each service sector is different. While this may not present a factual issue right now, this does not mean there will not be an issue in the future.

A good approach to services subsidies regulation should be both comprehensive and effective. It should evolve with time and sometimes ahead of time. It will require both the necessary rules and a dispute settlement process. If Members agree upon this at the beginning, then having disciplines on export and domestic service subsidies at the present stage should be reasonable.

The system will also require stand-still commitments and a phase-out process. Members should specify in their commitments what export and domestic service subsidies are in effect. And Members should set up schedules to gradually reduce existing subsidies according to those schedules.

A system that (1) provides the necessary rules, (2) includes a dispute settlement mechanism, (3) requires stand-still commitments, and (3) establishes a phase-out process, should encourage Member participation in developing subsidy regulations. Basing such a system on an SCM/AoA hybrid approach should allow more detailed rules on service subsidies by adopting that aspect of the SCM Agreement framework.

c. Categories and Time Duration for Green-light Subsidies So Member and scholar discussions lead to the conclusion that there can be several types of subsidies listed in the green

light category.¹¹⁴ Most importantly, these service subsidies shall not be *specific*, and shall be either *de jure* or *de facto*. I propose that those subsidies that are specific, but meet the following conditions, should also be included as green-light subsidies:

- (1) Subsidies designed to achieve a public policy.¹¹⁵ This may include, but is not limited to, assistance not involving direct payments to producers or processors, such as research, pest and disease control, extension and advisory, marketing, and infrastructural services, water, energy, transport, and education;¹¹⁶
- (2) Subsidies to disadvantaged regions, not limited to specific enterprises or industries within a region, that are given as part of a general framework of regional development, where the region can be shown to be disadvantaged in terms of economic development (e.g. income per capital or household income per capita, or GDP);¹¹⁷
- (3) Disaster relief subsidies.¹¹⁸
- (4) Research & Development subsidies: Assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms, up to a maximum of 75% of the costs of industrial research or 50% of the costs of pre-competitive development activity, subject to a number of conditions on the scope of the assistance;¹¹⁹

¹¹⁴ Working Party on GATS Rules, *Communication From Hong Kong, China And Mexico: Non-Actionable Subsidies In Trade In Services*, JOB(07)/27 (March, 7, 2007).

¹¹⁵ Synthesis Report of the Discussions in the Meeting, *supra* note 42, at 4, para. 13.

¹¹⁶ Working Party on GATS Rules, *supra* note 113, at para. 4(a).

¹¹⁷ *Id.* at para. 3(b).

¹¹⁸ *Id.* at para. 4(d).

¹¹⁹ *Id.*

- (5) Environmental protection subsidies: assistance to adapt existing facilities to new environmental requirements, provided that the help is given on a one-time basis, is limited to 20% of total costs, and is generally available to all eligible firms.¹²⁰

The first category is *necessary* to achieve a certain *public policy*. It is without doubt that subsidies are the most efficient tool used by governments to accomplish a variety of economic, social or environmental objectives.¹²¹ However, sometimes both beneficiaries and institutions are easily addicted to subsidies, and without these subsidies, a wave of bankruptcies can happen.¹²² In order to prevent this from taking place, but also insure a country's development, a necessity test is required to determine the need for such a subsidy. In general, the focus should be on national policy objectives, and Members' rights to regulate outlined in the GATS should not be compromised.¹²³

Following this rationale, a standard of *necessity* should be established. The necessity test contained in the GATT Article XX general exception can be a useful reference for future disciplines.¹²⁴ Some scholars have already suggested examining whether the subsidy used is needed to achieve the policy goal, and whether it is not more trade-restrictive than necessary.¹²⁵

As to the second and third category, disadvantaged regions and disaster relief are borrowed from the goods disciplines. Without government support, service providers are hardly willing to invest in these areas. To provide an optimal standard of living for people located in these areas, it is important to have this exception. This same emphasis on the importance of subsidies is applicable in the disaster relief area.

¹²⁰ *Id.* at para. 3(c).

¹²¹ United Nations Conference on Trade and Development, *Subsidies To Services Sectors: A Neo-Protectionist Distortion Or A Useful Development Tool?*, UNCTAD/DITC/TNCD/MISC/2003/7, 20 April 2005, at 3, para. 1.1, available at http://www.unctad.org/en/docs/ditctncdmisc20037_en.pdf.

¹²² *Id.* at 10, para. 2.1.

¹²³ Synthesis Report of the Discussions in the Meeting, *supra* note 42, at 4, para. 13.

¹²⁴ *See generally* Lo, *supra* note 52, at 277-280.

¹²⁵ Synthesis Report of the Discussions in the Meeting, *supra* note 122.

R&D is an important and controversial part of the SCM Agreement, but still, as the role of knowledge in the modern economy cannot be overemphasized,¹²⁶ R&D has a unique, crucial, and universal impact on each country's productivity and competitiveness.¹²⁷ R&D activities, in particular, are the main sources of innovation and productivity, and ultimately play a crucial role in economic development at large.¹²⁸ It is important to have this category listed in the non-actionable subsidies. Moreover, the negative effect and perverse distortions commonly associated with subsidies are likely to be minimal, if any, in the case of R&D.¹²⁹

The last category is the protection of the environment. Some major subsidies to services have caused the pollution of the environment. Subsidies to energy services are commonly used in developing and developed countries, and the main environmental problems resulting from energy production include global warming, land and sea pollution caused by acid rain, dust and soot, incomplete combustion, and health problems.¹³⁰ Subsidies to transport services can also increase environmental problems. Exhaust emitted from vehicles is a major cause of pollution. Hence, subsidies granting assistance to facilities that are more environment-friendly should be taken into consideration.

d. Semi-Actionable Service Subsidies Those service subsidies that are not semi-prohibited or non-actionable should fall under the category of actionable subsidies. These subsidies should not be prohibited unless there is evidence of adverse effects. The reason behind this category is that, considering subsidies as a kind of economic pollution. The modern economy could not function

¹²⁶ See generally GROSSMAN, G. AND E. HELPMAN, INNOVATION AND GROWTH IN THE GLOBAL ECONOMY (1991) (Investment in the R&D is the centerpiece of "new growth theory").

¹²⁷ United Nations Conference on Trade and Development, *supra* note 120, at 14.

¹²⁸ *Id.* at 14, footnote 8.

¹²⁹ *Id.* at 15.

¹³⁰ *Id.* at 20-21.

if every kind of polluting economic activity was fully prohibited.¹³¹ Thus, they need to provide a balanced mechanism. GATT/WTO negotiators realized that a complete prohibition on any kind of subsidy was not economically, socially, or politically feasible.¹³² Partial protections for parties who suffer from adverse conditions are definitely more feasible.

In this category, a Member should be required to prove that a certain service subsidy, performed by another Member, indeed causes *adverse effects*. The criteria listed in the SCM Agreement can offer guidance.¹³³ As for the definition of serious prejudice, some examples can be taken into account.¹³⁴ These requirements are essential to semi-actionable subsidies. As I proposed earlier, the progressive phasing-out process is the main idea in the services trades. Therefore, we can utilize this concept and apply it to the actionable subsidies in the SCM Agreement.

Service subsidies that fall into this category are only actionable when they cause adverse effects to other Members. Members can refer to those criteria in the SCM Agreement. However, if a subsidy is found to adversely affect another Member, it should be subject to a reduction commitment determined by the Dispute Settlement Body. As for how much the reduction should be, this can be determined either by the Working Party or the DSB based on the best available information. This serves the idea of having progressive development in the services trades, and also can be the motive for Members to deal with the service subsidy issue.

¹³¹ *Id.* at 35.

¹³² *Id.*

¹³³ The SCM Agreement, *supra* note 30, art. 5. (“(1) injury to the domestic industry of another Member; (2) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994; (3) serious prejudice to the interests of another Member.”)

¹³⁴ *Id.* art. 6. (“(1) subsidies to cover operating losses sustained by an industry; (2) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems; (3) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.”)

Members have to know what is taking place within their jurisdictions. If they don't, they might face the possibility of losing their privileges. Moreover, this can provide Members with additional motivation to adhere to the information exchange mandates on their own, instead of relying on the Working Party.

e. The Inclusion of a Peace Clause Since the hybrid approach adopts the phasing-out method, I propose that there is a need for the inclusion of a peace clause, or due restraint. Article 13 of the AoA is an example of such a peace clause. Such a clause would provide that “agricultural subsidies committed under the agreement cannot be challenged under other WTO agreements, in particular the Subsidies Agreement and GATT.”¹³⁵ This provision contains the privileges for the AoA categories. It prohibits Members from challenging Green-box subsidies or applying countervailing duties under the AoA.¹³⁶ Amber/Blue-box categories can face the possibility of CVD but with the exercise of *due restraint*.¹³⁷ Export subsidies are also protected from CVD

¹³⁵World Trade Organization, *Glossary Term: peace clause*, available at http://www.wto.org/english/thewto_e/glossary_e/peace_clause_e.htm.

¹³⁶Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 410. [hereinafter AoA], art. 13 (a). (“domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:

- (i) non-actionable subsidies for purposes of countervailing duties;
- (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and
- (iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994.”)

¹³⁷*Id.* art. 13(b). (“domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member’s Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:

- (i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations;
- (ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year; and
- (iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year;”)

with some conditions and with the admonition of due restraint.¹³⁸ The AoA peace clause remained in effect for a period of nine years, expiring at the end of 2003.¹³⁹

In the hybrid system, green-light subsidies should be subject to the same privilege as the Green-box subsidies. Semi-prohibited/semi-actionable subsidies should be exempt from the application of CVD due to the lack of empirical evidence currently available regarding certain CVD matters.¹⁴⁰ But the peace clause is not without time limit. Members should set a time frame for such a privilege to expire.

¹³⁸ *Id.* art. 13(c). (“export subsidies that conform fully to the provisions of Part V of this Agreement, as reflected in each Member’s Schedule, shall be:

- (i) subject to countervailing duties only upon a determination of injury or threat thereof based on volume, effect on prices, or consequent impact in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations; and
- (ii) exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement.”)

¹³⁹ World Trade Organization, *Agriculture: Explanation, Other issues*,

http://www.wto.org/english/tratop_e/agric_e/ag_intro05_other_e.htm#peace_clause.

¹⁴⁰ See Chapter 9 for detailed explanations.

F. SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

The idea to incorporate special and differential treatment in the GATS was taken from the introduction to Article 27 in the SCM Agreement.¹⁴¹ As discussed previously, there is no evidence that suggests that goods trade is so different from service trade as to require an entirely new subsidy control mechanism. It is possible to apply the existing special and differential (S&D) treatments in service trades. Moreover, doing so can only give developing countries incentives to sit down and talk about the subsidy regulation issues.

¹⁴¹ The SCM Agreement, *supra* note 30, art. 27. (“27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.”)

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies,¹⁴¹ and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member’s exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable

In addition to providing incentives, it is also important for developing countries to know that services trade liberalization is not only for the benefit of developed countries. It is important for developing nations as well. Major developing countries are increasingly involved in service markets, such as information technology, back office operations, and call centers.¹⁴² The unified regulation of service trades can also protect the interests of developing countries and least-developed countries.

The following are some suggested S&D treatments that are possible for consideration:

under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

- (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or
- (b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.”)

¹⁴² Bhala, *supra* note 39, at 101.

- (1) Permission for subsidies in Mode I when research and development activities are concerned and permission for the developing countries to maintain free trade zones in services;¹⁴³
- (2) Exemption from countervailing measures for the least developed countries, and for developing countries with some restrictions, such as a low gross domestic product (GDP) country, when the subsidies granted are too low, or the volume of subsidies are too low;¹⁴⁴
- (3) Allowing developing countries to maintain export subsidies on services for longer periods, subject to their gradual removal;¹⁴⁵
- (4) If services are aimed to develop domestic services, those services should be exempt from subsidy regulations with due moderation.

The details of the above S&D treatment, such as the appropriate periods of time, the amounts of subsidies granted and the calculation of subsidies, are issues for future development. It is, however, unquestionable that having an S&D provision in service trades is necessary.

G. RECOMMENDATIONS

In this chapter, I recommend that Members adopt the current definition of subsidy in goods trade to services trade. The original text in the SCM Agreement should be preserved. Hence, the definition of service subsidy should be:

- “(1) For the purpose of this Agreement, a subsidy shall be deemed to exist if:

¹⁴³ Eugui, *supra* note 83, at 27.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

- (i) there is a financial contribution by a government or any public body within the territory of a Member¹⁴⁶ (referred to in this Agreement as “government”), ~~i.e. where~~, including but not limited to:
 - (ii) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;
 - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
- or
- (i) there is any form of income or price support in the sense of Article XVI of GATT 1994;
- and
- (b) a benefit is thereby conferred.
- (2) A subsidy as defined in paragraph 1 shall be subject to the provisions of this agreement only if such a subsidy is specific in accordance with the provisions of specificity.

As for the specificity criteria, the concept embodied in the SCM Agreement can also be applicable:

- (1) In order to determine whether a subsidy is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:
- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
 - (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

¹⁴⁶ A more flexible interpretation is required to assess the relationship between the financial contribution and the subsidizing Member.

- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
- (2) A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.
- (3) A subsidy which is limited to a certain mode of service supply or a certain sector of service trades inscribed in the Schedule of this Agreement, such subsidy shall be specific
- (4) Any subsidy falling under the provisions of prohibited subsidies shall be deemed to be specific.
- (5) Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.”

The above two provisions are responsible for defining what a subsidy is. In regards to the classification system, I propose to adopt a hybrid system, combining the SCM Agreement and AoA models.

Table 21. Proposed Hybrid Classification System for GATS

Semi-prohibited Subsidy	Two categories of subsidies should be identified: (1) export subsidy; (2) domestic substitution subsidy. Members should specify in their commitments what export and domestic service subsidies are in effect. Members should set a time period during which to gradually decrease the subsidies according to schedules.
Semi-Actionable Subsidy	This type of subsidy should be actionable only if it causes: (1) injury to the domestic industry of another Member; (2) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994; or (3) serious prejudice to the interests of another Member. If it can be confirmed that adverse effects have been caused by this type of subsidy, it should then be subject to reduction. The amount of reduction would be determined by the DSB or the Working Party, whoever obtains the best available information.
Non-actionable Subsidy	This class of subsidy includes: (1) Assistance in services necessary to achieve certain public policy. This may include,

	<p>but is not limited to, assistance not involving direct payments to producers or processors, such as research, pest and disease control, extension and advisory services, marketing and infrastructural services, water, energy, transport, and education;</p> <p>(2) Disadvantaged regions not limited to specific enterprises or industries within a region, which is given as part of a general framework of regional development, and the region can be shown to be disadvantaged in terms of economic development (e.g. income per capital or household income per capita, or GDP) than the Member country as a whole;</p> <p>(3) Disaster Relief.</p> <p>(4) Research & Development: Assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms, up to a maximum of 75% of the costs of industrial research or 50% of the costs of pre-competitive development activity, subject to a number of conditions on the scope of the assistance;</p> <p>(5) Environmental protection: assistance to adapt existing facilities to new environmental requirements, provided that the help is given on a one-time basis, is limited to 20% of total costs, and is generally available to all eligible firms</p>
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Lastly, the incorporation of a peace clause and S&D treatment are necessary in the GATS subsidy disciplines. These privileges are:

- (1) Until [such time as the information exchange mandate has been satisfactorily fulfilled], all categories of subsidies (semi-prohibited, semi-actionable, and non-actionable) shall be:
 - (i) exempt from the imposition of countervailing duties;¹⁴⁷
 - (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and
 - (iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994

- (2) After [such time as the information exchange mandate has been satisfactorily fulfilled, and the peace clause of paragraph (1) expires], developing and least developed countries shall enjoy
 - (i) permission to grant subsidies in Mode I for research and development activities and permission to maintain free trade zones in services;
 - (ii) exemption from countervailing for least developed countries in all instances, and for developing countries

¹⁴⁷ “Countervailing duties” where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.

whose gross domestic product (GDP) is below an appropriate threshold established through negotiation;

- (iii) the maintenance of export subsidies on services for an additional period [to be determined], subject to their gradual removal;
- (iv) the exemption from countervailing duties for subsidies promoting the development of domestic services.

