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 11
Chapter 2: Attenuations Favoring Developing Countries 35
Chapter 3: The De Minimis Technique of Attenuation 44
Chapter 4: Attenuations Favoring Countries in Economic Transition 46

B. Implicit Techniques of Attenuation 51
Chapter 5: The “Mutually Satisfactory Solution” 51
Chapter 6: The Poorly Defined Concept 58
Chapter 7: The Ambiguous Silence as to the Link Between Two Texts 62
Chapter 8: Techniques of Interpretation Functioning as an Attenuation 65
Chapter 9: Placing Functionally Similar Practices Beyond the Field of Subsidies 68
Chapter 10: The Absence of Special Treatment for Special Subsidies 77
Chapter 11: Intensifying the Burden of Proof as an Implicit Technique 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
Table of Contents

Chapter 13: Dilution of Required Effects 93
Chapter 14: An Unexploited Technique of Attenuation: The Legal Absence of Consumers 97
Chapter 15: Attenuations Favoring Developing Countries in the Field of Countervailing Duties: A Dubious Privilege 111
Chapter 16: Imprecise Requirements with Respect to the Initiation of Countervailing Duty Proceedings 113

Part II. Techniques of Attenuation as a Seed for the Birth of Legal Disputes 117

A. Legal Disputes Arising from the Ambiguous Link between 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
Chapter 18: The Airbus Case (GATT/1947 System) 125
Chapter 19: Relevance of the Tokyo Round Illustrative List for the Definition of a Countervailable Subsidy (GATT/1947 System) 132
Chapter 20: A Variation on this Theme in the WTO System: The A Contrario 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 WTO Agreements 154

B. Disputes 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 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 the Possibility of Multiple Universal Reference Sets (WTO System) 187
Chapter 27: The “In Fact Tied” Criterion: Tentative Rulings (WTO System) 190
# Table of Contents

C. The Failure of Extremist Techniques of Interpretation 199

C(a). The Failure of Country B’s Sophisticated Economic Interpretations 199

Chapter 28: The *Wine Grape* Case (GATT/1947 System) 199
Chapter 29: The Attempt to Convert an Indirect Subsidy 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 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 Attenuations Through an Extremist Technique of Interpretation 225

Chapter 33: The Attempt to Differentiate Producers Receiving the Subsidy and Producers Benefiting from the Subsidy (GATT/1947 System) 225
Chapter 34: The Failure of the Net Cost Approach to “Benefit” (WTO System) 227
Chapter 35: The Attempt of an Ultra-restrictive Interpretation of “Payment” (WTO System) 230
Chapter 36: The Failure of the Formalistic Interpretation of “Financed by Virtue of Governmental Action” (WTO System) 235

D. Vulnerability of Attenuations Favoring Developing Countries 239

Chapter 37: Vulnerability of the Eight-year Exemption Relating to Prohibited Export Subsidies 239
Chapter 38: Vulnerability of the Exemption Relating to Subsidies Contingent on the Use of Domestic Products 243
Chapter 39: Vulnerability of the Protection Against the “Serious Prejudice” Claim 248

E. The Difficulty to Apply Coherently Attenuations Derived 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 View of “Distortion” 267
Chapter 43: “Distortion”: A Poor Guide for Explaining Several Normative and Interpretative Choices 273

F. Causality between Subsidy and Injury for the Purpose of Countervailing Duties: A Legally Indeterminate Attenuation 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 International Texts: The Case of the United States 289
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

Part III. Obstacles in the Way of Clarifying Attenuated Norms through the Case Law Process 305
Chapter 48: Panel’s Reluctance to Rule Clearly 307
Chapter 49: Adoption of the Panel’s Report and the veto of the Losing Party 314
Chapter 50: Conflicting Interpretations of the Panel’s Report 318
Chapter 51: Implementation Made Dependant upon the Uruguay Round Negotiations 333
Chapter 52: Procedural Obstacles as a Reaction to the Quasi-automatic Establishment of a Panel in the WTO System 336
Chapter 53: Lost Opportunities for the Case Law Process 342

Annex 355
Bibliography 413
Table of Cases 414
Index 415