

Regulation of Subsidies and State Aids in WTO and EC Law

Conflicts in International Trade Law

Kluwer

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By

Gustavo Luengo Hernández de Madrid

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PREFACE

Comparative studies of the subsidies disciplines of the WTO and of the EU are rare. The few that have been published deal only with certain aspects of the subsidy/State aid regimes of the two legal systems. In any case, we are not aware of any broad, all embracing comparison which compares the substantive and procedural rules of the WTO, in particular the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture (AA), on the one hand, with the State aid control provisions of the EC Treaty and the implementing rules adopted by the Council and the Commission, on the other.

The reason is simple: the task is daunting. The rules of the two legal systems governing subsidies and State aids are detailed and highly complex. They exhibit similarities, but also major differences. The WTO rules are relatively new and largely unexplored. In spite of their detail, they are far from clear. As they are the result of difficult and highly controversial international negotiations, their 'constructive ambiguity' is hardly surprising: that ambiguity is the price which was paid for a successful conclusion of the SCM and the Agricultural Agreement. Up until now, WTO dispute settlement procedures have remained limited in number and in scope. Such procedures have focussed mainly on subsidies which are forbidden, while subsidies which are only actionable have so far been somewhat neglected.

The EC rules on State aid control are of course much older and far more developed and defined by European Commission decisions and judgments of the European Courts. That these rules are in certain respects more generous, *i.e.*, that they leave occasionally greater scope to Member State's action is surprising and rather counterintuitive. However, the practical effects of this greater flexibility should not be overestimated, as the apparent flexibility is compensated by other elements of the EC's legal order. It is indeed not

surprising that, taken together, the EC rules on State aids are stricter than the subsidy rules of the WTO.

Gustavo Luengo's comparative analysis is published at a timely moment. The controversy between the US and the EU on the subsidies granted respectively to Airbus and Boeing illustrate the importance—and political explosiveness—of subsidies and their control in the WTO. As the controversy centres on two 'national' champions, it is infinitely more visible than the preceding case, brought (successfully) by the EU against the US and concerning the fiscal privileges which Foreign Sales Corporations enjoyed under US tax law, or the equally successful attack of the regime for sugar beet and sugar, which Brazil launched against the EU.

It is, of course, not astonishing that the generous subsidies granted by the EU in the framework of the Common Agriculture Policy are a privileged target for WTO dispute settlement procedures. At first sight, it is more surprising that subsidies granted by Member States and approved by the Commission under the EC State aid rules become the object of controversies, if these rules are, as mentioned before, on the whole more stringent than the WTO rules. However, the Airbus case offers a good illustration that EC State aid control does not protect the EU against the argument that State aids granted by EU Member States constitute a forbidden or actionable subsidy under the SCM Agreement. EC State aid rules do not constitute a perfect screen against violations of the WTO subsidy discipline, because they are *object*—as opposed to *effect*—oriented. The EC rules allow the Commission to authorize *inter alia* major State aids for regional development, for important projects of common European interest (Airbus is considered to be such a project) and the development of certain economic activities (a clause which is used for the authorization of rescue and restructuring aid). It is obvious that such State aid can have adverse effects on international trade and therefore violate the provisions of the SCM Agreement.

All this is extremely well explained in Gustavo Luengo's monograph. His detailed analysis will be of great assistance to all readers who seek to understand the similarities and differences between the subsidy rules of the WTO and the State aid control discipline of the EU. These similarities and differences are of particular interest to those concerned with the decision making practice of the European Commission and its results in light of the constraints which flow from the WTO regime. Should the Commission become stricter in order to avoid conflicts with the SCM Agreement? Or could the Commission be more generous in allowing State aids, for example so as to allow the matching of subsidies granted in third countries? It is obvious that globalization and the lack of any similar system of internal subsidy control in other parts of the world make these questions highly relevant. Gustavo Luengo's monograph will be of great help in answering them.

Claus D. Ehlermann

October 2006

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The author will welcome any comments on this book at gusluengo@gmail.com.