The structure and wording of above provisions are only preliminary. The purpose here has been to suggest the basic structure and approach.

VIII. COUNTERVAILING MEASURES IN SERVICE TRADES

To ascertain the appropriateness of countervailing measures in the services trade is one of the mandates listed in GATS Article XV. With the *hybrid* regulation model I proposed in Chapter 7, the services trade regulation regime is not yet in a position to incorporate countervailing measures. This does not suggest, however, that it is not an appropriate aspect of services trade regulation. The GATS mandates that Members discuss countervailing measures, making this an appropriate area for further recommendations.

A. DIFFERENCES BETWEEN GOODS AND SERVICES IN THE APPLICATION OF COUNTERVAILING MEASURES

In order to discuss the appropriateness of countervailing measures under the GATS, it is important to understand the purpose of such measures under the GATT. Why did Members decide to allow such relief measures in goods trade? Why should there be any entitlement to such relief? Are the concerns any different in applying countervailing measures in the trade in services than in the trade in goods?

1. The Purpose of Countervailing Measures

The definition of a countervailing measure is an “action taken by the importing country, usually in the form of increased duties to offset subsidies given to producers or exporters in the exporting country.”¹ Since these measures are usually in the form of duties, we frequently mention them as countervailing duties (CVD).

For at least 100 years, international trade policy-makers have found that certain subsidies were inappropriate and responded with two mechanisms: (1) permitting national governments to offset the effect of subsidies on imported goods by using countervailing duties; and (2) providing international rules concerning the use of subsidies in international trade.² The United States passed a law addressing CVDs in 1897.³ Until now, the United States has been the most extensive user of CVDs; few other governments have done so and in rare cases.⁴ Therefore, in the SCM Agreement, the provisions on CVD proceedings largely track prior U.S. procedures.⁵

Applying a CVD is no different from imposing a tariff.⁶ More precisely, a CVD is simply a duty on top of the MFN tariff.⁷ Prof. Jackson has discussed the policy underpinnings of CVDs and subsidies rules as follows:⁸

¹ World Trade Organization, *Glossary term: countervailing measures*, http://www.wto.org/english/thewto_e/glossary_e/countervailing_measures_e.htm.

² JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO*, 94 (2000).

³ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM*, 225 (1989). *See generally* COMMITTEE OF WAYS AND MEANS U.S. HOUSE OF REPRESENTATIVES: OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, 83-86 (2001).

⁴ Jackson, *supra* note 2, at 87.

⁵ M. Jean Anderson and Gregory Husisian, *The Subsidies Agreement*, in *THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION*, 329 (Terence P. Stewart ed., 1996).

⁶ RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE*, 1062 (2007).

⁷ *Id.* *See also* Bhala, *supra* note 6, at 1054-1061. (It provides detail economic analysis on subsidy effects on the Supply and Demand Curves.)

⁸ Jackson, *supra* note 3.

- (1) Economists demonstrate persuasively that subsidies can have a considerable distorting effect, and many subsidies in international trade clearly reduce overall world welfare.⁹
- (2) Because the uses of subsidies can seriously damage world welfare, there is a reason for the international trade system to intervene – to inhibit subsidies.¹⁰
- (3) Some still consider a system of international rules to be a *second best* solution regarding subsidies. They are skeptical about the efficiency of international rules to achieve a certain discipline.¹¹

These reasons allow governments to utilize CVDs in order to discourage the use of subsidies.¹² Do CVD laws really discourage the use of subsidies? United States CVD laws have indeed had some impact.¹³ Not only are the CVD laws supported by policy reasons, but they are also supported by legal rationales.¹⁴ CVDs can rectify the *unfairness* caused by subsidies.¹⁵

There are, however, criticisms of CVD laws. Those criticisms are summarized by Jackson as follows:

⁹ Jackson, *supra* note 2, at 90. (“Some might argue that CVD laws exalt property rights and interests of the minority over the majority. Domestic producers, the output of which a CVD protects, gain. But their gain is the loss to the public, which pays higher prices.”)

¹⁰ *Id.* See also Jackson, *supra* note 2, at 92-3 and JACKSON, LOUIS, AND MATSUSHITA, IMPLEMENTING THE TOKYO ROUND, NATIONAL CONSTITUTIONS AND THE INTERNATIONAL ECONOMIC SYSTEM, CHAPTER 11 (1984). (These two books contain more arguments in support of CVD laws.)

¹¹ *Id.* at 97.

¹² *Id.* at 91. (“This approach can be countenanced even though the motives of governments in applying countervailing duties are really not to maximize world welfare, but are instead to maximize the welfare of the producers who constitute important political constituencies within the country.”)

¹³ Although it is a cursory study, Prof. Jackson has had personal discussions with foreign government officials who are planning to change their government subsidy programs due to pressure from exposure to US countervailing duty actions.

¹⁴ Bhala, *supra* note 6, at 1066.

¹⁵ *Id.* (He also points out an opinion made by Prof. Robert W. Mcgee that “fairness can be defined as non-coercive exchange. So long as an export-import deal is voluntary, with no official tariff, quota, or remedy, then it is fair.” CVD is an artificial interference with property rights, hence it may not suffice for fairness.)

- (1) Only large countries are able to use CVDs to discourage the use of subsidies by other countries. Small countries are generally unable to create such an impact.¹⁶
- (2) The appropriateness of CVDs is weakened by the economic analyses presented in the Sykes¹⁷ and Trebilcock¹⁸ papers, which show that CVDs have the welfare-limiting effects of any tariff.¹⁹

One thing to bear in mind is that CVDs only target export subsidies. That is to say, in the case of export subsidies, only importing countries can initiate CVD proceedings towards exporting countries. Why are export subsidies so heinous that the WTO still allows the use of CVDs while such measures remain controversial? One prominent rationale against CVDs is that from the importing country's perspective, "the consumers of subsidized goods and services will enjoy the lower prices that result from subsidies, even if taxpayers at large and unsubsidized producers suffer."²⁰ If an export subsidy is implemented on a certain good or service, consumers in the importing country will benefit from such a subsidy. However, the same economist states that,

To be sure, it is possible to devise scenarios in which subsidies granted by foreign governments to their exporting firms can be harmful to an importing nation. One possibility is that the subsidy may drive out all competitors of the subsidized firms under circumstances where it is difficult for competitors to re-enter the market later, leaving the subsidized firms with monopoly power that results in higher (rather than lower) prices.²¹

¹⁶ Jackson, *supra* note 2, at 91.

¹⁷ See generally Alan O. Sykes, *Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach*, 21 L. & Pol. Int'l Bus., 699 (1990).

¹⁸ See generally Michael J. Trebilcock, *Is the Game Worth the Candle? Comments on A Search for Economic and Financial Principles in the Administration of U.S. Countervailing Duty Law*, 21 L. & Pol. Int'l Bus.

¹⁹ Jackson, *supra* note 2, at 97. See also Bhala, *supra* note 6, at 876-7 (It provides more discussions on the neo-classical assumptions underline the CVDs.)

²⁰ Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, John M. Olin Law & Economics Working Paper No. 186, 10 (2003), available at http://www.law.uchicago.edu/files/files/186.aos_subsidies.pdf.

²¹ *Id.* at 11. See also Janusz Ordover, Alan Sykes & Robert Willig, *Unfair International Trade Practices*, 15 N.Y.U.J. Int'l L. & Politics 323 (1983). See also James Brander & Barbara Spencer, *Export Subsidies and International Market Share Rivalry*, 18 J. INT'L ECON. 83 (1985); Avinash Dixit and Alan Kyle, *The Use of Protection and Subsidies for Entry Promotion and Deterrence*, 75 Am. Econ. Rev. 139 (1982), Jonathan Eaton and Gene Grossman,

It seems that the question of the appropriateness of CVD laws is sometimes relatively subjective. As Prof. Jackson states,

Nevertheless, if one believes that the world would be better off if there were a general reduction of the use by governments of subsidies relating to products that grow in international trades, one could argue that the US policies, motivated for entirely different reasons, may fortuitously or coincidentally be having a salutary effect on the world economy.²²

But it is important to consider one thing: In the case of services trade, is having a system of international rules still a second best solution regarding subsidies? Perhaps to have a single mechanism to deal with subsidies is appropriate in services trades. I suggest (below?) that if the appropriateness of CVD laws in service subsidies is denied, Members still have the second choice.

2. Current Discussions

Regarding the question of whether it is appropriate to have countervailing measures, i.e., countervailing duties in services trade, there is not much information available to date. However, some scholars seem to be strongly opposed to such measures.

The majority opinion is that it is not possible to have a CVD mechanism in the services trade. Professor Benitah does not recommend the adoption of a CVD regime due to its impracticability in the services trade.²³ His reasons are listed as follows:

1. CVDs can be a protectionist tool: filing a CVD complaint could reduce foreign exporters' competitors in several ways even if the case ends with a finding of a

Optimal Trade and Industrial Policy Under Oligopoly, 101 Q. J. Econ. 386 (1986). (They provide more information on the economics models on the effect of export subsidies.)

²² JOHN H. JACKSON, JEAN-VICTOR LOUIS, AND MITSUO MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: LEGAL ASPECTS OF CHANGING INTERNATIONAL ECONOMIC RULES, 255 (1982).

²³ Benitah, *supra* note 23, at. 36.

negative injury determination. This would create uncertainty for foreign exporters and reduce their interests in investment.²⁴

- (2) Redundancy with the future GATS safeguard measure: Although no consensus yet, it is possible to argue that the simultaneous establishment of a CVD and the emergency safeguard measure (ESM) would lead to redundancy although there is presently no consensus.²⁵
- (3) CVDs are only used by a few developed countries: Since the establishment of CVDs, they have only been utilized by the U.S. and the EU. The usefulness of CVDs is minor for developing countries. Hence, it can be argued that it is not in the interest of developing countries to see the emergence of such a regime.²⁶

A report by the European Services Network clearly opposes establishing an equivalent to countervailing duties in services, citing difficulties in measurement and enforcement.²⁷ The report states: “The immense difficulties in measuring, classifying and regulating the supply of services should argue against any attempt to introduce a notion of countervail. In trade of goods, the notion is very difficult to apply fairly; in services trade it would be almost impossible.”²⁸

Some still believe that the same actions that are taken in goods trade can be taken in services trade, but limitations arise from the very nature of services and from the methodological

²⁴ *Id.* at 33.

²⁵ *Id.* at 34. (“Article X of GATS mandates WTO Members to undertake multilateral negotiations on an emergency safeguard measure (ESM) for services...Many developing countries have proposed that governments be allowed to impose temporary restrictions on the supply or consumption of services if their domestic firms are threatened by surging services imports. But industrialized countries have been extremely unreceptive to the idea of an ESM in the service sector. The US in particular argues that the ESM advocates have failed to make a case for these safeguards and that any such rules could scare off investment by foreign service providers since they create legal uncertainty...the injury test would likely play a decisive role in both of these regimes (ESM and subsidy) while the issue of ‘unfair’ subsidies would play a secondary role.”)

²⁶ *Id.*

²⁷ European Service Network Policy Committee, *European Services Network Preliminary Views On Subsidies In Services: Final Version*, Jun. 25, 1999, at 4, available at <http://www.esf.be/new/wp-content/uploads/2009/06/subsidie.pdf>.

²⁸ *Id.*

limitations in the investigative procedure.²⁹ David Vivas Eugui³⁰ sets out the factors that determine the possibility of applying CVDs in services as follows,³¹

- (1) Determining the injury: he proposes that the same criteria as those put forward in the draft safeguards in services could be used.
- (2) Calculating the effect of the subsidy on the supply of services: he believes that calculations in services are more complex than those in goods. The technical problems and economic measurement problems need to be solved by those interested countries.
- (3) Calculation of countervailing measures: He believes it would be possible to work with abstract units for the supply of services. However, this kind of solution is arbitrary and would be very difficult to apply.
- (4) Imposition of border measures: He believes it would be impossible to apply the same mechanisms as in goods. The use of taxes on consumption or on the supply of the service, which follow the commercial transaction rather than the good or service, is recommended.

3. Sub-conclusion

As mentioned earlier, once a Member determines that its domestic service industries suffered material injury from another Member's subsidy there are two ways to deal with subsidy

²⁹ David Vivas Eugui, *Negotiations in WTO on the Rules of the General Agreement on Trade in Services: the case of Venezuela*, in UNCTAD Commercial Diplomacy Programme, UNCTAD/DITC/TNCD/6, 7 February 2001, at 26-27, available at <http://www.unctad.org/en/docs/poditctncd6.en.pdf>.

³⁰ He is currently a consultant with UNCTAD; LLB Universidad Catolica Andres Bello, Caracas, Venezuela; LLM Common Law Studies, Georgetown University, Washington D.C., USA

³¹ Eugui, *supra* note 29, at 26-27.

situations.³² One way to remedy these material injuries is to bring a complaint to the WTO dispute settlement forum, seeking removal of the challenged subsidy. The second way is to file a complaint in a national forum of the country importing the subsidized products, seeking the imposition of countervailing duties.³³

B. THE PROBABILITY THAT EXPORT SUBSIDIES WILL EXIST IN ALL FOUR MODES OF SERVICE SUPPLY

An initial question of concern to Members is whether there is a real export subsidy taking place in all four modes. In Chapter I, I provided a table of examples of the four modes of service supply under the GATS. In this Chapter, I seek to find a *real situation* to represent subsidies in each of the four modes of supply.

1. Mode I Examples

As presented in Chapter III, the difference between Mode I, in which the services supplied from the territory of a Member State are traded into the territory of any other country, and Mode III, when services are supplied by a supplier from one Member, through commercial presence in the territory of any other Member, is whether there is a commercial presence in the export-targeted country. If there is no commercial presence, the service belongs to Mode I. If there is any form of commercial presence, the service falls under the Mode III category. Now, Mode I and Mode III are often seen as taking place together. It is reasonable to infer that, from a business

³² See Chapter IV of this dissertation.

³³ Benitah, *supra* note 23, at 33.

operator's perspective, having a commercial presence in a foreign country will attract more business and more customers. This is more commonly seen in financial and medical services, such as Citigroup, HSBC, UPMC, etc.

To analogize the situation from the goods trade to the service trade in Mode I, examples could cover any benefit granted to service suppliers of a Member that increases its competitive edge, giving them an advantage in the market, such as preferential interest rates, tax rebates, duty-free equipment, and reduced- or rate-free telecommunications to supply the service.³⁴

There are many examples showing that countries are willing to support efforts of local companies to expand overseas. Countries, mostly developed, have established institutions, often seen as banking facilities, to help their local industries export goods and services. Most importantly, this example can take place in both Mode I and Mode III.

The Export-Import Bank of the United States (hereinafter Ex-Im Bank) is one example. This bank is the *official export credit agency* of the United States.³⁵ The charter of the Ex-Im Bank stipulates that,

The objects and purposes of the Bank shall be *to aid in financing and to facilitate exports of goods and services*, imports, and the exchange of commodities and services between the United States or any of its territories or insular possessions and any foreign country... The Bank's objective in authorizing loans, guarantees, insurance, and credits shall be to contribute to maintaining or increasing employment of United States workers.³⁶

The mission of this agency is to “enable U.S. companies — large and small — to turn export opportunities into real sales that help to maintain and create U.S. jobs and contribute to a

³⁴ Luis Abugattas Majluf, *Towards Disciplines on Subsidies on Agreements to Liberalize Trade in Services*, Report Prepared for the CRNM/IDB Project, Aug. 2002, at 11, available at http://www.crn.org/index.php?option=com_docman&task=doc_download&gid=166&Itemid=82.

³⁵ Export-Import Bank of the United States, *Mission* <http://www.exim.gov/about/mission.cfm>.

