WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

A Commentary

Panels and the WTO Appellate Body have rendered a large number of complex and lengthy rulings on the Agreement on Subsidies and Countervailing Measures. The reasoning behind these rulings is often intimately linked to the underlying facts of a particular case and the methods of litigation adopted by the parties. Without guidance, it is difficult to find and research a specific subsidy issue quickly. This book provides an essential article-by-article commentary on the Agreement and sets out the law as it emerges from this body of rulings, providing the legal basis for further analysis of subsidy disciplines within the realms of economics and political science. It also includes a useful summary of the negotiating history and the links to other WTO Agreements such as GATT 1994. This important reference work will appeal to international trade lawyers, government officials, researchers, students of international trade law, business associations and NGOs.

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WTO AGREEMENT
ON SUBSIDIES AND
COUNTERVAILING
MEASURES

A Commentary

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PREFACE

A free trade regime that does not reign in or seek to regulate artificial subventions will likely help trigger its own demise.

Bhagwati (1988, p. 35)

The WTO Agreement on Subsidies and Countervailing Measures (ASCM) was one of the most important achievements of the Uruguay Round of Multilateral Trade Negotiations, and it was a major step in the international regulation of subsidies and anti-subsidy action. With the WTO now comprising more than 160 members including all major economic powers, the ASCM is a truly global charter governing subsidies.

The WTO celebrated its twentieth anniversary in 2015. While rule-making in the WTO proved to be difficult (most notably, the fate of the Doha Development Agenda Negotiations launched in 2001 is uncertain), the WTO's dispute settlement system can clearly be considered a success. After GATT 1994 and the WTO Anti-Dumping Agreement, the ASCM is the WTO agreement that is most frequently referred to in requests for consultations. The largest disputes dealt with by the WTO's dispute settlement mechanism involved subsidies such as the civil aircraft cases that opposed the US and the EU, US – FSC and US – Upland Cotton. There exists now an important body of rulings adopted by the WTO Dispute Settlement Body that has considerably clarified the ASCM.

This book undertakes to set out comprehensively panel and Appellate Body rulings concerning the ASCM. It is thus meant to be an inventory of the multilateral subsidy disciplines as they have developed over the years. The reasoning developed by panels and the Appellate Body in these rulings is often complex, subtle and intimately linked to the underlying facts and the way the parties litigated their claims. Therefore, the description of the findings normally closely follows the wording employed by panels and the Appellate Body. Moreover, a considerable degree of circumspection...
is usually warranted when trying to distil more general principles from these rulings.

Subsidies can distort trade, e.g. when they are used as part of the mercantilist toolbox or when they support ailing industries and thus prevent necessary structural changes of the economy. But subsidies can also correct market failures, for instance those linked to climate change. Therefore, it is important that subsidy disciplines target ‘bad’ subsidies while leaving sufficient policy space to governments to address market failures. This book does not intend to provide an analytical framework for distinguishing ‘good’ and ‘bad’ subsidies. Such a task clearly falls into the realm of economics and political science. But by setting out the law as it emerges from this body of rulings, it can serve as a basis for such an analysis.

My former colleagues Steve Gospage and Peter Klein have seen earlier drafts of this book. The text has greatly benefited from their comments and suggestions and the author is very thankful for these contributions. Obviously, all remaining errors are those of the author.

Last but not least, it should be pointed out that the usual disclaimers apply. Any views expressed in this book are personal and cannot be attributed to the European Commission or the EU.