ABBREVIATIONS

AMS	Aggregate Measurement of Support
AoA	Agreement on Agriculture
AoS	Agreement on Safeguards
ASCM	Agreement on Subsidies and Countervailing Measures
CAP	Common Agricultural Policy
CFI	Court of First Instance
CMO	Common Market Organization
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
ECJ	European Court of Justice
EEC	European Economic Community
EAEC Treaty	Treaty establishing the European Atomic Energy Community
EC Treaty	Treaty establishing the European Community
ECSC Treaty	Treaty establishing the European Coal and Steel Community
EEC Treaty	Treaty establishing the European Economic Community
EU	European Union
EU Treaty	Treaty on European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
HC	Havana Charter
ITO	International Trade Organization

TBT	Agreement on Technical Barriers to Trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

Table of Contents

Preface	xix
Acknowledgements	xxi
About the Author	xxiii
Abbreviations	xxv
Part I: Introduction	1
Chapter 1: Preliminary Remarks	3
I. Subsidies in the International Context	3
A. What is a Subsidy?	5
B. Types of Subsidies	8
1. <i>Export Subsidies</i>	8
2. <i>Domestic Subsidies</i>	9
C. Conclusion	9
II. Scope of this Work: Subsidies in the WTO and the EC	10
Chapter 2: Economic Analysis of Subsidies	13
I. Introduction	13
II. Analysis of International Trade	15
A. Theory of Comparative Advantage	15
B. Theory of Proportion in Factors of Production	17
C. Economies of Scale	18
D. Imperfect Competition	19
E. Conclusion	20

III.	Effects of Subsidies on International Trade	20
A.	Effects of Export Subsidies	22
B.	Effects of Domestic Subsidies	26
C.	Conclusion	27
IV.	Effects of the Adoption of Countervailing Duties	28
V.	Concluding Remarks	30
Part II:	The Regulation of Subsidies in the WTO	31
Introduction to Part II		33
Chapter 3:	Evolution of the Regulation of Subsidies in International Trade: From the GATT to the WTO	35
I.	Introduction	35
II.	Subsidies in the Havana Charter	36
A.	Negotiations for the Creation of the ITO: Origins of the GATT	37
B.	Regulation of Subsidies in the HC	39
C.	Conclusions	41
III.	Subsidies in the GATT (1947–1979)	41
A.	The GATT of 1947	42
1.	<i>GATT Negotiations</i>	42
2.	<i>Obligations on Subsidies in the GATT</i>	43
3.	<i>The Definition of 'Subsidy' in the GATT of 1947</i>	46
4.	<i>Conclusion</i>	47
B.	The Reforms of 1955	47
1.	<i>Export Subsidies</i>	47
a)	Non-Primary Products	48
b)	Primary Products	49
2.	<i>Revision Clause</i>	51
3.	<i>Conclusion</i>	51
C.	The Situation after the Reform of 1955	52
1.	<i>Notification of Subsidies</i>	52
2.	<i>Export Subsidies for Primary Products</i>	53
3.	<i>Export Subsidies for Non-Primary Products</i>	57
4.	<i>The Definition of Subsidy after the Reform of 1955</i>	58
a)	Price Support Systems	59
b)	Subsidies Financed by a Non-Governmental Levy	60
c)	Multiple Exchange Rates	60
d)	Purpose of the Subsidy	61
e)	Other Cases	61
5.	<i>Conclusions</i>	62

IV.	The Subsidies Code from the Tokyo Round of 1979	63
A.	Negotiations During the Tokyo Round (1973–1979)	63
B.	The Tokyo Round Subsidies Code of 1979	65
1.	<i>Track I—Countervailing Duties</i>	66
2.	<i>Track II—Obligations on Subsidies</i>	68
C.	The Situation after the Reform of 1979	74
1.	<i>The Definition of ‘Subsidy’ after the Tokyo Round of 1979</i>	74
2.	<i>Situation after the Tokyo Round</i>	76
3.	<i>Relevant Cases after the Reform of 1979</i>	78
a)	Export Subsidies for Primary Products	79
b)	Export Subsidies for Non-Primary Products	81
c)	Countervailing Duties	82
D.	Conclusions	83
V.	Negotiations in the Uruguay Round (1986–1994)	84
A.	The Negotiations on Subsidies in the Uruguay Round	84
1.	<i>Definition of ‘Subsidy’</i>	85
a)	The Position of the US	86
b)	The Position of the EC	86
2.	<i>The ‘Traffic Light Approach’</i>	87
3.	<i>Other Important Issues: Trade Remedies, Sub-National Entities and Developing Countries</i>	88
4.	<i>Negotiations on Primary Products</i>	88
B.	Proposals Made during the Negotiations	89
1.	<i>The Cartland Draft</i>	89
2.	<i>The Dunkel Draft</i>	90
3.	<i>The De Zeeuw Draft</i>	92
C.	Conclusions	92
VI.	The Final Result: Agreements on Subsidies in the WTO	93
VII.	Concluding Remarks	95
Chapter 4: The Regulation of Subsidies in the Agreement on Subsidies and Countervailing Measures		97
I.	Introduction	97
II.	Definition of ‘Subsidy’: Article 1 ASCM	102
A.	1st Element: 1st Alternative—Financial Contribution	103
1.	<i>Government or Other Public Body</i>	103
2.	<i>Territoriality of the Measure</i>	106
3.	<i>Exhaustive List of Cases Considered to be Financial Contributions</i>	107
a)	Direct Transfer of Funds or Potential Transfers of Funds or Liabilities	108
b)	Foregoing of Government Revenue That Would Be Collected Otherwise	108
c)	Provision of Goods or Services	110

