

of more inclusive growth. Do Europe's commitments to battle climate change and its 'green deal' not marginally trump the US position as a 'climate behemoth' – one that clings on to what Wainright and Mann¹² call 'anti-planetary capitalism'?

Despite its structural limitations, *Straight Talk on Trade* is a timely part-academic, part-popular reading at a time of global trade imbroglios and, by extension, a sobering reminder for 'politicians of all stripes' (274) about the cracks in the global capitalist order, now even more brutally bared by the covid-19 pandemic. While trade policy specialists may lament how Rodrik overlooks certain flanks of the global economic architecture, political economists, public policy wonks, and nonexperts alike will find this contribution thought-provoking as to the contemporary crises in commerce, capital, and climate, and how we may emerge out of them sane, if not unscathed.

ANTONIO SALVADOR M. ALCAZAR III

Doctoral School of Political Science, International Relations & Public Policy

Central European University, Vienna, Austria

Email: Alcazar_Antonio@phd.ceu.edu

doi:10.1017/S1474745620000300

What Shapes the Law? Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines

edited by Luca Rubini and Jennifer Hawkins

European University Institute, 2016, ISBN:978-92-9084-432-7, xvi + 142pp.

A *subsidy* is a transfer of money (or something of value) from a government to a private economic actor ostensibly for the purpose of influencing behavior by that actor in a socially beneficial direction. Subsidies can be used in an economy enjoying any mix of market and non-market features. The government of a fully market economy could logically use a subsidy to correct market failure. Any subsidy used in one economy can externalize effects on other economies. Because subsidies can shape and distort trade, they have been an instrument and an object of national trade policy for centuries. The international trading system as it developed in the twentieth and twenty first centuries has given increased attention to addressing the transborder economic impact of subsidies.

Legal and social science scholars have also been giving more attention to the problem of state subsidies and a recent publication adds a new intellectual resource for such analytical efforts. Orchestrated by Professor Luca Rubini of the Birmingham Law School, this collection of 26 essays by subsidy experts examines the history and practice of the international and the European Union (EU) regimes to discipline subsidies. What makes this four-part work especially valuable is that many of the commentators played key roles over previous decades in conceptualizing and negotiating subsidy disciplines. The creation of this permanent record of participant views is a gift to practitioners, teachers, and policymakers. As the late Julio Lacarte Muró, a founder of the World Trade Organization (WTO) and its predecessor institutions, explains in a Foreword to the volume, this electronic volume 'sets out objectively and fully the multiple sides of a question that is due to exercise the world trading community now and in the future'.

¹²Wainright, J. and Mann, G. (2013) 'Climate Leviathan'. *Antipode* 45(1): 1–22.

The book is divided into four parts, three of which pertain to WTO law and the last of which addresses EU law. This review will discuss mainly the first three parts on the multilateral trading system.

Part I of the compendium focuses on ‘foundations’. In his opening essay, English historian Anthony Howe comments on the vocabulary of subsidy and provides an overview of nineteenth and early twentieth century British subsidies and of the beginning of international regulation which came in the Sugar Convention of 1902. He also briefly discusses the early analytical work done in the League of Nations on the political economy of subsidies. In his essay, Douglas Irwin, a professor of economics and scholar of trade policy history, recalls the origins of countervailing duties in the nineteenth century and the efforts in the League of Nations to address subsidies as a trade barrier. An essay by trade scholar Petros C. Mavroidis points out that the WTO definition of subsidy ‘is a mess’ and is ‘full of holes and loopholes’. Regarding WTO dispute settlement, he notes that WTO Members have ‘shown remarkable restraint when challenging subsidies’. In her essay, political science professor Michelle Cini focuses on the rise of State Aid disciplines in European competition law beginning in 1968. The essay by economics professor Bernard Hoekman calls attention to how WTO subsidy rules failed to adapt to address the new challenges of value chains and supply chain trade. According to Hoekman, as government subsidy policy has evolved to focus on incentivizing inward investment rather than only incentivizing the production or export of goods, assessing the transborder spillovers of subsidies has become much more ‘complex than in a world where production is mainly national’. As a result, governments are finding it ‘harder to design’ a mutually beneficial ‘cooperation on rules’ in the WTO Agreement on Subsidies and Countervailing Measures (SCM), or in additional rules that consider the effects of differential regulatory policies, investment subsidies, and behavior of companies equivalent to a subsidy. An essay by the late J. Michael Finger reminds us of the intellectual clarity he brought to trade policy analysis. Finger cautions against presuming the WTO to be an ‘extension of the EU model to the rest of the world’. Rather, he underlines the truth that ‘national subsidy policy’, and indeed all trade policy, is national rather than necessarily rational. As a result, multilateral policymakers should be looking broadly for ways to shape ‘national decisions to grant or remove subsidies’. Notably, Finger points to a need to integrate WTO principles into ‘national decision processes’.