³⁶ Export-Import Bank of the United States, *Charter Section 2a*, <http://www.exim.gov/about/charter/section2a.cfm>.

stronger national economy.”³⁷ By providing working capital guarantees (pre-export financing), export credit insurance, loan guarantees, and direct loans (buyer financing), Ex-Im Bank has supported more than \$400 billion worth of U.S. exports over 70 years.”³⁸

As part of its direct lending program, the Bank has a tied aid *war chest* it uses to counter specific projects that are receiving foreign-subsidized export financing.³⁹ *Tied aid credits* and *mixed credits* are two of the primary methods whereby governments provide their exporters with official assistance to promote exports.⁴⁰ Tied aid credits include loans and grants that reduce financing costs *below market rates for exporters* and are tied to the procurement of goods and services from the donor country.⁴¹

The United States is not the only country that offers this kind of support to its local industries. The United Kingdom’s export credit agency, the British Chamber of Commerce (hereinafter BCC), also offers export services, such as export training and help with export documentation. Additionally, the BCC provides a series of supportive processes for local industries to export.⁴² One of the support programs aids the review of export communications. The review is designed to prevent language and cultural barriers from coming between British exporters and overseas business.⁴³ The subsidy provided for these reviews are,

The cost of each review is £500 + £87.50 VAT. Eligible companies can receive from UKTI a subsidy of £350 towards the cost of the first review and a subsidy of £250 towards each of the second and third reviews. VAT is charged on the full cost of each review.⁴⁴

³⁷ Export-Import Bank of the United States, *supra* note 35.

³⁸ Export-Import Bank of the United States, *supra* note 35.

³⁹ Jackson, James K., *Export-Import Bank: Background and Legislative Issues*, Update November 14, 2001, at 3, available at <http://crapo.senate.gov/issues/banking/2007-01-19-ex-imbank.pdf>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² British Chambers of Commerce, *Export Communications Review*, <http://www.britishchambers.org.uk/zones/export/export-communications-review>.

⁴³ *Id.*

⁴⁴ British Chambers of Commerce, *Subsidy*, <http://www.britishchambers.org.uk/zones/export/export-communications-review/subsidy.html>.

Australia has a similar support program and similar system of financial assistance, which helps local companies break into export markets. For example, Australia utilizes the Export Market Development Grants (hereinafter EMDG) scheme, which is a key Australian Government financial assistance program for aspiring and current exporters.⁴⁵ The EMDG is administered by Austrade. The scheme supports a wide range of industry sectors and products, including inbound tourism and the export of intellectual property.⁴⁶ Examples of the support provided by the EMDG are as follows,⁴⁷

- (1) encouraging small and medium sized Australian businesses to develop export markets;
- (2) reimbursing up to 50 percent of expenses incurred on eligible export promotion activities, above a \$10,000 threshold;
- (3) providing up to eight grants to each eligible applicant.

Rwanda permits investors to operate in export processing zones, and these investors are exempt from duties or taxes.⁴⁸ These enterprises are required to export at least 80% of their production or to supply the required percentage to export services.⁴⁹ These are examples showing that governments are indeed, under some circumstances, willing to support the expansion of local companies with or without any commercial presence in another country.

⁴⁵ Australian Government Austrade, Export Market Development Grants (EMDG), <http://www.austrade.gov.au/Export-Market-Development-Grants-EMDG/default.aspx>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Natasha F. Ward, *Theoretical Challenges And Practical Difficulties For The Development Of Subsidies Disciplines In The General Agreement On Trade In Services*, WORLD TRADE INSTITUTE, MILE 7, Sep. 30, 2007, at 33, available at http://web65.uranus.ibone.ch/images/stories/MILE/MILE%20Theses/MILE%207/Natasha%20Ward_MILE%207.pdf?PHPSESSID=7f41ef09f5e133e08848ea72ed35570c. (She cited this example from the GATS Working Party Report, Subsidies for Service Sectors-Information Contained in Trade Policy Reviews: Background Note by the Secretariat, S/WPGR/W/25/Add.5, 7 (March 2007).)

⁴⁹ *Id.*

Some people may wonder about a government's purposes in establishing such banks. Does this mean that governments are encouraging their local companies to export overseas? Or does this simply demonstrate that local companies are so eager to expand their businesses that governments cannot stop them, so they instead choose to help ensure their benefits?

In my opinion, the original purpose for establishing such banks may not be the main concern to discuss. The focus should be on the present effect of having this banking system. By setting up this support program, governments are encouraging domestic industries to export overseas. The establishment of these programs subsidizes and creates incentives for local companies to go offshore. Hence, it is reasonable to conclude that these support programs can be examples of subsidies in the Mode I supply of services.

2. Mode II Examples

In Chapter I, I suggested the possibility that the traditional perspective of *exporting* is different between goods and services in the Mode II situation, in which services from the territory of one Member State are supplied in that state to the service consumer of any other Member State. Analogizing goods trade to services trade in Mode II, allows the conclusion that an export subsidy would be “any measure which grants benefits to domestic suppliers of a Member generating as a result of such measure ‘runaway business’ from another Member.”⁵⁰ Most CARICOM countries provide incentives to the tourism sector through the Hotel Aids Ordinance and other programs.⁵¹

⁵⁰ Majluf, *supra* note 34.

⁵¹ *Id.* at 9.

According to some CARICOM countries' regulations, it is obvious that these countries are promoting their tourism businesses. The following are some examples:⁵²

- (1) Anguilla: enacts an Ordinance to provide for the establishment of a statutory authority known as the Anguilla Tourist Board for the *encouragement, promotion and development of tourist traffic to Anguilla*, for adequate and efficient tourist services for Anguilla, and for matters connected therewith or incidental thereto.⁵³
- (2) Bahamas: enacts an Act to encourage the construction of hotels in the colony by *providing for the refund of customs duties and emergency taxes and certain other concessions*, and for the exemption of such hotels from certain taxation, and also to relieve existing hotels from certain taxation.⁵⁴
- (3) Dominica: enacts an Ordinance to promoting the hotel industry in Dominica by *granting certain relief with respect to customs duties, income tax, and real property tax* to persons who expend moneys upon the construction or equipment of hotels in Dominica and for purposes incidental thereto and connected therewith.⁵⁵
- (4) Mexico: enacts a law comprised of five parts sub-divided into chapters and articles in Spanish. Provides for the development of tourism, in terms of the planning of tourism including priority development zones, the decentralization of

⁵² Onecaribbean.org, www.onecaribbean.org. (It is the official tourism business website of the Caribbean countries, and contains detail information on each Caribbean countries' domestic regulations on tourism information.) *See also* Caribbean Tourism Legislation Database, www.onecaribbean.org/content/files/legislationdatabase.doc. (It contains individual country's domestic regulations.)

⁵³ *Id.* (The Anguilla Tourist Board Ordinance, 1993. (No. 16 of 1993))

⁵⁴ *Id.* (The Hotels Encouragement Act, 1954, with subsequent amendments. Chapter 304)

⁵⁵ *Id.* (Hotel Aids Ordinance, 1958. Ch. 321)

functions, the *promotion and publicity of tourism*, the National Tourism Fund, and operational aspects of the sector.⁵⁶

- (5) St. Vincent & The Grenadines: enacts an Act to provide incentives for the renovation, refurbishment and expansion of existing hotels, for the construction of new hotels, and for matters incidental thereto and connected therewith.⁵⁷
- (6) Turks & Caicos Islands: enacts an Ordinance to encourage the establishment, conduct, and expansion of development enterprises on the islands by the granting of relief from customs duties and taxes to persons engaging in such enterprises incidental to and connected with any of the foregoing purposes.⁵⁸

Fiji also has subsidies provided in the Hotels Aid Act.⁵⁹ The article provides that,

Subject to the other provisions of this section, where a hotel owner:

- (a) has been granted provisional approval; and
- (b) has completed the project and the amenities thereto have been provided in accordance with the provisional approval,

he shall be *granted a subsidy up to a maximum rate of 7 per cent of the total capital expenditure* incurred in the project and in the provision of such amenities as may be approved by the Minister in the provisional approval, but less the cost of any land acquired for the project.⁶⁰ (emphasis added).

⁵⁶ *Id.* (Ley Federal de Turismo, 1992 (Federal Tourism Law))

⁵⁷ *Id.* (The Hotel Aid Act, 1988. (No.16 of 1988))

⁵⁸ *Id.* (Encouragement of Development Ordinance, 1972. (No. 2 of 1972))

⁵⁹ Laws of Fiji, Chapter 215, Hotels Aid, Ordinance No. 35 of 1964, Legal Notice No. 112 of 1970, Acts Nos. 35 of 1975, 17 of 1981, available at http://www.paclii.org/fj/legis/consol_act_OK/haa105/. (Hotel Aid Act is established to induce investment and re-investment in the hotel/resort segment of the tourism sector, the Hotel Aid Act is administered by the Product & Development Unit. The Hotel Aid Act consists of investment incentives divided into 2 major parts. Part 1 of the Hotel Aid Act features standard allowances and subsidies whilst Part 2 features the Short Life Investment Package.)

⁶⁰ Article 5(1), Laws of Fiji, Chapter 215, Hotels Aid, *Ordinance No. 35 of 1964, Legal Notice No. 112 of 1970, Acts Nos. 35 of 1975, 17 of 1981.*

Many countries, such as France, Malaysia, India, Singapore, the United States, and the United Kingdom, provide incentives to promote tourism.⁶¹ France provides grants to improve the accessibility of geographical regions such as Reunion.⁶² Singapore supports cheap flights and provides training grants to help its tourism business.⁶³

These examples support the claim that countries do provide incentives for tourism through domestic aid programs. At a preliminary glance, these are real examples of Mode II subsidies. However, I believe there are more factors to be considered.

I propose to use the goods trade as a model to start defining certain aspects of the service trades, including the definition of subsidy and the categorization of subsidy. We should be reminded that the definition of export subsidy is “subsidies *contingent, in law or in fact*, whether solely or as one of several other conditions, *upon export performance*, including those illustrated in Annex I.”⁶⁴ (emphasis added) As previously introduced, export performance is a criterion for determining whether there is an *export* subsidy. Therefore, keeping this criterion in mind, we should look into these domestic regulations again.

Based on the definition of export performance listed in the definition, the regulatory system to be adopted should provide an important condition, instead of merely identifying *incentives*. This important condition is that a subsidy can only be granted if the consumers are foreigners, not nationals. Suppose the law only grants subsidy to hotels, saying that if guests are not locals, these guests can receive a cheaper price for staying. The government will help cover the price difference. In this case, I suggest *it is* an export service subsidy in Mode II.

⁶¹ Rajeev Ahuja, *Towards Developing Subsidy Disciplines under GATS*, Indian Council for Research on International Economic Relations, Working Paper No.174, November 2005, at 29, available at <http://www.icrier.org/pdf/WP174.pdf>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 14 [hereinafter the SCM Agreement], art. 3.1(a).

One possible situation is, in fact, the export performance. Suppose the law grants a subsidy to hotels but does not require guests to be foreigners. While, on its face, this law does not target foreigners, if that is the group that benefits in fact, the targeted consumers are still foreigners. In this situation, I propose *it is still* an export service subsidy in Mode II.

With this element, previous examples of domestic tourism aids can possibly be considered export subsidies. Based on the limited information currently available, I do not believe that making a rush determination is appropriate.⁶⁵ Hence, it should be left to Members to develop further findings on these relevant laws.

Another commonly seen example is found in government support of events that attract a global audience, such as the World International Exposition (World Expo),⁶⁶ the Olympics,⁶⁷ the FIFA World Cup,⁶⁸ etc. While holding such an event, governments will grant support to the local industries, such as hotels, transportation, and other services. This definitely gives the tourism industry parallel benefits. But one crucial element is whether such world events are supported by governments.⁶⁹ If the recipients of the benefit are governments themselves, then those benefits will not be considered Mode II examples.

⁶⁵ Ward, *supra* note 48, at 33. (She states that, “By contrast, for some services, the granting of a subsidy is tied to anticipated export earnings, for example, almost all subsidies for the delivery of tourism services through Mode 2 may be considered *de facto* subsidies.”)

⁶⁶ Official Site of the Bureau International des Expositions, <http://www.bie-paris.org>. (The history of having World Expo can be traced back to 1851, in London, United Kingdom. As for the 2010 World Expo, it is held in Shanghai, China. The benefits that incurred from holding the World Expo.). Yang Lina, *Shanghai World Expo to boost economy*, English.Xinhua.Net, http://news.xinhuanet.com/english2010/video/2010-03/15/c_13211350.htm. (“Massive infrastructure construction and stimulated consumption are set to drive the local economy.... Some 70 million visitors from home and abroad, are expected to attend the event. Revenue generated by tickets, food and souvenirs is expected to reach 11 billion yuan. Businesses related to travel and hotels are expected to pull in 80 billion yuan. (emphasis added)”)

⁶⁷ This international sports game is held in different cities. The International Olympic Committee will make vote for the city during the IOC session. *See generally* Official website of the Olympic Movement, <http://www.olympic.org/en>.

⁶⁸ The world cup is held by FIFA in different FIFA member countries for holding men’s international soccer tournaments. *See generally* FIFA World Cup, <http://www.fifa.com/aboutfifa/index.html>.

⁶⁹ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1999, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS], art. 3. (“For the purposes of this Agreement:

3. Mode III Examples

In Mode III, an analogous example would be an export subsidy by any measure which provides a benefit to service suppliers of a Member to establish abroad or once the supplier is established to support its operation in another Member's territory.⁷⁰

Subsidies under Modes III and IV rarely occur since no country has an incentive to support this type of activity in the services trade. Instead, governments would encourage domestic corporations or people to provide services domestically. Hence, Mode III and Mode IV examples will contradict the general practices.⁷¹ This is the conclusion found in a working paper published by The South Centre,⁷² which states that,

Conceptualizing an export subsidy is not straightforward in the case of mode 3. There are not many situations where a government would give a subsidy, in the traditional sense, to a firm that was planning to establish itself in another country. It is more likely that countries wishing to attract foreign investment provide

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- (a) "measures by Members" means measures taken by:
- (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities)

⁷⁰ Majluf, *supra* note 34.

⁷¹ 楊光華, 服務補貼規範展必要性之初探, 政大法學評論 *translated in*, Guang-hua Yang, *Discussion on the Necessity to Have Service Subsidy Regulations in WTO*, Chengchi Law Review, at 123, footnote 12 (2004). Sauvé Pierre, *Completing the GATS Framework: Addressing Uruguay Round Leftover*, *Aussenwirtschaft*, Vol. 57, No. 3, 329-330 (2002), available at <http://www.cid.harvard.edu/cidtrade/Papers/Sauve/sauvegats.pdf>. Calvin Maduna, *The WTO Services: An Analysis Of The Gats And Issues Of Interest For Least Developed Countries*, Trade-Related Agenda, Working Papers 23, South Centre December 2004 Development And Equity, at 41, available at http://www.southcentre.org/index.php?option=com_content&view=article&id=224%3Athe-wto-services-negotiations-an-analysis-of-the-gats-and-issues-of-interest-for-least-developed-countries&catid=52%3Atrade-in-services&lang=en.

⁷² See generally South Centre, www.southcentre.org. (In August 1995, the South Centre was established as a permanent inter-Governmental organization of developing countries. In pursuing its objectives of promoting South solidarity, South-South cooperation, and coordinated participation by developing countries in international forums, the South Centre has full intellectual independence. It prepares, publishes and distributes information, strategic analyses and recommendations on international economic, social and political matters of concern to the South. The South Centre enjoys support and cooperation from the governments of the countries of the South and is in regular working contact with the Non-Aligned Movement and the Group of 77. The Centre's studies and position papers are prepared by drawing on the technical and intellectual capacities existing within South governments and institutions and among individuals of the South. Through working group sessions and wide consultations which involve experts from different parts of the South, and sometimes from the North, common problems of the South are studied and experience and knowledge are shared.)

incentives argued as a means of development assistance based on market failures.⁷³

It is true that a country rarely benefit from subsidizing its people and companies to provide services overseas. But it is NOT impossible.