d)	Payments to a Funding Mechanism or Entrustment/Direction of Private Bodies	111
B.	1st Element: 2nd Alternative—Income or Price Support	119
C.	2nd Element: Benefit	123
D.	Conclusions	128
III.	Specificity of the Measure: Article 2 of the ASCM	129
A.	The Specificity Test	132
1.	'De Jure' <i>Specificity</i>	138
2.	'De Facto' <i>Contingency</i>	138
B.	Specificity of Regional Subsidies	139
C.	Specificity <i>per se</i>	140
D.	Burden of Proof of Specificity	140
E.	Conclusions	141
IV.	Prohibited Subsidies: Article 3 of the ASCM	142
A.	Export Subsidies	143
1.	'De Jure' <i>Contingency</i>	144
2.	'De Facto' <i>Contingency</i>	145
B.	The Illustrative List of Export Subsidies	148
C.	Domestic Content Subsidies	154
D.	Conclusions	157
V.	Non-Actionable Subsidies: Article 8 of the ASCM	158
A.	Assistance for R&D Activities	159
B.	Assistance to Disadvantaged Regions	160
C.	Assistance for Adapting Infrastructures to New Environmental Requirements	161
D.	Notification and the Opportunity for Appeal	162
E.	Other Non-Actionable Subsidies	163
F.	Conclusions	165
VI.	Actionable Subsidies: Articles 5 and 6 of the ASCM	166
A.	Injury to the Domestic Industry of Another Member	166
B.	Nullification or Impairment of GATT Benefits	168
C.	Serious Prejudice	169
1.	<i>Cases Where a Serious Prejudice is Presumed (Subsidies Prohibited Prima Facie)</i>	170
2.	<i>Cases Where Serious Prejudice May Exist (Prohibited Subsidies)</i>	172
a)	Displacement or Impediment of Imports	172
b)	Displacement or Impediment of Exports	173
c)	Price Undercutting by the Subsidized Product	174
d)	Increase in the World Market Share of the Subsidized Primary Product	177
D.	Conclusions	177
VII.	Remedies: Disputes and Countervailing Duties	178
A.	Multilateral Forum: Disputes before the DSB	180
1.	<i>Procedures for the Different Categories of Subsidies</i>	180

a)	Red Category: Prohibited Subsidies (Article 4 of the ASCM)	181
b)	Amber Category: Actionable Subsidies (Article 7 of the ASCM)	182
c)	Green Category: Non-Actionable Subsidies (Article 9 of the ASCM)	183
2.	<i>Results of These Procedures: Withdrawal, Repayment or Removal of the Effects</i>	184
3.	<i>Conclusion</i>	187
B.	National Forum: Countervailing Duties	187
1.	<i>Substantive Requirements</i>	189
a)	Existence of a Specific Subsidy	189
b)	Material Injury to a Domestic Industry	191
c)	Causal Link	192
2.	<i>Procedural Requirements</i>	193
a)	Initiation and Consultation	193
b)	Calculating the Amount of Countervailing Duties	194
c)	Duration and Termination of Countervailing Duties	197
d)	Possibilities for Judicial Review of the Countervailing Duties	197
C.	Conclusions	198
VIII.	Notification and Monitoring of Subsidies: The Role of the SCM Committee	199
IX.	Exceptions for Developing Countries: Article 27 of the ASCM	201
A.	Prohibited Subsidies	202
B.	Actionable Subsidies	202
C.	Countervailing Duties	204
D.	Conclusions	204
X.	Concluding Remarks	204
Chapter 5:	The Regulation of Subsidies in the Agreement on Agriculture	207
I.	Introduction	207
II.	The Agreement on Agriculture	208
A.	Commitments on Domestic Support	209
1.	<i>Amber Basket</i>	210
2.	<i>Blue Basket</i>	213
3.	<i>Green Basket</i>	214
a)	General Services	215
b)	Food Security Industry	215
c)	Domestic Food Aid	215
d)	Direct Payments to Producers	215
4.	<i>Conclusion</i>	216