Part II scrutinizes the ‘real world’ of subsidy negotiations with contributions from former negotiators and staff serving at the General Agreement on Tariffs and Trade (GATT) or the WTO. GATT staff veteran Peter Williams comments on the ‘conditions’ that led to the success of the Tokyo Round in the late 1970s and the Uruguay Round in the early 1990s. Williams observes that while ‘it is relatively easy to find a balance of benefits at a low level’, conditions have to be right ‘to find a balance of benefits at a high level’. Those two earlier rounds were successful because of conditions such as the wide ‘range of subjects’ on the negotiating agenda, the ‘powerful motives and objectives’, and the ‘leadership’ of the US government. Trade lawyer and former US negotiator John D. Greenwald looks back at lessons learned from the incorporation of subsidy disciplines into the GATT Tokyo Round Agreements. Greenwald reaches the depressing conclusion that ‘it is all but impossible to subject national subsidy programs to strict WTO discipline’. Instead, he offers a pragmatic argument that the only effective discipline comes through unilaterally imposed countervailing duties (CVDs). Seen from that perspective, he is critical of two WTO Appellate Body decisions that make it more difficult (than it should be) to impose CVDs. Greenwald died at a young age during the editing of this volume. Like his father, the late Ambassador Joseph Greenwald, John made vital contributions to the international trading system.

Another former American negotiator on subsidies, Gary Hufbauer, contributes an excellent essay on what was and was not achieved on subsidies during GATT rounds. Hufbauer, a highly respected trade policy analyst in all major capitals, observes that the SCM Agreement ‘proved relatively ineffective’ and that key potential elements of an effective regime, such as private rights

of action and a WTO ombudsman on subsidies, were never given consideration by governments bent on retaining their capacity for domestic ‘sunrise’ or ‘sunset’ subsidies. Hufbauer also reminds us that ‘subsidies to the service industries completely escape the purview of the WTO system’. The essay by Jan Woznowski, a former GATT and WTO secretariat official, compares the format of subsidies negotiations in the Havana, Tokyo, Uruguay, and Doha Rounds and relates how the Tokyo and Uruguay Round negotiations were carried out in ‘a small group of negotiators’ who did not keep detailed records. Another valuable comparative observation is that while the first three rounds had a lead promoter in the United States, the US government omitted to play that role in the failed Doha Round. His essay further observes that the subsidies negotiators in the Uruguay Round ‘were not thinking about public international law as such’ and were not ‘trying to ensure any coherence with any other body of law’. In addition, he reveals that the subsidy negotiators succeeded only because they were *unaware* of the future design of WTO dispute settlement that negotiators would later agree to. Former EU negotiator Hugo Paemen recommends that any new study of subsidies ‘take a more comprehensive view and also cover their underlying economic, political, social, military, security and sovereignty motivations’, as well as ‘pressure’ from ‘stakeholders’. Another former EU negotiator Gerard Depayre contributes an excellent analysis of what was achieved in the Uruguay Round and of what the actual results since then have been. For example, he notes the ‘failures in the notification system’ and the ‘reluctance of countries to invoke WTO rules against other countries for fear of counter attacks against their own schemes’. Looking to the future, Depayre calls for consideration of the ‘realities of the very diverse universe of subsidization’ such as the fact that certain subsidies are meant to serve environmental goals. He also urges consideration to provide ‘direct access of private parties to the dispute settlement mechanism’. The final essay comes from former Canadian negotiator Terry Collins-Williams, who underlines the need for better data and information on subsidies. He finds that member government practice in transparency has been ‘woefully deficient’, in part because the SCM Agreement is ‘silent on quantification and notification standards’. Collins-Williams suggests that the WTO should ‘expand third-party notification of subsidies and perhaps draw upon the resources of international organisations’ as well as some non-governmental organizations.