Without considering reasons, countries do have laws that authorize subsidies to local companies to provide service overseas. The Taiwanese government provides some regulations to help their local industries invest overseas, or to invest in countries that maintain diplomatic relations with Taiwan.⁷⁴ Another example would be the United States Overseas Private Investment Corporation (OPIC). OPIC facilitate long-term borrowing through U.S. Government-backed loan guarantees.⁷⁵ Moreover, OPIC provides direct loans, loan guarantees,⁷⁶ and investment funds⁷⁷ to U.S. businesses. These provisions of support are based on the belief that it is appropriate to encourage overseas development through private industries.⁷⁸

The South Centre working paper further states that,

⁷³ Calvin Manduna, *The WTO Services Negotiations: An Analysis of the GATS and Issues of Interest for Least Developed Countries*, Trade-Related Agenda, Development and Equity (T.R.A.D.E.), Working Papers 23, at 41 (December 2004), available at

http://www.southcentre.org/index.php?option=com_content&view=article&id=224%3Athe-wto-services-negotiations-an-analysis-of-the-gats-and-issues-of-interest-for-least-developed-countries&catid=52%3Atrade-in-services&lang=en.

⁷⁴ Ministry of Economic Affairs, Department of Investment Services, *Assistance for Foreign Investment and Technical Cooperation*, <http://www.dois.moea.gov.tw/asp/law1.asp> and *Assistance with Corporation to Invest in Country with Public Relation*, <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=J0040013>.

⁷⁵ OPIC, Investment Funds, at1, available at

http://www.google.com/url?sa=t&rct=j&q=opic%20support%20market%20prices&source=web&cd=2&sqi=2&ved=0CCkQFjAB&url=http%3A%2F%2Fwww.opic.gov%2Fsites%2Fdefault%2Ffiles%2Fdocs%2Fopic_investment_funds2009.pdf&ei=tL6wTuPCK8jt0gHxkdHjAQ&usq=AFQjCNHe8u8-XYv6dvEKBB-pr8hfEQvYg.

⁷⁶ OPIC, *Finance Eligibility Checklist*, <http://www.opic.gov/financing/eligibility-checklist>.

⁷⁷ Overseas Private Investment Corporation, *How Funds Work*, <http://www.opic.gov/investment-funds/how-funds-work>. (“Typically, OPIC financing will be provided to the fund in the form of a loan in which certificates of participation guaranteed by OPIC (and backed by the full faith and credit of the U. S. Government) are sold to “eligible investors” as defined in OPIC’s governing statute. In general, eligible investors include: U.S. citizens; U.S. corporations, partnerships, or the like which are more than 50% beneficially owned by U.S. citizens; and foreign entities wholly owned by U.S. citizens. OPIC requires either (1) that the fund manager or general partner be eligible investors, or (2) a significant percentage of the limited partner capital of the fund (typically, an amount equal to 25% of the OPIC financing) be provided by eligible investors.”)

⁷⁸ OPIC, *Overview*, <http://www.opic.gov/doing-business-us>.

Export market development is another important category of subsidized services as governments provide assistance to cover the costs of various activities aimed at penetrating new markets abroad or for preparation of feasibility studies and project proposals. These are all programmes primarily intended to lead to exports of services. Many firms from LDCs and developing countries have complained about these subsidies, particularly, in engineering and consultancy services – as they find themselves unable to compete with subsidized foreign firms both abroad and in their own home markets. Indeed, subsidized feasibility studies could lead to exports of major projects, which might also be subsidized by export credits tied to purchase of both goods and services from the country of origin.⁷⁹

The paper cites Canada’s Program for Export Market Development as an example.⁸⁰

This program is called Global Opportunities for Associations (GOA), formerly the Program for Export Market Development - Associations (PEMD-A). The purpose of the GOA is “to provide contribution funding to support national associations undertaking new or expanded international business development activities, in strategic markets and sectors, for the benefit of an entire industry (member and non-member firms).”⁸¹

The eligibility requirements include, for example, the obligation “to be a *national* association (or in some cases, a regional association with a national perspective) whose objective is to promote sector-specific international business development for its members and industry at large.”⁸² Eligible activities for this type of support include,

Those activities may promote products or *services*, improve market access, or generate market intelligence. Three types of international business promotion activities are eligible:

- (1) direct contacts (such as trade shows, outgoing missions and *incoming visits*)

⁷⁹ Manduna, *supra* note 73, at 41.

⁸⁰ *Id.*

⁸¹ Official website of Foreign Affairs and International Trade Agenda, *Global Opportunities for Associations (formerly PEMD-A)*, <http://www.tradecommissioner.gc.ca/eng/funding/global-opportunities-associations/home.jsp>.

⁸² Official website of Foreign Affairs and International Trade Agenda, *Global Opportunities for Associations (formerly PEMD-A): Program Eligibility*, <http://www.tradecommissioner.gc.ca/eng/funding/global-opportunities-associations/eligibility.jsp>.

(2) marketing tools (such as *web site development targeting foreign customers*, print materials and other materials that promote integrative trade opportunities of a Canadian industry

(3) other marketing activities (such as *research*, awards programs, and *indirect marketing* that promotes relationship building, or improves access to foreign markets).⁸³

The benefits conferred by this program are,

Annual non-repayable contributions range from a minimum of \$20,000 to a maximum of \$150,000 and the funding approvals are made for a one-year period for activities and related expenditures taking place between April 1 and March 31 of the following year. GOA provides matching funds of up to 50% of eligible expenses.⁸⁴

In certain fields of services, such as energy services, it is common to see companies receiving government support for situating R&D activities overseas. Intensified global competition has forced companies to invent and develop commercially viable products and services faster. At the same time, the requisite knowledge has become more multidisciplinary and more broadly located, making innovation more expensive and riskier than ever. Hence, innovation strategies increasingly depend on global sourcing. This has become a major motive for locating R&D outside the home country.⁸⁵ So, it is also logical to say that, in the above situation, governments may subsidize local industries to establish subsidiaries overseas.

In addition to the R&D example, government support programs mentioned in Mode I can also be applicable in Mode III. The reason why these programs are applicable in both Mode I and Mode III is that these programs' mission is to *support their local industries ability to export goods and services offshore*. In order to export goods and services, companies can decide to establish subsidiaries or simply export through traditional channels.

⁸³ *Id.*

⁸⁴ Official website of Foreign Affairs and International Trade Agenda, *supra* note 77.

⁸⁵ Radhika Perrot and Sergey Filippov, *Localization Strategies of Firms in Wind Energy Technology Development*, United Nations University – Maastricht Economic and social Research and training centre on Innovation and Technology, Sep. 2010, at 8, available at <http://www.merit.unu.edu/publications/wppdf/2010/wp2010-047.pdf>.

Stories of success published on governments websites demonstrate that such subsidies are provided to businesses that are setting up a commercial presence offshore. An illustrative example is Envirup.com, a Nottingham-based waste management service company that was seeking to build an Electrical Waste Recycling plant in Romania.⁸⁶ With help from the British government, the company modified their original plan for approaching the Romanian market.⁸⁷ Guntert & Zimmerman Const. Div., Inc, a California-based construction company, also received support in its expansion into Eastern Europe.⁸⁸ Because of the funds it received, Guntert & Zimmerman made a sale in early 2010 of \$1.4 million in concrete paving equipment to a Czech Republic company looking to expand its fleet of road construction machinery.⁸⁹

4. Mode IV Examples

The Mode IV category would capture as an export subsidy any measure which provides a benefit to natural persons of a Member, who temporarily supplies a service in another Member's territory.⁹⁰

At first glance, it also seems quite unlikely that a country would subsidize its nationals to work abroad. Sending nationals to work offshore seems to mean giving away a country's

⁸⁶ British Chambers of Commerce, *Case studies: An Opportunity Too Good to Waste*, http://www.britishchambers.org.uk/zones/export/case-studies_1/uniway-solutions-ltd.html.

⁸⁷ *Id.* ("Romania is not yet ready for world class waste management. The state-of-the-art services that we have here in the UK are simply not appropriate for that marketplace. They need an intermediate level service. For example, at the time of my visit, all municipal waste went straight to landfill. However, the landfill sites were being closed down in preparation for accession to the EU. They needed an immediate solution to the problem but were not in a position to introduce the best of what is available in the UK. At present, the Romanian market for waste management is probably 20 or 30 years behind the UK").

⁸⁸ Export-Import Bank of the United States, *Small Business Success Stories*, http://www.exim.gov/sbgport/SB_success.cfm.

⁸⁹ *Id.*

⁹⁰ Majluf, *supra* note 34.

resources to other countries. Because countries generally wish to keep experts in their domestic markets, it is hard to conceive of the possibility of subsidizing nationals to work offshore.

However, hypothetically, it is still possible for countries to subsidize their workers offshore. Suppose a certain service sector within a country is full, and there are a lot of service providers unemployed. Governments may take several methods in dealing with this situation. While attracting foreign companies to run business domestically is the most common strategy, an alternative is to provide support to citizens working abroad in the saturated sector. This type of scenario has occurred in both the Philippines and in India.

The Philippines government has long provided support to its nationals to work overseas, as its economy is incapable of creating jobs for all of its citizens domestically. According to the Manila-based IBON Foundation, the Philippines faces historic joblessness, with an average annual unemployment rate of 11.3% from 2001 to 2007.⁹¹ Exporting labor has become the passport to safer and greener pastures for both jobless Filipinos and the government, which is already plagued by sporadic political unrest over legitimacy and corruption issues.⁹²

In response to these issues, the Philippines government established the Philippines Overseas Employment Administration (POEA) to help their people work overseas.⁹³ Remittance is a key issue in this process, and the Philippine government has actively encouraged people to send money back home.⁹⁴ Moreover, by migrating officially, migrants receive a number of subsidized benefits: pre-migration training on social and work conditions abroad, life insurance

⁹¹ Carmela Cruz, *Global Crisis Hits Overseas Workers Hard*, ALTERNET, Dec. 27, 2008, http://www.alternet.org/immigration/115014/global_crisis_hits_overseas_workers_hard/.

⁹² *Id.*

⁹³ See generally Official Website of the Philippine Overseas Employment Association, www.poea.gov.ph.

⁹⁴ Kevin O'Neil, *Labor Export as Government Policy : The Case of Philippines*, MIGRATION INFORMATION SOURCE, Jan. 2004, <http://www.migrationinformation.org/feature/display.cfm?ID=191>.

and pension plans, medical insurance and tuition assistance for the migrant and his or her family, and eligibility for pre-departure and emergency loans.⁹⁵

In Indonesia and Vietnam, governments are also supporting citizens that decide to work offshore, and governments seem to support the idea of exporting workers overseas to rake in badly needed foreign exchange.⁹⁶ This results in new problems such as increasing crime rates, abuse of workers, and human rights violations.

Some states in India face similar problems. Kerala is a typical example, and its unemployment is a big issue, forcing citizens to find work in the Persian Gulf area. An interview with a Kerala native reveals a proper description on the situation, “So many educated people are here, but we have no jobs.”⁹⁷ Therefore, the government of Kerala provides some programs helping their nationals work abroad.⁹⁸

These are examples of Mode IV subsidies. An interesting point is that these programs provided by governments may raise similar questions as those raised in Modes I and III. Because most of these programs are found in Southeast Asia, people may question the purpose of establishing programs that help nationals work overseas. Due to bad economic markets, people are forced to work overseas. Governments cannot stop them from working offshore. Instead, they are taking actions to help them work offshore and to secure their people’s benefits. However, as mentioned previously, the original purpose does not matter, and what matters the most is the effect of providing incentives for service providers to work overseas.

⁹⁵ *Id.*

⁹⁶ Tran Dinh Thanh Lam, *Vietnam’s overseas workers get raw deal*, ASIA TIMES ONLINE, July 2, 2003, http://www.atimes.com/atimes/Southeast_Asia/EG02Ae05.html.

⁹⁷ Jason DeParle, *Jobs Abroad Support “Model” State in India*, THE NEW YORK TIMES, Sept. 7, 2007, available at http://www.nd.edu/~jwarlick/documents/DeParle_JobsAbroadSupportModelStateinIndia.pdf.

⁹⁸ The Official Web of Government of Kerala, *Service/Activities*, http://www.kerala.gov.in/index.php?option=com_content&view=article&catid=85:non-resident-keralites-affairs-department&id=2956:norka-dept-services&Itemid=2258.

C. RECOMMENDATIONS ON THE PROBABILITY QUESTION

From the above discussion, one can see that export subsidies may occur in all four service modes. Some Members' statements, providing no real world examples of service subsidies, question this conclusion. On the other hand, apart from demonstrating that real world service subsidies exist, additional empirical evidence is necessary for further development. This could affect Members' motives to conduct future negotiations on service subsidies, and remind Members to fulfill their obligations under the GATS.

Regarding the possible economic effects on export service subsidies, I have not conducted any empirical economic analysis. Therefore, the monetary impact of trade-distorting effects caused by these possible export subsidies cannot be estimated or calculated.⁹⁹ Moreover, more detailed information is necessary in order to examine some of the examples, and corroborate existing information on their impact upon markets.¹⁰⁰ It is understood that some scholars opposed to regulating export service subsidies are on the side of developing countries. I also recognize the truth that it is impossible to have a complete elimination of export subsidies at the present time. This is why I have proposed a compromise structure for the current

⁹⁹ Majluf, *supra* note 34, at 18. ("Conceptually, these (SCM) conditions could apply to trade in services. However, the SCM assumes by definition that all export subsidies have adverse effects on trade, therefore they are prohibited. There is no need also to prove actual distortion of trade in order to prove export contingency. In the case of services the possible effects of subsidies on trade are not as straightforward as in the case of goods; neither is the determination of those cases in which in fact, not by law, the subsidy is contingent upon export performance.")

¹⁰⁰ *Id.* at 19. ("Article XV recognizes that in "certain circumstance" subsidies have trade-distortive effects. The outright prohibition of export subsidies, or their phasing-out, will require that a very convincing case be made demonstrating that in all circumstances exports subsidies distort trade. Even in such a case treatment to be granted to developing countries should be carefully assessed. Export-enhancing subsidies can play an important role in the development of service sectors in developing countries, and in pursuing national policy objectives. Furthermore, the outright prohibition of this type of services can limit the possibilities open to these countries to benefit from the new market opportunities provided by trade liberalization in developed countries. It might be the case that an initial push might be required to allow domestic services providers to venture in the international market. From the point of view of developing countries interests it seems to be more favourable to rely on the trade-distorting effect, or injury test, rather than renouncing policy area altogether, in dealing with export subsidies.")

negotiation. This analysis provides further support for the concept of a *hybrid* regulation model for service subsidies and countervailing measures.

What we can determine is that export subsidies do occur in all four modes of service supplies, even though their trade-distorting impacts are controversial. This makes a phasing-out process preferable to the outright and immediate elimination of all such subsidies. Furthermore, the authorization of differential/preferential treatments is indispensable for the purpose of protecting developing countries and least-developed countries.

I recognize that more empirical data is necessary to any final determination of the best regulatory system for service subsidies. But enough information exists to conclude that Members should be motivated to act on their mandates, especially information exchange. That process will help provide the information on which a better structure can be built.

At the beginning of this chapter, I stated that if a *hybrid* regulatory structure is applied to service subsidies, a system for the imposition of countervailing measures may not be appropriate at this time. With more information and empirical evidence (which can result from the required information exchange), however, Members might progress to a more advanced system regarding countervailing measures in the future.

The fact that the appropriateness of countervailing measures is not an issue in applying the *hybrid* approach, does not mean that countervailing measures are inappropriate in services trade. If we recall that the purpose of countervailing measures is to offset the trade-distorting effects resulted from subsidies, then it is reasonable to believe that having countervailing measures in the GATS might also create similar effects to offset service subsidies.