B.	Commitments on Export Subsidies	217
1.	<i>Export Subsidies for Products Subject to Reduction Commitments</i>	218
a)	List of Export Subsidies (Article 9.1. of the AoA)	219
1.	Direct Subsidies	219
2.	Export Sales under the Domestic Market Price	220
3.	Export Payments for Agricultural Products	221
4.	Subsidies to Reduce Costs of Marketing or Transporting Exports	224
5.	Upstream Subsidies	225
b)	Other Export Subsidies (Article 10.1 of the AoA)	225
c)	Conclusion	227
2.	<i>Export Subsidies for Products Not Subject to Reduction Commitments</i>	227
3.	<i>Conclusion</i>	230
C.	Conclusions	230
III.	The Application of the ASCM to Basic Agricultural Products: The Relationship Between the ASCM and the AoA	231
A.	Definition of 'Subsidy' in the AoA	231
B.	Specificity in the AoA	234
C.	Conclusions	235
IV.	Trade Remedies: The Expiration of the Peace Clause	235
A.	The Peace Clause: Exceptions to Article 13 of the AoA	236
1.	<i>Exceptions for Domestic Support</i>	237
2.	<i>Exceptions for Export Subsidies</i>	238
3.	<i>Expiration of the Peace Clause: Application of the ASCM</i>	239
B.	Lack of Conformity of a Measure With the AoA: Withdrawal of the Subsidy (Article 4.7 of the ASCM)	240
C.	Conclusions	242
V.	Concluding Remarks	242
	Chapter 6: Subsidies in the WTO: The 'Foreign Sales Corporations' Case	245
I.	Introduction	245
II.	The <i>DISC</i> Case	249
A.	Group of Experts in DISC	251
B.	Group of Experts in the European Cases	252
C.	The Aftermath of These Cases	254
D.	Conclusions	255
III.	The <i>US-FSC</i> Case	256
A.	The FSC-First Panel and AB Reports	257
1.	<i>Measures in Relation to the FSCs</i>	257

2. <i>First Panel Report</i>	260
a) EC Arguments	261
b) US Arguments	262
c) Conclusions of the Panel	264
3. <i>First AB Report</i>	268
4. <i>Conclusions</i>	270
B. The ETI–Second Panel and AB Reports	271
1. <i>Measures Introduced by the ETI</i>	272
2. <i>Second Panel Report</i>	273
3. <i>Second AB Report</i>	276
4. <i>Conclusions</i>	277
C. Developments of the <i>FSC/ETI</i> Case	277
IV. Conclusions from the <i>FSC</i> Case	280
 Part III: EC Rules on State Aids	 283
Introduction to Part III	285
 Chapter 7: Evolution of the State Aid Rules in the EC	 287
I. Introduction	287
II. State Aids in the History of the EC	291
A. Rules on State Aids: From ECSC to EEC	282
B. Evolution of the Rules on State Aids After the EEC Treaty	293
C. Conclusions	296
III. State Aids Nowadays: Statistics	296
IV. Concluding Remarks	303
 Chapter 8: The Notion of ‘State Aid’: Article 87.1 of the EC Treaty	 305
I. Introduction	305
II. The Notion of ‘Aid in Any Form’	307
A. Examples of Advantages Granted by the State	309
1. <i>Participation in the Capital of Enterprises</i>	309
2. <i>Loans</i>	310
3. <i>Government Guarantees</i>	311
4. <i>Sale of Public Goods</i>	311
5. <i>Acquisition of Products or Services by the State</i>	312
6. <i>Provision of Public Services by the State</i>	312
7. <i>Conclusions</i>	314
B. Intention of the Government When Granting the Measure	314
C. Indirect Advantages	315
D. Form of the Aid	315