The Law of Subsidies under the GATT/WTO System

Marc Benitah





KLUWER LAW INTERNATIONAL THE HAGUE / LONDON / NEW YORK

Table of Contents

Acknowledgments	ix
Abbreviations	xi
Introduction	1
Part I. Legal Techniques for Attenuating Entitlements Granted to the Party Allegedly	-
Affected by a Subsidy	7
A. Explicit Techniques of Attenuation	11
Chapter 1: Effect-based Norms Chapter 2: Attenuations Favoring Developing Countries Chapter 3: The <i>De Minimis</i> Technique of Attenuation Chapter 4: Attenuations Favoring Countries in Economic Transition	11 35 44 46
B. Implicit Techniques of Attenuation	51
Chapter 5: The "Mutually Satisfactory Solution" Chapter 6: The Poorly Defined Concept Chapter 7: The Ambiguous Silence as to the Link Between	51 58
Two Texts Chapter 8: Techniques of Interpretation Functioning	62
as an Attenuation Chapter 9: Placing Functionally Similar Practices Beyond the Field of Subsidies	65 68
Chapter 10: The Absence of Special Treatment for Special Subsidies Chapter 11: Intensifying the Burden of Proof as an Implicit Technique	77
of Attenuation	84
C. The Relative Weakness of Attenuations in the Countervailing Duty Field	87
Chapter 12: Attenuations Derived From the Simple View of "Distortion" and Constraining the Identification of a Countervailable Subsidy	87

	Dilution of Required Effects	93
Chapter 14:	An Unexploited Technique of Attenuation: The Legal Absence of Consumers	97
Chapter 15:	Attenuations Favoring Developing Countries	71
	in the Field of Countervailing Duties: A Dubious Privilege	111
Chapter 16:	Imprecise Requirements with Respect to the Initiation	
7	of Countervailing Duty Proceedings	113
Part II.	Techniques of Attenuation as a Seed for	
	of Legal Disputes	117
	Disputes Arising from the Ambiguous Link	110
betwee	n Two Texts	119
Chapter 17:	The Relationship between Article I of the 1947 General Agreement and the Tokyo Round Subsidies Code	
	(GATT/1947 System)	119
	The Airbus Case (GATT/1947 System)	125
Chapter 19:	Relevance of the Tokyo Round Illustrative List for the Definition of a Countervailable Subsidy	
C1 . 20	(GATT/1947 System)	132
Chapter 20:	A Variation on this Theme in the WTO System: The <i>A Contrario</i> Saga	141
Chapter 21:	The Issue of Admissibility in the Pasta Case (GATT/1947 System)	151
Chapter 22:	Potential Issues as to the Relationship between	151
•	WTO Agreements	154
B. Dispute	es Arising from Poorly Defined Concepts	173
Chapter 23:	The "More than Equitable Share" Criterion	
•	(GATT/1947 System)	173
Chapter 24:	The Absence of a Definition of the "Material	
C1 . 25	Advantage" Criterion (WTO System)	181
Chapter 25:	"Inconsistency with Development Needs": A Criterion nearly Impossible to Satisfy (WTO System)	185
Chapter 26:	The Ambiguity of the "Otherwise Due" Criterion and	105
•	the Possibility of Multiple Universal Reference Sets	
	(WTO System)	187
Chapter 27:	The "In Fact Tied" Criterion: Tentative Rulings	100
	(WTO System)	190

	Table of Contents	vii		
C. The Failure of Extremist Techniques of				
Interpr	retation	199		
C(a). The	Failure of Country B's Sophisticated Economic			
Inte	rpretations	199		
	The <i>Wine Grape</i> Case (GATT/1947 System) The Attempt to Convert an Indirect Subsidy	199		
-	into a Direct Subsidy (GATT/1947 System)	205		
Chapter 30:	The Failure of Analyzing a Subsidy as Benefiting a Merchandise Rather than a Firm (WTO System)	212		
Chapter 31:	Attempts to Sophisticate the Standard Case	212		
	Law Definition of "Benefit" (WTO System)	214		
Chapter 32:	The Attempt to Treat Export Restraints as Subsidies	218		
C(b). The	Failure of Attempts to Intensify Country B's			
` '	nuations Through an Extremist Technique of			
Inte	rpretation	225		
Chapter 33:	The Attempt to Differentiate Producers Receiving			
	the Subsidy and Producers Benefiting from the	225		
Chapter 34	Subsidy (GATT/1947 System) The Failure of the Net Cost Approach to "Benefit"	225		
Chapter 54.	(WTO System)	227		
Chapter 35:	The Attempt of an Ultra-restrictive Interpretation of			
C1	"Payment" (WTO System)	230		
Chapter 36:	The Failure of the Formalistic Interpretation of "Financed by Virtue of Governmental Action"	235		
	(WTO System)	200		
D Vulner	ability of Attenuations Favoring			
	oing Countries	239		
_	Vulnerability of the Eight-year Exemption Relating	20)		
Chapter 37.	to Prohibited Export Subsidies	239		
Chapter 38:	Vulnerability of the Exemption Relating to Subsidies			
Chapter 30.	Contingent on the Use of Domestic Products Vulnerability of the Protection Against the	243		
Chapter 39.	"Serious Prejudice" Claim	248		
E. The Difficulty to Apply Coherently Attenuations				
	d from the Concept of "Distortion"	251		
Chapter 40:	Different Views of "Distortion"	252		

Chapter 41:	Attenuations Derived from the Simple View of "Distortion"	256
Chapter 42:	Legal Treatment Reflecting the Sophisticated	230
-	View of "Distortion"	267
Chapter 43:	"Distortion": A Poor Guide for Explaining Several	
	Normative and Interpretative Choices	273
	ty between Subsidy and Injury for the Purpose	
	ntervailing Duties: A Legally Indeterminate	
Attenua	ation	281
Chapter 44:	International Texts: A "Double Bind" Scenario	281
Chapter 45:	The Confusion of National Legislation and Case	
	Law Faced with the Indeterminacy of	200
Chamtan 16.	International Texts: The Case of the United States The Confesion of National Logislation and Case Law	289
Chapter 40:	The Confusion of National Legislation and Case Law Faced with the Indeterminacy of International Texts:	
	The Case of the European Union	296
Chapter 47:	The False Dilemma between the Effects of "Subsidized	
•	Imports" and the "Effects of the Subsidy": Critical	
	Analysis of the Panel's Report on Atlantic Salmon	300
	Obstacles in the Way of Clarifying ed Norms through the	
	v Process	305
Cast Lav	V 110CC55	303
	Panel's Reluctance to Rule Clearly	307
Chapter 49:	Adoption of the Panel's Report and the veto of the	
C1	Losing Party	314
	Conflicting Interpretations of the Panel's Report Implementation Made Dependant upon the Uruguay	318
Chapter 31.	Round Negotiations	333
Chapter 52:	Procedural Obstacles as a Reaction to the Quasi-	333
-	automatic Establishment of a Panel in the WTO System	336
Chapter 53:	Lost Opportunities for the Case Law Process	342
Annex		355
Bibliograph	ıy	413
Table of Ca	ses	414
Index		415