I have concluded that it is probable that export subsidies exist in all four modes of services supply. Suppose in the future negotiation rounds, Members agree to bring in the

concept of countervailing measures at the end of the peace clause period. More issues will be left to handle, such as measuring the magnitude of subsidization, assessing the impact on domestic producers and in trade in general, and designing appropriate remedies.¹⁰¹ Without Members' active participation in this matter, these technical issues will be hard to resolve. Nevertheless, it is important to consider such matters. Therefore, in Chapter 9, I will follow up this discussion of the probability of subsidies in each mode of service supply by considering both the appropriateness of countervailing measures, and their administrability and feasibility within the GATS.

¹⁰¹ *Id.* at 20. (He further mentions that, "Many of the provisions of the SCM would not be therefore easily transferable to trade in services....Therefore, a gradual approach might be advisable in developing rules and disciplines for subsidies on trade in services. Some basic disciplines can be put into effect, and those reviewed and expanded over time. The evolution of disciplines on subsidies on trade in goods shows the complexity involved in such as task.")

IX. THE POSSIBLE APPLICATION OF COUNTERVAILING MEASURES IN SERVICES TRADE

In Chapter 8, I introduced the concept of countervailing measures in the goods trade and discussed its application to services trade. Under the *hybrid* approach that I propose, a countervailing measures mechanism is not necessary at this time. But, what about having countervailing measures in the future? If, as was demonstrated in Chapter 8, one can find examples of service subsidies in each of the four modes of supply, is it feasible or administrable to have countervailing measures applicable to subsidies in trade in services? In this Chapter, I will discuss the possible application of CVDs to services subsidies in general, and to export subsidies in particular.

A. CONDITIONS FOR THE IMPOSITION OF COUNTERVAILING DUTIES IN THE SCM AGREEMENT

First, let us recall from Chapter 3 that there are three requirements for conducting CVD proceedings: subsidy, material injury, and a causal relationship between the subsidy and the injury.¹ In Chapter 7, I demonstrated that subsidies can exist as a practical matter in each of the four modes of delivery in services trades. Thus, the first requirement for obtaining a CVD

¹ See Chapter 4.II.B of this dissertation.

remedy can *actually* exist in each mode, but this does not yet satisfy the other two requirements – material injury and causation. Demonstrating these two requirements with detailed, empirical evidence and adequate data is indispensable. The limited availability of information regarding subsidies in the services trade is an obstacle in writing this dissertation. It is expected that Members and international organizations will continue to make contributions to the information database. Based upon the information available, however, I will propose relevant regulations for each requirement.

1. Recommendations on the Existence of a Service Subsidy

The first requirement is that there is a subsidy taking place in a service trade. Comparatively, this element is easier to prove than the other two. As long as Members agree on the definition of subsidy and upon classification, we can identify the existence of a subsidy practice. As shown in the examples in Chapter 8, export service subsidies can exist as a practical matter in every mode of supply. Apart from export subsidies, many domestic service subsidies also exist. In Rajeev Ahuja's working paper, he observes that many (sector-specific) subsidies exist:

- (1) *Telecommunication services*: The U.S. provides a number of direct mechanisms that target both service providers and subscribers. Malaysia provides fiscal incentives to promote investments in telecommunication. China provides low interest loans, offers discounted tax rates, and makes generous provisions of land in high-technology parks. India provides preferential credit and guarantees and loans to service providers, like BSNL. Singapore supports subsidized loans,

organizes training and human resource programs, reimburses trade promotion costs incurred by firms, and gives tax incentives to exporters.²

- (2) *Social services*: Canada provides subsidies to promote public care in less prosperous provinces, for research and innovation in health information, for professional training, and for public health research for certain diseases such as cancer. China funds a national disease prevention control centre and local disease prevention projects. India provides funding for national disease control programs including HIV/AIDS, and for implementing family planning programs. South Africa provides subsidies to facilitate primary health care, to enable lower income groups to use health care facilities, and to facilitate medical care in remote areas.³
- (3) *Audio visual services*: France subsidizes their domestic industries to preserve their culture's independence and diversity, unity and prestige. The United Kingdom gives tax incentives to promote growth, employment, and investment and also to facilitate structural change to meet global competition. Italy subsidizes activities that promote cinematographic projects, including film industry events, public institutions, professional associations, and a screenplay award. Germany subsidizes movies that promote German culture and language. India provides subsidies for the construction of theatre/multiplexes and for the promotion and discovery of national talent.⁴ Canada has several film incentives programs, which no longer require Canadian content.⁵

² Rajeev Ahuja, *Towards Developing Subsidy Disciplines under GATS*, Indian Council for Research on International Economic Relations, Working Paper No. 174, November 2005, at 29-30, available at <http://www.icrier.org/pdf/WP174.pdf>.

³ *Id.* at 30.

⁴ *Id.* at 32.

⁵ See generally Claire Wright, *Hollywood's Disappearing Act: International Trade Remedies to Bring Hollywood Home*, 39 Akron L. Rev. 739 (2006). (These feature film subsidies have caused material injuries to the U.S.

One significant difference between the SCM Agreement and the proposed hybrid system is that: in the current goods trade, only prohibited/actionable subsidies are subject to CVD. In the proposed hybrid framework, at the end of the peace clause, semi-prohibited/semi-actionable subsidies would be subject to CVD disciplines.

2. Recommendations on the Material Injury Determination

The purpose of having a CVD is to eliminate the effects of a subsidy from influencing the importing country's markets. What are the effects of subsidies? Professor Sykes lists two possible effects:

- (1) Subsidies lower the producers' cost of production, and this reduction can lead to two results:
 - (a) Some subsidies depend directly on output. In general, producers will respond to a reduction in short-run marginal costs by lowering the price.⁶
 - (b) Even where the amount of the subsidy is not contingent on output and does not affect short-run marginal costs of production, it can affect long-run marginal costs.⁷
- (2) Subsidies will have no impact on the output of recipients.⁸

Hollywood feature film industry.)

⁶ Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, John M. Olin Law & Economics Working Paper No. 186, 10 (2003), available at http://www.law.uchicago.edu/files/files/186.aos_subsidies.pdf. (Prof. Sykes gives an example that, "the subsidy program may provide a producer with \$1 for each widget that it produces, for example (or \$1 for each widget that it exports, the classic "export subsidy" discussed below). Subsidies that increase with output in this fashion are economically equivalent to a reduction in the short-run marginal costs of production for the producer that receives them.")

⁷*Id.* at 5. (Prof. Sykes gives an example: "imagine an unprofitable company that is unable to cover its operations under ordinary circumstances. A subsidy to that company that is contingent on it remaining in business can avert a shut-down in operations – it must simply be enough to allow the company to cover its variable costs at some level of output. Likewise, a subsidy can induce a company to build new capacity to enter a market when the expected returns to entry absent the subsidy would not be high enough to induce entry.")

Even though it is possible to have export subsidies in the four different modes, the possible effects of subsidies are not as straightforward as they are in goods trade.⁹ The assessment and calculation of a subsidy's impact on domestic markets is fairly difficult. World Trade expert, Luis Abugattas Majluf, raised this concern, saying, "As an example we can mention the presumption of serious prejudice when subsidies are above the benchmark of five percent of the price. In many services it would be difficult even to determine the actual price due to the customized nature of many transactions."¹⁰ In goods trade, it is relatively easy to calculate a subsidy's impact upon an industry, since goods are tangible and the importation of goods can easily be targeted. On the other hand, it is quite difficult to assess a service subsidy's impact due to the complexity of services trade since services are intangible and the importation of services through different modes can be targeted only with difficulty. This difficulty also occurs in the injury test.

According to the SCM Agreement, the applicable concept of injury is "*material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.*"¹¹ The concept of materiality is fairly abstract.¹² Still, the

⁸*Id.* (Prof. Sykes gives an example: "that a government simply sends a company an unexpected check for \$1 million. The money is in no way contingent on the company's output, or on it remaining in business. The owners of the company will be pleased to receive this subsidy, of course, but there is no reason for them to change their operations in any way – whatever level of output was most profitable without the subsidy will also be most profitable with the subsidy.")

⁹ Luis Abugattas Majluf, *Towards Disciplines on Subsidies on Agreements to Liberalize Trade in Services*, Report Prepared for the CRNM/IDB Project, Aug. 2002, at 18, available at http://www.crn.org/index.php?option=com_docman&task=doc_download&gid=166&Itemid=82. Calvin Manduna, *The WTO Services Negotiations: An Analysis of the GATS and Issues of Interest for Least Developed Countries*, Trade-Related Agenda, Development and Equity (T.R.A.D.E.), Working Papers 23, at 41 (December 2004), available at http://www.southcentre.org/index.php?option=com_content&view=article&id=224%3Athe-wto-services-negotiations-an-analysis-of-the-gats-and-issues-of-interest-for-least-developed-countries&catid=52%3Atrade-in-services&lang=en.

¹⁰ Majluf, *supra* note 9, at 20.

¹¹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1999, 1867 U.N.T.S. 14. [hereinafter the SCM Agreement], art. 15, footnote 45.

¹² See 19 U.S.C. § 1677(7) for the definition of materiality is harm that is not inconsequential, immaterial, or unimportant.

SCM Agreement provides some factors for consideration.¹³ The argument for material retardation of the establishment of a domestic industry is rarely successful in practice.¹⁴ However, measuring the degree of subsidies, such as calculating per unit subsidization rates, is challenging.¹⁵ Sauvé Pierre, however, proposes a possible method for calculating injuries:

[T]he serious prejudice provision in the SCM Agreement does contain specific tests of total *ad valorem* subsidization that might be relevant in a service context. In particular, it is worth noting that the SCM Agreement states that serious prejudice is deemed to exist when the overall rate of subsidization exceeds 15% of the total funds invested in a new start-up operation. In a sense, this resembles closely a plausible scenario under Mode 3, whereby the subsidization is given to entice the establishment of a commercial presence by a service provider.¹⁶

Currently, due to the lack of data contributed by Members, there is not enough evidence available to make a determination on the appropriateness of CVDs. Pierre suggests that calculating the injury is only plausible in mode 3 situations. As for the other three modes, Members need to come up with more empirical analysis.

Based on the definition of injury in the SCM Agreement, a determination of injury shall,

¹³ The SCM Agreement, *supra* note 11, art. 15.7. (“A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

- (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports;
- (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (v) inventories of the product being investigated.”)

¹⁴ RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, 1113 (2007).

¹⁵ Sauve Pierre, *Completing the GATS Framework: Addressing Uruguay Round Leftover*, Aussenwirtschaft, Vol. 57, No. 3, 331 (2002), available at <http://www.cid.harvard.edu/cidtrade/Papers/Sauve/sauvegats.pdf>. (He further mentions in footnote 37 that, “It is also debatable whether it would be advisable to even contemplate a countervailing duty mechanism for services trade. Countervailing implies that the use of an unilateral remedy to try to resolve what is inherently a bilateral or multilateral issue—at least two governments are involved, the one providing the subsidy and the complaining party.”)

¹⁶ *Id.*

be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such product.¹⁷

If we utilize the same requirements in service subsidy situations, then the assessment of injury must be based on *like services and service providers* in a domestic market.

If we apply the *likeness* criteria from the goods trade, then three factors can help us to assess whether services are alike: physical characteristics, consumer habits and tastes, and end use.¹⁸ However, these criteria might raise questions in service trades. Professor Bhala uses the end use criterion as an example: “Consider tertiary education. From the point of view of a teacher, face-to-face instruction and correspondence courses are not qualitatively *like* services. But, to a student who cares solely about obtaining a degree or qualification, the two pedagogies are like.”¹⁹ The concept of *like services and service providers* is also stipulated in the MFN and NT principle in the GATS, which can provide us with some guidance.²⁰ Nevertheless, the current likeness criteria for services and service providers are not yet a major part of the subsidy discussions between Members.

A Working Paper published by the WTO states that,

One explanation may be the limited jurisprudence – only five disputes – existing so far under the GATS. In two disputes, the panels and the Appellate Body made findings with respect to national treatment, but likeness was addressed in a very cursive manner. Moreover, in WTO services bodies, Members have shown

¹⁷ The SCM Agreement, *supra* note 11, art. 15.1.

¹⁸ Bhala, *supra* note 14, at 1589 (citing Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (October 1996)).

¹⁹ *Id.* at 1589.

²⁰ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1999, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS], art II, para. 1. (“With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to *like services and service suppliers* of any other country.”) *Id.* art. XVII, para.1. (“In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own *like services and service suppliers.*”)

limited interest for discussing such issues *in abstracto* and have expressed a preference to leave it to case-law to determine likeness on a case-by-case basis, as has been done under the GATT.²¹

Additionally, among WTO dispute settlement cases, different opinions arise.²² Also, among commentators, different opinions arise.²³ It seems that no conclusion can be drawn on like services and service providers at this time.²⁴ Such an undetermined result will definitely create problems in CVD proceedings for service subsidies.

²¹ Mireille Cossy, *Determining “likeness” under the GATS: Squaring the circle?*, WORLD TRADE ORGANIZATION: ECONOMIC RESEARCH AND STATISTICS DIVISION, Staff Working Paper ERSD-2006-08, Sept. 2006, at 2, available at http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf.

²²*Id.* at 7-8. Those cases are:

Cases	Comments on likeness
EC – Bananas III	the panel circumvented the difficulty of determining likeness of service suppliers by finding that “to the extent that entities provide these like services, they are like service suppliers” (Panel report in <i>EC – Bananas III</i> , para. 7.322)
Canada – Autos	The panel found that, contrary to what was claimed by Japan, there were no “like” Japanese and Canadian wholesaler service suppliers; hence, “in the absence of ‘like’ domestic service suppliers, a measure by a Member cannot be found to be inconsistent with the national treatment obligation in Article XVII of the GATS” (Panel report in <i>Canada – Autos</i> , paras. 10.283-10-289)
US – Gambling	Different opinions on whether there was “always a need to assess likeness for both ‘services’ and ‘service suppliers’” (Panel report in <i>US – Gambling</i> , page C-44) Antigua argued, in essence, that a cumulative requirement would have the effect of limiting the scope of Article XVII since “less favourable treatment of like services would only be caught by Article XVII to the extent that the services are supplied by like service suppliers”. (Panel report in <i>US - Gambling</i> , p. C-44) the United States argued that likeness had to be established for both services and service suppliers. (Panel report in <i>US – Gambling</i> , p. C-45)

²³ *Id.* at 8-9. (These opinions include, “Abu-Akeel argues that the reference to services and service providers is of little practical significance because “any treatment of services is also, in effect, a treatment of the suppliers thereof and vice-versa”. Hence, the reference to services and suppliers does not do any harm, “except for the confusion it may cause as it implies that the distinction has a practical significance”. Nicolaidis & Trachtman attach importance to the fact that Article XVII refers to both services and suppliers. These authors argue in favour of a “disjunctive” test, whereby both services and service providers would have to be evaluated, but separately.¹⁹ This “disjunctive test” is supported by Krajewski who is concerned that a “cumulative” test would not allow Members to discriminate among like services because a measure “which treats service suppliers – for valid regulatory reasons – differently could be invalidated if (also) affected the supply of like services”)

²⁴ *Id.* at 46. (“The correlation between services and service suppliers has been dealt with in a cursory manner by panels, with the result that the concept of like suppliers remains largely empty. This is not surprising since the traditional likeness test developed under the GATS is ill-suited to compare service suppliers... There seems to be a shared feeling that the well-established GATT approach to determine likeness of goods cannot be mechanically transposed under the GATS. The four criteria used in GATT jurisprudence offer a narrow base for determining likeness of services and service suppliers, and may have liberalizing effects exceeding what is necessary to protect conditions of competitions for foreign services and service suppliers.”)

With respect to the distinct modes of supply in service trades, I propose that the SCM Agreement factors might not be sufficient. The SCM Agreement should include more factors to assess the materiality of injuries. These additional factors may include: unemployment rates/salary reduction of service providers (as in Mode 4), lost sales/lost business (as in Mode 3), and Gross Domestic Product (GDP) of a country, among others. The uncertainty of like services and service providers will hinder Members' implementation of CVD mechanisms.²⁵ However, the question of likeness of services and service providers arises not only in subsidy cases, but also in MFN and NT situations. If more information and data are provided by Members, then these issues might be more clearly considered. At the present stage, it is not possible to adequately judge the appropriateness of CVDs in service trades as a response to subsidies.

