Book Review


The treatment of subsidies is a subject of vital importance in international trade law. It is a field of law, which is governed by a multitude of provisions that emerge from various agreements and amendments within the framework of the GATT/WTO system. The goal of this study is to show that there is a fundamental theme underlying this patchwork of provisions and that this theme constitutes the key to an understanding of the legal basis for the myriad of provisions. A starting point is the assumption that subsidies granted by one party cause adverse effects to another party and that the party subject to such effects would seek to defend itself. As the author points out, it is unrealistic to think that the legal system could provide full protection against these adverse effects of subsidies – because that would amount to a prohibition of subsidies with all its economic and social consequences. The focus of the work is thus on what is called ‘legal techniques of attenuation’. Such attenuations relate to the entitlements granted to the party defending itself against the adverse effects of subsidies. In this task the author has been inspired by the way in which a negative externality, such as pollution, is dealt with in the domestic law.

It is not possible to do justice to this comprehensive work by Marc Benitah within this space. A great number of very complex legal aspects of the topic are dealt with and only a few can be presented here.

The subject and the angle of approach are well chosen. Different legal techniques of attenuation are methodically examined and demonstrated through many illustrative examples in the form of legal disputes and case law, some of which have attracted public attention (e.g. the *Airbus* case). Despite the author's ability to lighten the subject with these examples, most of the content of the book is certainly not easily digested. It requires a great deal of knowledge of, and interest in, international trade law to fully appreciate this study. To the initiated reader it is, however, a goldmine of valuable information.

The legal material used throughout the work is extracted from both the GATT/1947 and the WTO system. For each point demonstrated, references are made to both systems – first to the GATT/1947, and subsequently to the WTO legal material. This method serves the purpose of showing the close connection between the systems as well as determining whether the new norms of the WTO system are truly innovative. Although this approach in general is well motivated, it could appear perhaps exaggerated and unnecessary to uphold in some places. In Chapter 21 for instance, the author gives an illuminating example of the consequences of certain ambiguities in the legal texts within the GATT/1947 system but concludes (p. 154) that the current WTO system makes this scenario unlikely, by virtue of an explicit general interpretative note.
The book is divided into three parts. In the first part, legal techniques for attenuating entitlements granted to the party allegedly affected by a subsidy are examined. Both explicit and implicit applications of such techniques are identified. Among the explicit techniques, attenuations favouring developing countries and countries in economic transition are given special attention. The characteristic features of the implicit techniques come from the fact that they function as attenuations even if such a role was not consciously envisaged by the negotiators of international agreements. This effect could be the result of poorly defined concepts or the ‘ambiguous silence’, as the author puts it, as to the link between two texts. It could also be caused by using different techniques of interpretation or placing functionally similar practices beyond the field of subsidies. Since one of the most effective weapons against subsidies is to invoke countervailing duties, a considerable part of the study is devoted to different aspects of this measure. In several chapters the author thus deals with the relative weakness of attenuations in the countervailing-duty field.

An unexploited technique of attenuation is the absence of consumers in the legal texts. Already in the introduction, Benitah announces that this matter will be the object of discussion in the study, and in Chapter 14 it is demonstrated that consumers are virtually neglected in this context. This draws the attention to the overall question of which actors are to be taken into account in international trade law and the fact that there is an antitrust-related perspective to the problem. Today this is undoubtedly one of the central issues in international trade law, and it is thus somewhat regrettable that the laws of subsidies in connection with competition or anti-trust law are not analyzed more thoroughly in this study.

The second part is the most comprehensive part of the three parts of this book. Here the author illustrates how different techniques of attenuation function as ‘seeds for the development of legal disputes’. The case law chosen for this purpose may appear to be of less value in a European perspective since almost all the disputes involve either US or Canadian interests. In this context the common law nature of the GATT/1947 is observed and it is pointed out that the law gradually elaborated in the GATT/1947 system was closely related to the common law tradition. The same analysis remains valid for the WTO system. That is why a lawyer trained in the US common law system might feel more at ease in the WTO/GATT system than European lawyers. The key issues in the disputes referred to in the book are, however, of great relevance also to Europeans and in several of these disputes the EU is actually also a party.

Benitah shows that numerous legal disputes have resulted from ambiguous silence as to the link between two legal texts such as the GATT/WTO, the Subsidy Codes, the Agreement on Trade in Civil Aircraft, and the EC implementing legislation. Other disputes have arisen from poorly defined concepts, and in relation to these cases, the author examines the extent to which judges – in a certain way – become legislators. Yet other disputes are caused by the attempt of one party to go beyond the ordinary meaning of the words of the legal texts in order to bypass, or in some cases to intensify, the attenuations. For this purpose two ‘radical’ techniques of interpretation are discussed with reference to the case law; on the one hand interpretation based on a sophisticated economic reasoning, and on the other, interpretation founded on an ultra-restrictive literal meaning of words. The author shows that in practice the former technique is used more frequently than the latter. However all these ‘extremist’ attempts seem to have failed.

In different aspects, developing countries are granted special favours within the WTO system. According to certain provisions in the Uruguay Round Subsidies Agreement, advanced developing countries are for instance, under certain conditions, allowed to maintain otherwise prohibited export subsidies for eight years from the entry into force of the WTO Agreement. The author discusses why such attenuating rules are surprisingly vulnerable.