

because the networked world in which we now live is affecting law and the legal process as never before, whatever the tribunal. In this respect, there are moves towards discussing the possibility of international conventions on the admission of digital evidence into legal proceedings. It is for this reason that the tensions between different legal approaches, as highlighted by the author in the context of the WTO settlement procedure, cause so many conceptual problems that have practical consequences. To this extent, the findings of the Cambridge AHRC Research Project on European Legal Development conducted by the Centre for European Legal Studies will be of great interest. In the meantime, this very useful text serves to illustrate some of the problems not only faced by the WTO, but in legal systems across the earth generally.

STEPHEN MASON*

The WTO Agreement on Safeguards by ANDREW SYKES [Oxford University Press, Oxford, 2006, 392 pp, ISBN 978-0-19-927740-7 £94.95 (h/bk)]

Since its inception, the GATT has allowed safeguard measures in case of unexpected import surges. In the context of reciprocal trade concessions, safeguards buffer the effects of sharp fluctuations in trade inflows and adjust the 'GATT bargain'. As the Appellate Body of the World Trade Organization (*Argentina—Footwear*) noted, however, safeguards are 'extraordinary' (*Argentina v Footwear*). Their requirements and conditions for their use raise difficult questions which have so far received confusing answers. They are difficult to resort to and to successfully defend. As Sykes notes, this 'state of affairs' may 'discourage the use of safeguard measures' (page 209) and, importantly, the under-utilization of safeguards may undermine the 'plausibly useful role' they 'play in the system' diverting 'protectionist pressures' elsewhere.

These few remarks confirm the importance of a serious analysis of safeguards regulation and one which tests its suitability against its rationale. This is the objective of Sykes' commentary: '[m]y goal in this book is not simply to illuminate the legal issues associated with safeguard measures, but to explore the rationale for safeguard measures in the WTO/GATT system, and the related policy debate over the proper role of safeguard measures' (p 34).

Chapter 1 offers an overview of safeguards in the GATT/WTO. Chapter 2 is particularly important. After a brief overview of the basic economics of international trade and protection, Sykes develops his analysis systematically, considering the economic and political economic rationales of safeguards. He shows how economic theory militates against the use of safeguards. The claims that they would facilitate the restoration of competitiveness or the execution of orderly contraction or structural adjustments, or that they would achieve redistributive equity objectives, are rejected. So is the case in favour of political economic theories that view safeguards as safety valve or as deterrents of cheating in international trade relations. Instead Sykes puts forward a justification based on public choice and optimal contracting literature which is the cornerstone of this chapter and has various implications for the operation of safeguards, most notably the 'serious prejudice' test and the analysis of causation. Safeguards would be acceptable Sykes argues, when the 'import-competing industry is suffering severe dislocation, and when the exporting industry that would be harmed by revocation is prosperous' (p 68) and is able to weather any compensation/retaliation. Safeguards would be justified when they are 'politically efficient', that is when 'the gains to officials in the importing country can "outweigh" the losses to officials in the exporting country' (ibid). Confirming a finding of Kenneth Dam,¹ the entitlement of political officials to 'take back' concessions that become politically burdensome would also enhance their willingness to make concessions in the first instance.

* Barrister.

¹ K Dam, *The GATT: Law and International Economic Organization* (University of Chicago Press, Chicago, 1970).

After briefly outlining the basic principles of the judicial review of the decisions of national authorities in Chapter 3, the subsequent chapters analyse the various requirements of safeguards law (as resulting from GATT article XIX and the WTO Agreement on Safeguards). While Chapter 4 details the procedural obligations, Chapters 5, 6, 7 and 8 examine the substantive elements.

Sykes immediately notes the causality paradox in safeguards. The analysis commences with the perplexing meaning of the 'unforeseen developments' and 'effects of the obligations incurred' prerequisites which he cumulatively dubs as 'unforeseen developments clause'. He shows how an 'exogenous' causal factor—which may well be provided by these 'unforeseen developments'—is necessary to make the causation analysis meaningful. If this requirement is dropped, which has been the GATT practice, the narrower question 'did increased quantities of imports cause serious economic injury to a domestic industry?' is highly problematic from an economic viewpoint. Indeed, it is the forces of supply and demand that determine the quantity of imports *and* the indicators of injury. Put differently, increased imports and injury occur simultaneously and one cannot be viewed as a cause of the other. This causality paradox emerges also in the antidumping and countervailing duty context. In many cases, dumping, that is geographical price discrimination, is a perfectly legitimate commercial practice. The question 'did dumped imports cause material injury to the domestic industry?' is highly perplexing. Analogously, if the focus of anti-subsidy measures is not on the 'exogenous' causal factor, that is the subsidy, the whole causality analysis becomes faulty. Despite the Appellate Body's revival of the controversial 'unforeseen developments' clause and its construction as a condition for the use of safeguard measures, many questions remain unanswered.

Sykes devotes 56 pages to the analysis of causation. The case-law review shows that the criteria used are flawed and the crucial issues remain open. Causation analysis is confused. So is the 'non-attribution' analysis. The ultimate logical impossibility is the attempt to distinguish between causal contribution of 'increased imports' and that of 'other factors' since the latter *are* often among the 'cause' of the former. Sykes' argumentation is rigorous and cogent. Drawing on US experience and literature, he outlines a number of possible solutions to conclude that '[a]ll of these options are logically intelligible, yet none of them are clearly desirable as a policy matter, and each poses considerable practical challenges to implementations' (p 208).

Finally, while Chapter 9 analyses the requirements of permissible safeguards, paying special attention to the selectivity issue, Chapter 10 deals with the rules on compensation and retaliation and the prohibition of so-called 'Grey-Area' measures.

Sykes concludes by noting that, due to confusing and flawed standards, safeguard measures in the WTO operate in a sort of 'legal limbo'. If they are used, they are likely to be successfully challenged. Their use is therefore discouraged and, as noted, their need is satisfied by using (and misusing) substitutes such as antidumping or countervailing duties.

The rich analysis of the various chapters is accompanied by various annexes which go beyond the WTO and US/EC legal texts to include notifications to the WTO Committee on Safeguards concerning national legislation, safeguard measures and a listing of measures in place at the time of publication. These statistics are now out of date but can be updated with small effort.

In conclusion, Sykes presents readers with a book that masterfully combines accessible language with depth of analysis and cogent argumentation with respect to a crucial topic of international trade law. The multi-disciplinary approach is key in creating the added value. The close connections with antidumping and subsidy/countervailing duty law further make Sykes' commentary a necessary reading for anybody interested in the law, economics and politics of trade remedies and subsidy control.

LUCA RUBINI*

* Birmingham Law School.