3. Recommendations on the Question of Causation between the Subsidized Imports and the Injury

The third requirement for the introduction of CVD relief is to determine the *causal relationship* between the subsidized service imports and the material injury suffered by domestic service industries. In U.S. proceedings regarding subsidized goods, in a CVD investigation, “a private petitioner must show more than the existence of an illegal subsidy and material injury or threat. To be successful, the injury or threat must occur *by reason of* the unlawful subsidy.”²⁶ The SCM

²⁵ Pierre, *supra* note 15. (He states that, “For mode 1, there would be several implementation problems, such as...the conceptual difficulty of defining ‘like services’ and ‘like domestic services providers.’”)

²⁶ Bhala, *supra* note 14, at 1141. (“In the *Gerald Metals, Inc v. United States*, United States Court of Appeals for the Federal Circuit, 132 F.3d 716, 720 (1997). The court states that, “Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Suramerica*, 44 F.3d at 985 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)). However, the substantial evidence standard requires more than mere assertion of “evidence which in and of itself justified [the Commission’s determination], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.” *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487, 95 L. Ed. 456, 71 S. Ct. 456 (1951)). Rather “the substantiality of evidence must take into account whatever in the record

Agreement provides some guidance in determining this *casual relationship*.²⁷ The concept of causation in both the U.S. proceedings and WTO rules is less precise than the injury test discussed previously. However, some U.S. and DSB decisions can provide guidance in assessing causal relationships, including those issued under the Anti-dumping or Safeguard Agreements.

In dumping cases, “essentially, as long as injury occurs by reason of dumped merchandise, causation is assumed.”²⁸ There are many other factors that could cause the injury suffered by domestic industries. The languages of the Anti-Dumping Agreement and the SCM Agreement are similar,²⁹ asking an investigating authority to differentiate other factors taking place at the same time.³⁰ To determine whether a causal relationship exists between dumped products and injury is a crucial step for DSB panelists.³¹ Professor Bhala outlines five steps in this process:

fairly detracts from its weight.” *Id.* (quoting *Universal Camera*, 340 U.S. at 488).”

²⁷ The SCM Agreement, *supra* note 11, art. 15.5. (“It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry”)

²⁸ Bhala, *supra* note 14, at 1112. (He further mentions that, “...in practice, causation winds up being confused with correlation. Cleaver choice of the period of investigation (POI) helps ensure the time during which merchandise is dumper corresponds to the time of woe as described by a petitioner.”)

²⁹ The SCM Agreement, *supra* note 27.

³⁰ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201 [hereinafter AD Agreement], art. 3.5. (“It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. *The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.* Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry (emphasis added).”)

³¹ Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,

- (1) “Identifying factors that could be causing injury to the petitioner;
- (2) Checking to see whether these factors are operating simultaneously;
- (3) Examining all of the factors to see if they do, in truth, have an injurious effects;
- (4) Differentiating injurious effects of subject merchandise from injurious effects of all other known factors;
- (5) Ensuring that injury caused by other factors is not erroneously attributed to subject merchandise.”³²

Moreover, The DSB clarified the issue of causal relationship in *United States – Subsidies on Upland Cotton*.³³ There it was determined that, in assessing causation, the DSB must consider other factors, such global demand, currency exchange rates, and other international issues.³⁴

With services subsidies, there may be other relevant factors causing injury to domestic service industries, in addition to subsidies. As shown in the Mode II examples, many factors can affect a country’s tourism business. Tourists might be more inclined to travel because their domestic currencies are strong, because of seasonal sceneries (e.g. cherry blossoms), or because

WT/DS184/AB/R, at para. 223 (July, 24, 2001). (“Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury.”) See also Appellate Body Report, *European Communities – Anti Dumping Duties on Malleable Cast Iron Tube or Pipe Fitting from Brazil*, WT/DS219/AB/R, at paras. 191-192 (July, 22, 2003). (“We do not find that an examination of collective effects is necessarily required by the non-attribution language of the *Anti-Dumping Agreement*. In particular, we are of the view that Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors... We are therefore of the view that an investigating authority is not required to examine the collective impact of other causal factors, provided that, under the specific factual circumstances of the case, it fulfills its obligation not to attribute to dumped imports the injuries caused by other causal factors.”)

³² Bhala, *supra* note 14, at 1162.

³³ Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (March 21, 2005).

³⁴ *Id.* at para. 456-457.

of visa waiver programs.³⁵ Conversely, a natural disaster may produce a negative impact on a country's tourism business (e.g. Japan's earthquake).³⁶ The steps proposed by Professor Bhala can help to assess whether the imported service subsidies are the cause of the injury suffered by the domestic industry.

From this discussion, we can presume that it is possible to apply CVD criteria from the goods trade in assessing service subsidy proceedings. In fact, several concepts from the SCM Agreements are applicable by analogy. But the connection will be stronger if more subsidy information on service sectors is produced by Members. The hope here is that a reasonable understanding of the potential regulatory framework can serve to urge Members to provide relevant information on this matter.

B. SUGGESTIONS ON THE COLLECTION OF COUNTERVAILING DUTIES

Determining the appropriateness of authorizing CVDs in response to service subsidies is difficult with more empirical information and the type of data that could support findings of material injury and causation. With more Member cooperation in future negotiations, however, this difficulty can be removed.

I have proposed some useful concepts for applying substantive rules from the goods trade to the services trade in the previous paragraphs. With respect to the administration of these rules, however, Members and scholars have been skeptical about just how to enforce or collect CVDs.

³⁵ The Hawaii Korean Chamber of Commerce, *Special Message from Lt. Governor Duke Aiona: Promoting Hawai'i Tourism in Korea*, <http://www.hkccweb.org/en/tourism-in-korea.html>.

³⁶ Tanya Mohn, *Japan's earthquake, radiation threats take toll on tourism: Uncertainty of nuclear reactor, mixed messages have American visitors on edge*, MSNBC.COM, Mar. 30, 2011, <http://www.msnbc.msn.com/id/42154541/ns/travel-news/t/japans-earthquake-radiation-threats-take-toll-tourism/>.

Indeed, several obstacles arise due to the different modes of supply in service trades. However, these problems are not entirely without solutions. In fact, several existing rules can serve as guidance. Therefore, regarding the collection of CVDs, I propose some possible approaches for Members in dealing with the four different modes of supply in service trades.

1. Some Ideas from the Value-Added Tax (VAT) System

A value-added tax (VAT) or Goods and Services Tax (GST) is one form of tax that imposes a multi-stage tax on the consumption of goods and services,³⁷ collected at every stage of the product development and distribution process, relative to the amount of value added during each stage.³⁸ The EU Member States, Canada, Australia, and India have all enacted VAT/GST. Since VAT/GST can be collected upon the consumption of *services*, it is useful to analyze administrative procedures in the VAT/GST system and consider their applicability to the collection of CVDs.

a. Registration of Taxable Service Suppliers and Exemption The first step is to identify the service suppliers who might be subject to CVD collection. The method employed by the VAT/GST system to target taxpayers is registration, with some systems making it mandatory and others voluntary.³⁹ I propose that this registration process is applicable in the services trades. Let us discuss Mode 3 and 4 examples that were previously discussed in Chapter 1.⁴⁰ Suppose Country A provides a subsidy to its law firms/lawyers to work in Country B, and Country B's

³⁷ Christopher Deal, *The GATT and VAT: Whether VAT Exporters Enjoy a TAX Advantage under the GATT*, Loyola of Los Angeles International & Comparative Law Journal, 17 Loy. L.A. Int'l & Comp. L.J. 649, 651 (April 1995).

³⁸ GEORGE N. CARLSON, *VALUE-ADDED TAX: EUROPEAN EXPERIENCE AND LESSONS FOR THE UNITED STATES*, 2 (1980). Brandon A. Ketterman, *VAT? A Look Inside Canada's Experience With the Goods and Services Tax*, 8 San Diego Int'l L.J. 259, 273 (Fall 2006).

domestic law firms/lawyers suffer material injury as a result of the subsidy. Country B is entitled to collect CVDs from Country A's law firms/lawyers located in its domestic market.

The first step is that Country B's authorities request Country A's law firms/lawyers to register. In this case, mandatory registration might be preferred. As a result, Country B will have a better understanding about who the taxable companies/persons are and where they are located. The next step comes when it comes time to file income tax reports, combined with the registration on the taxable Country A's service suppliers, Country B's authorities can collect CVDs from Country A's service suppliers. When creating the registration system, it is easier for Country B to monitor subsidized import transactions and collect CVDs.

However, this collection method – combining registration with income tax system – is only feasible in Mode 3 and 4 situations. Since those service suppliers either have a commercial or physical presence in the importing country, they are subject to the jurisdiction of the importing country. In Mode 1 and 2 situations, subsidized service suppliers are not located within the importing country. Hence, they are not subject to the importing country's jurisdiction. Requiring foreign service suppliers to register, without any incentives or punishment, would not be an easy system to enforce.

³⁹ *Id.* at 273. (“Canada uses a system of registration as its primary mechanism to administer the GST(Goods and Services Tax).”) *See also* Graeme S Cooper & Richard J Vann, *Implementing the Goods and Services Tax*, 21 Sydney L. Rev. 337, 344 (September 1999). (“...Registration is a requirement for inclusion in the GST system, and so services to keep purchase and sales by private individuals out.”). *See generally* WS Tibetan Chamber of Commerce, *VAT registration*, <http://www.tibetanc.org/vat%20registration/vat%20registration.html> (In India, it is also mandatory to register requiring that, “Every dealer who is registered under the Delhi Sales Tax Act, 1975 (43 of 1975) or the Delhi Sales Tax on Works Contract Act, 1999 (Delhi Act 9 of 1999) or the Delhi Sales Tax on Right to Use Goods Act, 2002 (Delhi Act 13 of 2002), at the time of commencement of this Act shall be deemed to be registered under this Act with effect from the first day of April, 2005, and he is not required to seek fresh registration under DVAT”).

⁴⁰ See Chapter I.B.3.a of this dissertation.

Nevertheless, exemption from registration exists in the VAT/GST system. Small businesses and retailers are exempt from registration.⁴¹ The main reason is that small businesses may bear high costs of compliance with the registration requirement.⁴² Taking this exemption and its rationale into consideration in the service subsidy situation, both injured states and foreign companies/persons bear burdens in complying with the registration process. Perhaps Members can create a “privilege threshold”⁴³ to exempt small businesses/low-income persons from the CVD collection. Thus, it can relieve both the injured country’s and foreign service suppliers’ burdens in keeping up with the documentation and registration.

b. Reverse-Charging Rule The reverse-charging rule concept is very unique in the VAT system. The general rule of the European Union’s VAT system is that the *intangible* services in cross-border transactions are subject to the reverse-charging rule.⁴⁴ This rule works by imposing VAT obligations on the recipient, rather than on the supplier.⁴⁵ The objective is to prevent the

⁴¹ Barry M. Freiman, *The Japanese Consumption Tax: Value-Added Model or Administrative Nightmare?*, 40 Am. U.L. Rev. 1265, 1282-1283 (Spring 1991). (In the Japanese Consumption Tax (CT) system, “it relieves small and medium-sized business enterprises from paying all or part of their potential tax liability. First, the law exempts those enterprises with taxable sales during the base period of less than thirty million yen (\$231,000) from paying the tax... Second, business enterprises with taxable sales between thirty and sixty million yen (\$231,000 and \$ 462,000) may claim a marginal or partial exemption from tax liability.”). See also Graeme S Cooper & Richard J Vann, *Implementing the Goods and Services Tax*, 21 Sydney L. Rev. 337, 420 (September 1999). (In Australia, “any firm that conducts an enterprise will be required to register if its total supplies exceed \$50,000 per annum. Non-profit societies, clubs and associations will only need to register if their total sales exceed \$100,000 per annum. Where the value of annual turnover is less than the threshold, the person is not required to register, but has the option of registration, provided they are carrying on, or propose to carry on, an enterprise.”). Ketterman, *supra* note 40. (Canadian GST has a special scheme requiring that, “Businesses with total taxable sales of goods and services of less than C\$30,000 per year may qualify for small supplier treatment, under which they need not collect nor pay any GST. (citing Excise Tax Act, R.S.C., c E-15, §148(1985))”). See generally Value-added and Non-Value-added Business Tax Act, amended June 25, 2003 Art. 13. (Still, some countries don’t grant exemption to small business. Taiwan even taxes the smallest vendors.)

⁴² ALAN SCHENK AND OLIVER OLDMAN, *VALUE ADDED TAX: A COMPARATIVE APPROACH*, 78 (2007).

⁴³ See *id.* (However, it is up to Members to decide what the requirements can define the exemption. In VAT/GST system, each country has its own threshold to exclude small businesses/persons from registration.)

⁴⁴ Stephen E. Shay, *Victoria P. Summers, Selected International Aspects of Fundamental Tax Reform Proposals*, 51 U. Miami L. Rev. 1029, 1057 (July 1997) (citing Council Directive 77/338, art. 9(2)(e), 1977 O.J.(L 145) 77 (as amended by Council Directives 91/680,92/111,94/5)).

⁴⁵ *Id.* (citing Council Directive 77/338, art. 21(1)(b), 1977 O.J.(L 145) 77 (as amended by Council Directives 91/680,92/111,94/5)).

situation where taxpayers order services from abroad to avoid paying domestic taxes.⁴⁶ This concept can be brought into the collection of CVDs in the Mode 1 and 2 situations since, in these two examples, both are cross-border transactions on services. Adopting this idea in collecting CVDs fits the purpose of having the reverse-charging rule in the VAT/GST system. In sum, collecting CVDs from the consumer of the subsidized service is a plausible way to deal with the Mode 1 and 2 situations.

Let us also consider the goods subsidy situation. In collecting CVDs in conjunction with goods subsidies, who is the person who must pay CVDs at the point of the importing country's customs control? It is the person who brought in the subsidized goods that are subject to the CVD. We can apply the same notion to service subsidy situations. In the services scenario, the person who brought in the subsidized services could be subject to paying the CVD. This concept may be applied to all four modes of service supply. In the Mode 3 and 4 examples mentioned previously, the CVD is levied upon foreign service suppliers, either corporations or persons, who brought in the subsidized services. In the Mode 1 and 2 examples, a CVD is levied upon the consumer of the service, who is also responsible for bringing in the subsidized services. Such a unique concept does not happen in the goods trade since CVDs are mostly collected from suppliers, instead of consumers. But because of the services trade's distinctive modes of supplies, it is useful to introduce this reverse-charging rule when administrating the collection of CVDs.

⁴⁶ *Id.* at 1058.

2. Some Ideas from the U.S. Online-Shopping Tax Methods

Another possible model we can examine for collection of duties on services is the taxation on e-commerce. This approach offers insight into Mode 1 supply situations. Suppose Country A subsidizes online service suppliers from Country A who provide services into Country B through the internet. Is it possible for Country B to apply CVDs to this type of services trade? The government of Country B will have difficulties collecting CVD from a source that has no physical presence in Country B. Internet shopping creates a similar situation and has been discussed regarding the collection of sales taxes, and can offer useful comparisons.⁴⁷

The modern notion of sales tax includes assessments on the purchase of goods and services, with sales taxes imposed on the transfer of tangible property as well as on some services.⁴⁸ Sales taxes are typically collected at the point of sale by a seller; however, some states in the U.S. also have use taxes.⁴⁹ Use taxes apply the same sales tax rate to out-of-state purchases made by state residents. Enforcing the collection of use taxes is generally difficult.⁵⁰

The U.S. and its states employ different methods to collect taxes from states. These include,

- (1) collecting use taxes from consumers: Michigan and Wisconsin have asked taxpayers to report their out-of-state purchases on their income tax forms, but very few have responded.⁵¹ Individual compliance with this tax is virtually

⁴⁷ See Verne G. Kopytoff, *Amazon Pressured on Sales Tax*, THE NEW YORK TIMES, March 13, 2011, <http://www.nytimes.com/2011/03/14/technology/14amazon.html>. (discussing the matter that Amazon.com is facing the pressure from several states in collecting customers' taxes).