Part III covers the same material from the perspective of scholars. The crisp essay by trade law scholar William J. Davey looks at ‘subsidy control’ in WTO litigation and draws upon Davey’s service as a WTO panelist and WTO Secretariat official who advised WTO panels. Examining each major WTO subsidy discipline, Davey points to the most problematic interpretive issues that have arisen such as the existence of a ‘de facto’ export subsidy and the standard for causation. His essay discusses the outcomes of the major cases and speculates on the extent to which WTO disciplines have changed national practice. A reviewer of an essay by Davey is faced with an impossible task of seeking to summarize a writing that is best read in the original. Trade scholar and practitioner Gary Horlick also contributes an excellent essay in which he recites the history of CVD determinations in the United States and notes the importance of this practice in the design of particular SCM provisions. The essay reminds us that CVDs are used mainly in large countries ‘which have markets worth protecting’ and the essay notes the interrelationship between CVDs and antidumping duties. Horlick hints at criticism of the Appellate Body for ‘rewriting’ the SCM Agreement – for example, by allowing ‘national authorities to find subsidies without any actual evidence’. Looking ahead, his essay suggests that climate change ‘will dominate the shape of future subsidy rules’ that will need to respond to the imperative of providing ‘global public goods’. Horlick calls for the WTO to take up the issue of climate before environment ministers act without being ‘worried too much about WTO niceties’. Trade attorney and scholar Dominic Coppens comments on the ‘20 years of (re)shaping WTO subsidy law’ by WTO judicial decisions. He argues that such reshaping seems to be guided by the adjudicator’s idea of fairness and about implications for the broader system. Coppens points to numerous cases to buttress his point. For example, in *Canada–Renewable Energy*, Coppens posits that the Appellate Body sought to create

'more policy space' for solar subsidies to producers by taking into account 'non-trade values'. He also discusses agriculture where he sees adjudication as having narrowed the flexibility originally afforded to agricultural subsidies. Longtime GATT and WTO Secretariat official Mark Koulen discusses the academic literature on the SCM Agreement that has grappled with the fact that the Agreement lacks a Preamble or explicit 'indication of its object and purpose'. He raises the question of whether there is currently 'insufficient' capacity in the trading system 'to produce the type of consensual knowledge that is necessary for Members to reach agreement' on proposed specific changes. The essay by Brazilian diplomat Eduardo Chikusa, who chaired the SCM Committee, characterizes past subsidy negotiations as having preserved 'policy space' for 'strategic sectors' such as agriculture. In future negotiations, he sees 'emerging countries', which 'did not have a significant say in the past' taking on a greater role for maintaining 'policy space for development objectives'. Trade lawyer Philippe De Baere observes that there is intent to interpret the SCM Agreement in ways that 'could justify measures countering export enhancing policies while allowing policies reflecting domestic policy objectives'. Yet, he is skeptical that the SCM Agreement recognizes policy justifications for otherwise illegal or countervailable subsidies. In addition, he doubts that a WTO adjudication would find currency undervaluation to be a de facto export subsidy. European Commission attorney James Flett offers what he calls a 'systematic interpretation of WTO Subsidies Law'. I would call Flett's essay a novel interpretation that adds value of the literature. Through a systematic interpretation of the subsidy-related provisions in GATT 1947, Flett suggests that the authors of the SCM were not seeking to 'destroy, *without explanation*', the basic GATT principles. In other words, Flett would read more GATT principles into the SCM Agreement than most commentators (myself included) have done. For example, he argues that 'if a subsidy is limited to what is necessary in order to ensure a common good, there is no *serious* prejudice or *significant* effect' on other Members. The carefully documented analysis in Flett's essay yields high value to a reader, but the author also rewards us with an afikoman in the form of a 'Draft Preamble for the Agreement on Subsidies and Countervailing Measures'.

Part IV contains six essays on the history and implementation of EU State Aid control measures. The essays are written by practitioners and by current and former EU officials.

A review of this volume is especially timely now when criticisms are being hurled at the WTO for having failed to restrain state aid, especially in China. The forthcoming WTO Ministerial in Kazakhstan in June 2020 may consider initiatives to negotiate revisions of the SCM Agreement especially as it pertains to non-market economies. Proposals are already circulating to strengthen the disciplines on subsidies and to weaken the disciplines on CVDs. Yet the new precedents being established in 2020 for government lending to businesses in response to the pandemic will make it harder to agree on disciplines. Finding a path forward will not be easy. Happily, this volume can illuminate the terrain for experienced WTO hands and can provide basic orientation to a new generation of treaty pathfinders.

STEVE CHARNOVITZ

George Washington University
Email: scharnovitz@law.gwu.edu