⁴⁸ W. Ray Williams, *Electronic Commerce in this 21st Century: Article the Role of Caesar in the Next Millennium? Taxation of E-commerce: An Overview and Analysis*, 27 Wm. Mitchell L. Rev. 1703, 1709 (2001).

⁴⁹ Hal R. Varian, *Debating the Prospect of E-Commerce Taxation: Article & Policy Commentary: Taxation of Electronic Commerce*, 13 Harv. J. Law & Tec 639, 640 (2000).

⁵⁰ *Id.* ("...since states do not have tax jurisdiction over out-of-state companies and thus cannot require them to collect use taxes at the point of sale.").

⁵¹ *Id.*

nonexistent for international or mail order category purchases.⁵² If a remote seller does not collect tax from a customer, it is up to that individual to report his purchase and self-assess the tax to the state.⁵³

- (2) collecting use taxes from firms: Businesses are subject to tax audits by state authorities, which is an easier way for states to collect a use tax from firms.⁵⁴ Compliance in this category is much higher than with collection from consumers.⁵⁵

While internet shopping is getting more and more popular these days, more states are eager to collect an online sales and use tax.⁵⁶ Some proposed methods are applicable to CVD collections in Mode I.

Registration processes should be combined in collecting CVDs in Mode I. Let us take the example from Chapter 1. Suppose Country A's government provides subsidies to its local law firms, which support legal consultation over the Internet. In other words, Country A's law firms are "exporting" their legal services to other countries, including Country B. As a result, Country B's local law firms may suffer injury from Country A's subsidies, since Country B's nationals may seek legal services from Country A's on-line legal service suppliers.

⁵² Pamela Swidler, *The beginning of the End to A Tax-Free Internet: Developing An E-Commerce Clause*, 28 *Cardozo L. Rev.* 541, 545 (2006). (In footnote 29, she further mentions that, "Most people are probably not even aware of the use tax and self-reporting requirements. (citing Gary C. Cornia, *Sales and Use Tax Simplification and Voluntary Compliance*, 24 *Pub. Budgeting Fin.* 1, 5 (2004))")

⁵³ *Id.* at 546-47. ("Some States, such as New York, North Carolina, and Michigan, have added use tax reporting lines to income tax returns. They give instructions on how to self-assess the amount of tax on out-of-state taxes. However, these efforts are only mildly successful.")

⁵⁴ Varian, *supra* note 49, at 641.

⁵⁵ *Id.*

⁵⁶ The New York Times, *Amazon v. the States*, March 18, 2011 Friday, http://www.lexis.com/research/retrieve?_m=f6361973d2bc5642887037730af08d50&docnum=5&fmtstr=FULL&startdoc=1&wchp=dGLbVzB-zSkAb&_md5=927ea65c605a72fd8d145f8fa2fd1d27. ("It's ridiculous now when so many states are in deep fiscal trouble. Illinois estimates that it is losing more than \$150 million a year in uncollected taxes; California is losing an estimated \$300 million a year. That would cover more than half the planned cuts for the University of California system.")

In this example, how can Country B's government collect CVDs after an investigating authority confirms a determination of subsidy, injury, and causation? We can divide the solutions into two categories:

- (1) Collection from firms: this category is comparatively easier than collection from consumers. Applying the reverse-charging rule from the VAT/GST system, Country B's authority has two options:
 - (a) Voluntary compliance by foreign exporters: Country B can ask Country A's online legal service providers to register with Country B's controlling authority.⁵⁷ Then, Country B may ask Country A's service providers to voluntarily submit their transaction details regarding Country B purchases from the Country A service providers.⁵⁸ Country B's authority in charge may collect a CVD based on each sale made to its domestic services markets. However, the main concern is compliance since Country A's service providers are not subject to Country B's jurisdiction. If no sanctions can be enforced, compliance in this model is doubtful.⁵⁹

⁵⁷ This voluntary registration idea is based on the European Commission (EC) proposed VAT amendments on e-commerce. See generally Thomas Fawkes, *The Proposed E.U. VAT on Electronically Transmitted Services: Enforcement and Compliance Issues*, 22 NW. J. INT'L. & BUS. 47, 50-57 (Fall, 2001), (explaining the European Union system to tax some forms of electronic commerce, and the discussions on the proposed amendments and discuss the possible disadvantages of the proposed amendments.)

⁵⁸ *Id.* ("The only exception to the registration rule is that, "if its annual level of sales within the E.U. is below 100,000 Euro (approximately \$70,000USD). This exemption has been suggested in order to avoid placing undue burden on the development of global e-commerce as a whole, as well as protecting those businesses only making occasional sales to European parties. (citing Proposal for a Council Directive Amending Directive 77/388/EEC as regards the Valued Added Tax Arrangements Applicable to Certain Services Supplied by Electronic Mean, COM (2003) 349 final (hereinafter Explanatory Memorandum) at 14)")

⁵⁹ *Id.* (In the EC VAT amendments situation, the same compliance issue occurs, but "EC fully believes that those non-E.U. vendors will comply with the new registration and collection requirements. The EC concedes that, 'the effectiveness of this approach to tax administrations can only be assured when it is underwritten by a reasonable and realistic expectation that non-compliance will be detected, remedied and that appropriate sanctions will be applied. The vendors' reputations appear to be the VAT regime's most effective deterrent to non-compliance by non-E.U., to risk exposure to significant and unresolved tax debts in the world's largest marketplace cannot be considered prudent business practice.'")

(b) Voluntary compliance from domestic firms:⁶⁰ Combined with the VAT/GST registration requirement, Country B's government can ask local recipients of receive legal services from Country A providers, to register with the authorities in charge. Later, these registered recipients could submit their financial statements to the authority in charge. Based on the submitted transaction records, Country B's government can collect CVD from Country B recipients of every subsidized service that has been purchased from a Country A provider.⁶¹ Compliance should be increased over the provider payment model because the recipients within Country B are subject to government audit.

(2) Collection from consumers: This one will cause more enforcement difficulties since individual transactions are hard to monitor. As a result, individual transaction monitoring will be costly during the enforcement process. Therefore, I propose that the best possible way is to ask consumers in Country B to self-

⁶⁰ This idea is based on the OECD's recommendations on cross-border business-to-business transactions. See Centre for Tax Policy and Administration, *International VAT/GST Guidelines*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Feb. 2006, at 13, available at <http://www.oecd.org/dataoecd/16/36/36177871.pdf>. (The rationale is that, "it is recommended that in cases where the supplying business is not registered and is not required to be registered for consumption tax in the country of the recipient business, a self-assessment or reverse charge mechanism should be applied... In the context of B2B cross-border transactions in services and intangible property the self-assessment/reverse charge mechanism has a number of key advantages. Firstly, it can be made effective since the tax authority in the country of consumption can verify and enforce compliance. Secondly, given that it applies to the customer, the compliance burden on the vendor or provider of the service or intangible product is minimal. Finally, it reduces the revenue risks associated with the collection of tax by non-resident vendors whether or not that vendor's customers are entitled to deduct the tax or recover it through input tax credits.")

⁶¹ This concept is based on Hawaii's proposed tax collection on internet shopping. See Mark Niese, *Hawaii deciding how to tax Internet shopping: Hawaii lawmakers consider creative ways to collect taxes owed for online purchases*, YAHOO FINANCE, Apr. 26, 2011, <http://finance.yahoo.com/news/Hawaii-deciding-how-to-tax-apf-3234488234.html?x=0&.v=1>. ("...either by requiring Internet sellers to hand over customer information to the government, or by enrolling in a multistate program in which websites voluntarily collect taxes... The tax collection method favored by House lawmakers would require out-of-state businesses to provide yearly statements to the government listing customer names and transaction amounts, which tax collectors could then use to seek the state's general excise of 4 percent on neighbor islands and 4.5 percent on Oahu.' All we're saying is, 'Hey, we can't force you to collect our taxes, but we can request information from you,' said Rep. Isaac Choy, D-Manoa. 'If you're not going to collect our taxes, give us information and we'll collect our own taxes...'"

register with the authorities in charge, and report their transactions for CVD collection.⁶² Moreover, Country B can pursue educational campaigns and other methods⁶³ to persuade Country B's nationals to pay the CVD voluntarily or not to purchase subsidized service imports.

From these proposed concepts, we can agree that it is not impossible to have CVD collection in services subsidies. The problem might be the cost of administering any available method of CVD collection. It is true that CVD collection may create burdens, such as registration and monitoring, on injured states, but it is up to injured states to decide whether to take such actions. Therefore, this dissertation tries to utilize the current rules or proposed amendments to design a feasible way for Members to decide.

C. WHAT IS THE APPROPRIATE ROAD FORWARD?

In Chapters 8 and 9, I have discussed the purpose of countervailing measures and have proposed several recommendations for the application of countervailing procedures in service subsidies. Considering the purpose, the substantive rules, and the administrative aspects of countervailing procedures, Members should decide whether it is appropriate to apply countervailing procedures

⁶² The same difficulty took place in OECD's recommendation on cross-border business-to-consumer transaction. See Centre for Tax Policy and Administration, *supra* note 60. ("Member countries recognize that no single option... is without significant difficulties. In the interim, where countries consider it necessary, a registration system should be considered to ensure the collection of tax on B2C transactions... it is recommended that a number of considerations be taken into account. Firstly, consistent with the effective and efficient collection of tax, countries should ensure that the potential compliance burden is minimized. For example, countries may wish to consider registration regimes that include simplified registration requirements for non-resident suppliers (including electronic registration and declaration procedures... Secondly, countries should seek to apply registration thresholds in a non-discriminatory manner. Finally, Member countries should consider appropriate control and enforcement measures to ensure compliance, and recognize, in this context, the need for enhanced international administrative co-operation.")

⁶³ See Varian, *supra* note 54. (This idea is based on some U.S. states' intention on how to make consumers report their out-of-state tax.)

in service trades.⁶⁴ This is the mandate stated in GATS Article XV. At present, I believe there is the lack of real-world examples that justifies creating a set of rules for countervailing procedures. If more service subsidy examples through the required information exchange, then it might become appropriate to authorize countervailing procedures in service subsidies. Until we have the empirical information on which to build such a system, the burden of proving the need for procedures seems not to have been met.

I noted that Members are mandated to “address the appropriateness of countervailing procedures⁶⁵(emphasis added)” instead of countervailing *measures*. This observation implicitly confirms that applying the notion of countervailing measures in the services trades is acceptable, but the concern is *how* to apply them. I have elaborated on some procedural aspects in this chapter for Members to consider in determining whether it is appropriate to have countervailing procedures.

In Chapter 4 of this dissertation, I note that Members have two options when facing a subsidy granted by other Members. In addition to unilaterally imposing countervailing measures, Members may challenge the subsidy within the multilateral system by following Article 4 or 7 of the SCM Agreement.⁶⁶ When the peace clause stipulated in the hybrid approach ends, I propose that if domestic countervailing procedures are not applicable, then Members are left with the option to challenge the subsidy at the international level. The procedure for such a challenge can follow the SCM Agreement model.⁶⁷ Below is an illustration of the procedure:

⁶⁴ GATS, *supra* note 20, art. XV. (“...The negotiations shall also address the appropriateness of countervailing procedures....”)

⁶⁵ *Id.*

⁶⁶ See Chapter 4.A of this dissertation.

⁶⁷ The SCM Agreement, *supra* note 11, art. 4 and 7

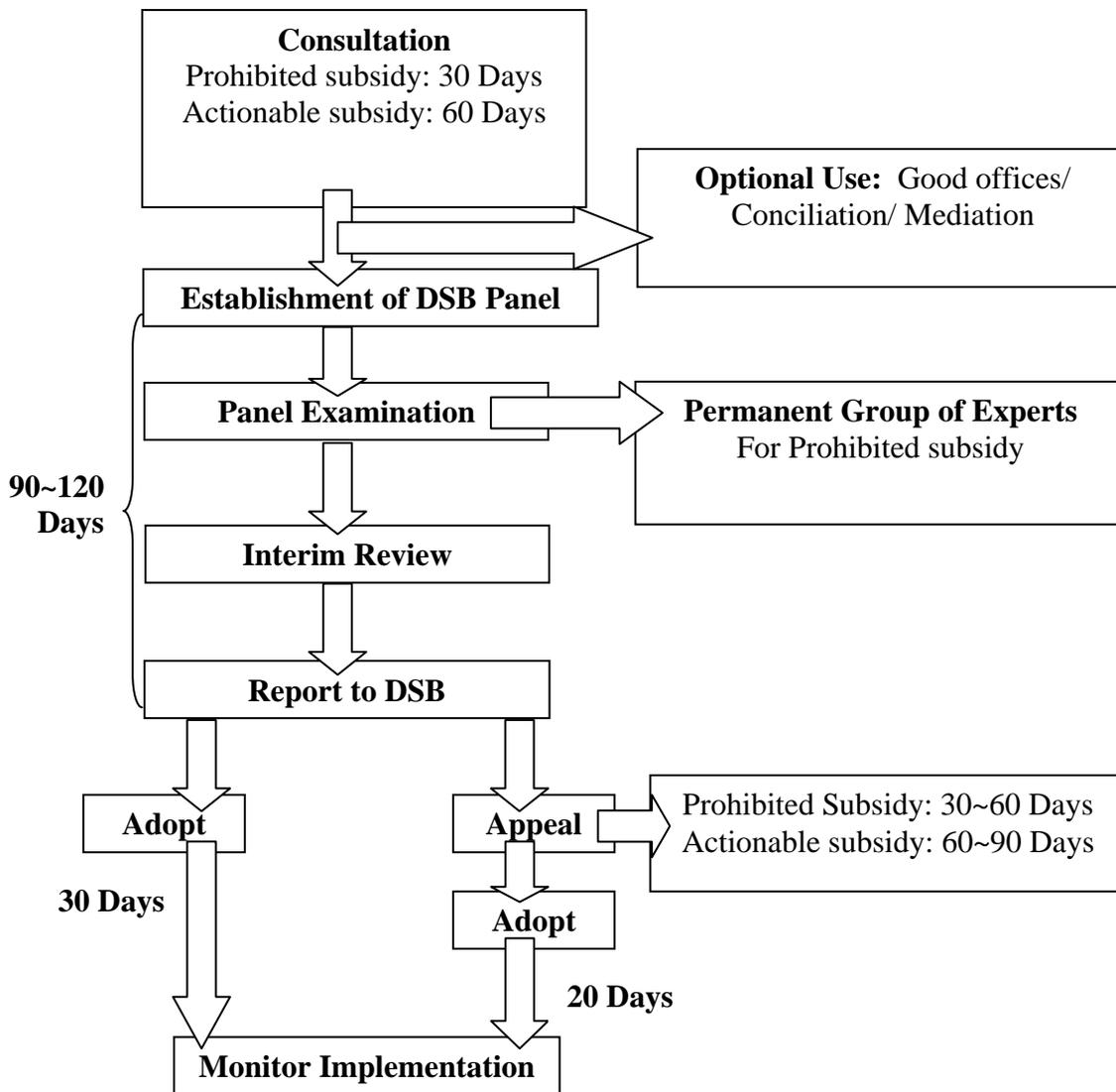


Figure 12. The SCM Agreement Dispute Settlement Procedure⁶⁸

The above illustration is based on Articles 4 and 7 of the SCM Agreement. One thing in particular to note is the establishment of the Permanent Group of Experts (PGE). It is stipulated in the SCM Agreement that Members shall assemble a Committee on Subsidies and Countervailing Measures,⁶⁹ which shall establish a PGE.⁷⁰ The PGE's function is to provide

⁶⁸ 羅昌發, 國際貿易法, translated in CHANG-FA LO, THE INTERNATIONAL TRADE LAWS, 840 (2002).

⁶⁹ The SCM Agreement, *supra* note 11, art. 24.1. ("There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat

consultation services to the DSB and the Members.⁷¹ The Council for Trade in Services carries similar responsibilities to the committee in the SCM Agreement.⁷² Thus, the GATS Council could establish a group of experts who target subsidies in services. Furthermore, the GATS experts group could consult with the PGE in the SCM Agreement since the hybrid approach adopts many notions from the SCM Agreement. At the implementation stage, Members can apply measures regulated in GATS Article XXIII,⁷³ which refers to the DSU Article 22.

The absence of procedures for countervailing measures on service subsidies does not, in itself, prevent Members from challenging a disputed subsidy in the WTO framework. The question is whether those procedures between governments at the international level currently also require the parallel authorization of national level procedures for authorizing countervailing measures. Until further empirical information is provided to prove that need, the WTO system should not authorize Members to establish domestic systems that would allow the imposition of countervailing measures in response to service subsidies. The problems of administration of such a system simply are too great.

to the Committee.”)

⁷⁰ *Id.* art. 24.3. (“The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified persons??? in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.”)

⁷¹ *Id.* art. 24.4. (“The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.”)

⁷² GATS, *supra* note 20, art. XXIV para. 1. (“The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.”)

⁷³ GATS, *supra* note 20, art. XXIII. (“1... 2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU. 3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.”)

X. CONCLUSIONS AND FUTURE WORK

The purpose of this dissertation has been to suggest direction for WTO Members on the future development of GATS Article XV, which only provides basic instructions on services subsidies. Due in part to the complexities of services trade, the development of rules addressing service subsidies under Article XV has been delayed and even ignored. Nonetheless, Members have committed themselves to consideration of a regulatory mechanism for service subsidies, and should thus engage in an effort to negotiate a service subsidies framework.

A. CONCLUSIONS ON GATS ARTICLE XV

Members and scholars have presented several submissions and papers on the definition of service subsidies. In this dissertation, I have demonstrated the importance of regulating services subsidies, and pointed out Members' inaction regarding their mandate under GATS Article XV.¹ My hope is that this discussion might reverse Members' indifferent attitudes and provide incentive to re-open the discussion.

¹ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1999, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS], art. XV. (“...For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.” At the time of this writing, only 5 Members have completed the information exchange mandate.)

1. Subsidy Definition

I propose application of the SCM Agreement definition of service subsidy as a starting point. If Members are unable to identify an existing service subsidy that falls outside of the categorization found in the existing goods definition of subsidy, there is no need to have a new definition for purposes of services trade. Nevertheless, Members may wish to provide for flexibility in language in order to cope with the unique characteristics of services trades and the possibility of future identification of subsidies that fall outside of the current framework for goods.

The definition of “subsidy” for goods purposes, found in the SCM agreement Article 1, can simply be used for services purposes (with a single, minor addition, shown as underlined):

- (1) For the purpose of this Agreement, a subsidy shall be deemed to exist if:
 - (a) there is a financial contribution by a government or any public body within the territory of a Member² (referred to in this Agreement as “government”), ~~i.e. where,~~ including but not limited to:
 - (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;
 - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above

² A more flexible interpretation is required to assess the relationship between the financial contribution and the subsidizing Member.

which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(i) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

(2) A subsidy as defined in paragraph 1 shall be subject to the provisions of this agreement only if such a subsidy is specific in accordance with the provisions of specificity.

One distinctive requirement of the SCM Agreement's definition is specificity, a concept designed to eliminate trade-distortive subsidies. I propose that this criterion is applicable in service subsidies and should thus carry over from goods to services. Furthermore, the specificity requirement should be included in the definitional stage instead of the countervailing measure stage. The definition of "specificity" for goods purposes, found in the SCM agreement Article 2, can simply be used for services purposes (with a single, minor addition, shown as underlined):

(1) In order to determine whether a subsidy is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions

must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
- (2) A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.
- (3) A subsidy which is limited to a certain mode of service supply or a certain sector of service trades inscribed in the Schedule of this Agreement, such subsidy shall be specific.
- (4) Any subsidy falling under the provisions of prohibited subsidies shall be deemed to be specific.
- (5) Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

Taken together, these two articles will serve to define what a subsidy is for purposes of a legal response in the context of services trade. Unlike Members' submissions, which only ask questions without answering them, my purpose here has been to respond with the best available information at hand, and to offer specific proposals that might move the process forward. As the process moves forward, Members should also continue with the information exchange mandated

in GATS Article XV. With more available information, the definition of service subsidy can be more complete.

On the topic of the classification system,³ I offer a third proposal for Members to consider. Both the SCM Agreement and the AoA have their advantages and disadvantages. Members, certainly, can choose between these two classification methods. But I propose a *hybrid* system, combining the SCM Agreement and AoA models. The following table illustrates my proposed classification system in detail:

Table 22. Proposed Hybrid Classification System for GATS

Semi-prohibited Subsidy	Two categories of subsidies should be identified: (1) export subsidy; (2) domestic substitution subsidy. Members should specify in their commitments what export and domestic service subsidies are in effect. Members should set a time period during which to gradually decrease the subsidies according to schedules.
Semi-Actionable Subsidy	This type of subsidy should be actionable only if it causes: (1) injury to the domestic industry of another Member; (2) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994; or (3) serious prejudice to the interests of another Member. If it can be confirmed that adverse effects have been caused by this type of subsidy, it should then be subject to reduction. The amount of reduction would be determined by the DSB or the Working Party, whoever obtains the best available information.
Non-actionable Subsidy	This class of subsidy includes: (1) Assistance in services necessary to achieve certain public policy. This may include, but is not limited to, assistance not involving direct payments to producers or processors, such as research, pest and disease control, extension and advisory services, marketing and infrastructural services, water, energy, transport, and education; (2) Disadvantaged regions not limited to specific enterprises or industries within a region, which is given as part of a general framework of regional development, and the region can be shown to be disadvantaged in terms of economic development (e.g. income per capital or household income per capita, or GDP) than the Member country as a whole; (3) Disaster Relief. (4) Research & Development: Assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms, up to a maximum of 75% of the costs of industrial research or 50% of the costs of pre-competitive development activity, subject to a number of conditions on the scope of the assistance; (5) Environmental protection: assistance to adapt existing facilities to new environmental requirements, provided that the help is given on a one-time basis, is limited to 20% of total costs, and is generally available to all eligible firms

³ Previously, Members were either opposed to the SCM Agreement classification system or to the AoA classification system.

Together with this hybrid system, I also propose to incorporate a temporary peace clause and temporary special and differential (S&D) treatment for developing and least developed countries. These changes can be accomplished by adding the following language (adapted from AoA Article 13) to a new service subsidies instrument:

- (1) Until [such time as the information exchange mandate has been satisfactorily fulfilled], all categories of subsidies (semi-prohibited, semi-actionable, and non-actionable) shall be:
 - (i) exempt from the imposition of countervailing duties;⁴
 - (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and
 - (iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994
- (2) After [such time as the information exchange mandate has been satisfactorily fulfilled, and the peace clause of paragraph (1) expires], developing and least developed countries shall enjoy
 - (i) permission to grant subsidies in Mode I for research and development activities and permission to maintain free trade zones in services;
 - (ii) exemption from countervailing for least developed countries in all instances, and for developing countries whose gross domestic product (GDP) is below an appropriate threshold established through negotiation;
 - (iii) the maintenance of export subsidies on services for an additional period [to be determined], subject to their gradual removal;
 - (iv) the exemption from countervailing duties for subsidies promoting the development of domestic services.

⁴ “Countervailing duties” where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.

The incorporation of the peace clause should help encourage compliance with the information exchange mandate (which is the real current problem) by reducing Member fears of action by other members targeted at the existing subsidies they would disclose. The incorporation of the S&D treatment provision insures that the interests of developing and least developed countries interests are taken into consideration.

2. Countervailing Measures

In addition to the need to define service subsidy, there is another mandate. As stated in GATS Article XV, Members are to “address the appropriateness of countervailing procedures.” By using the term “countervailing procedures,” instead of the term “countervailing measures,” this provision appears to imply that the authors have already concluded that countervailing measures are appropriate, and the only remaining question is what procedures should lead to their application. If this is correct, then Members should participate more actively in discussing the appropriate procedures for the implementation of a system that allows countervailing measures.

So far, there has not been the Member cooperation necessary to produce workable countervailing duty procedures for service subsidies. With my proposed hybrid approach, however, two important provisions would reduce Member concerns at this stage. These are the peace clause and special and differential treatment for developing countries, discussed in Chapter 7.

I do not underestimate the significance of countervailing measures in service subsidies. Therefore, with the information available to date, I propose a basic structure for the application of countervailing measures in service subsidies. In order to apply countervailing measures, an authority must find the existence of the three traditional elements: the existence of a service

subsidy, material injury suffered by domestic service suppliers, and the causal relationship between the subsidy and the injury. The second (injury) and third (causation) determinations are the difficult ones in the services context. Nonetheless, an appropriate framework for countervailing procedures (and measures) can be negotiated.

The collection of countervailing duties will be more complicated because of the different modes of service supply. While the collection of countervailing duties on service subsidies may be difficult, however, is not an impossible task. Similar processes used in e-commerce tax collection and the Value-added Tax/Goods and Services Tax (VAT/GST) system, provide workable possible examples. Using these examples, I propose the inclusion of a registration system⁵ and a reverse-charging rule in the countervailing procedure.⁶ I provide different applications for these elements based on the different modes:

a. Mode 1 and Mode 2 The main concern for these two modes is that service suppliers are not located in the country of injury. Therefore, they are not subject to the country of injury's jurisdiction for purposes of collection of countervailing duties. This causes procedural difficulties in collecting CVDs. Still, I offer a series of procedural regulations that may allow a workable system. These include:

- (1) Collection from firms: this category is comparatively easier than collection from consumers. Applying the reverse-charging rule, the country of injury has two options:

⁵ The purpose is to identify the service suppliers subject to CVD collection. The method is based on VAT/GST system's registration, either mandatory or voluntary.

⁶ This concept is based on the EU VAT system. The rule is imposing VAT obligation on the recipient, rather than on the suppliers when trading cross-border intangible services.

- (a) Voluntary compliance by foreign exporters: the service providers in country of injury can ask the importing country's service providers to register with the country of injury.⁷ It can then ask the importing country's service providers to voluntarily submit their transaction details in regard to the country of injury's corporations/consumers. The country of injury's authority in charge may collect a CVD based on every importing country's transaction made to its domestic services markets. The main issue is that of compliance, since the importing country's corporations are not subject to the country of injury's jurisdiction. If no sanctions can be enforced, compliance under this rule may be doubtful.
- (b) Voluntary compliance by domestic firms:⁸ Combined with the registration requirement, the country of injury's government can ask local corporations, which receive services from the importing country, to register with the authorities in charge. Later, these registered companies need to submit their financial statements to the authority in charge. Based on those submitted transaction records, the country of injury's government can collect CVDs on every service that has been purchased from the importing country.⁹ Moreover, compliance with this regulation should not be difficult since corporations are subject to government audits.
- (2) Collection from consumers: This will cause more enforcement difficulties since individual transactions are hard to monitor. As a result, individual transaction

⁷ This voluntary registration idea is based on European Commission (EC) proposed VAT amendments on e-commerce.

⁸ This idea is based on OECD's recommendations on cross-border Business-to-Business transaction.

⁹ This concept is based on Hawaii's proposed tax collection on internet shopping.

monitoring will be costly during the enforcement process. Therefore, I propose asking consumers in the country of injury to self-register with the authorities in charge, and report their transactions for CVD collection. Moreover, the country of injury can pursue educational campaigns and other methods¹⁰ to persuade their nationals either to pay the CVD voluntarily or not to purchase subsidized service imports.

b. Mode 3 and Mode 4 In these two situations, compliance is relatively easier to monitor. Because the service suppliers either have a commercial presence or are physically located in the country of injury, they are subject to the country of injury's jurisdiction.

With the registration system¹¹ and income tax system in place, the country of injury can have a better understanding about who and where the taxable corporations and people are. The country of injury's authority in charge can collect CVDs from the importing country's service suppliers by looking into income tax records.

I also suggest one possible exemption from the CVD. In order to alleviate burdens in countervailing procedures, Members can contemplate an exemption threshold,¹² which exempts small businesses/low-income persons from CVD collection. This relief mechanism can ease both the country of injury's and the service suppliers' obligations to register or document transactions.

These proposals are merely groundwork. It would not be appropriate to have countervailing procedures at present given the minimal Member participation in information

¹⁰ This idea is based on some U.S. states' intention on how to make consumers report their out-of-state tax.

¹¹ Mandatory registration is better.

¹² This idea is based on the VAT/GST system. Members shall decide what exemption requirements are.

exchange and the resulting lack of relevant information. However, having countervailing procedures in service subsidies is still plausible in the future.

B. RECOMMENDATIONS FOR FUTURE WORK

Several conclusions can be drawn from my analysis. First, the lack of real-world examples of service subsidies is a major obstacle. One can see from Members' submissions in Chapter 6 that they are clearly aware of this "chicken and egg" dilemma. Despite this understanding, however, not much progress has been made. Without real examples of existing subsidies, no empirical data can demonstrate the distortive effects of such subsidies. This insufficiency in data is a result of Members' lack of interest and participation. In response to the information exchange mandate in GATS Article XV, only 5 out of 153 Members have submitted their information. This is a sign that the political will necessary to make progress currently exists on the service subsidy issue. They need more incentives in order to actively address service subsidies. Otherwise, Sauvé's observation will hold to be true: the potential of trade distortion is only for economists.¹³

Second, there is no need to completely re-invent the subsidies wheel. Any new service subsidies instrument can begin with language found in the SCM Agreement and the AoA.

Third, concerning the definition of both service subsidy and specificity, Members should stop pointing at problems and instead comply with their information exchange mandates. My proposal regarding a definition is based primarily on the SCM Agreement mechanism. There are doubts, however, about its application to services trades. The financial contribution examples

¹³ Sauvé Pierre, *Completing the GATS Framework: Addressing Uruguay Round Leftover*, Aussenwirtschaft, Vol. 57, No. 3, 332 (2002), available at <http://www.cid.harvard.edu/cidtrade/Papers/Sauve/sauvegats.pdf>.

need to be completed. Maybe more types of financial contributions exist in service trades. The notion of territoriality needs to be flexible enough to capture the four modes of supply.

Fourth, regarding countervailing measures, problems occur at two stages: the determination of injury suffered by domestic industries, and the proof of causation between subsidy and injury. Calculation of the value of injury is a huge challenge since prices in services differ. Although there have been suggestions on how to calculate injuries under Mode 3, other Modes still have not been the subject of useful discussions on injury determination. Furthermore, the determination of causation is also difficult. In the Mode 2 situation, clarifying consumers' preferences, considering local scenic spots, and hosting world events are all important to a country's tourism sector. An authority needs to consider these factors while reaching the decision that the injury suffered by a Member's domestic industry is caused by another Member's subsidy. In order to build this causal relationship, an authority needs to examine factors beyond those that have already been discussed in goods subsidies.

Finally, regarding countervailing procedures, my proposal is that countervailing measures are not appropriate until further information on existing service subsidies is provided by the Members. Even with better information and the framework for effective countervailing procedures, the implementation, enforcement, and effective monitoring of countervailing measures will be time-consuming and costly.

Based on these conclusions, the following are my recommendations for future work:

- 1) Members must fulfill their Article XV obligation and provide information on existing service subsidies;
- 2) Future negotiations should focus on the language of the SCM Agreement and the AoA;

- 3) The definition of subsidy and specificity for services purpose should be based upon the existing definition of subsidy for goods purposes found in the SCM Agreement;
- 4) The determination of both injury and causation in any service sector countervailing duty procedures must take account of the difficulties of making such determinations caused in each of the four modes of supply; and
- 5) The first four recommendations require further work before a workable system for countervailing procedures and measures in the services sector can be properly established.

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