Titel der Master-Thesis

„Trade regulations: Comparative analysis of U.S. and EU approaches “

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### I. Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADA</td>
<td>Anti-Dumping Agreement</td>
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<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>CCT</td>
<td>Common Customs Tariff</td>
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<td>CCP</td>
<td>Common Commercial Policy</td>
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<tr>
<td>CN</td>
<td>Combined Nomenclature</td>
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<td>EBA</td>
<td>Everything but Arms</td>
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<td>EC</td>
<td>European Commission</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GSP</td>
<td>Generalized System of Preferences</td>
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<td>HS</td>
<td>Harmonized System</td>
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<td>HS Convention</td>
<td>International Convention on the Harmonized Commodity Description and Coding System</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NGOs</td>
<td>Non-governmental organizations</td>
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<td>NTA</td>
<td>New Transatlantic Agenda</td>
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<td>SCM Agreement</td>
<td>Agreement on Subsidies and Countervailing Measures</td>
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<td>TBR</td>
<td>Trade Barriers Regulation</td>
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<td>TEC</td>
<td>Transatlantic Economic Council</td>
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<td>TEP</td>
<td>Transatlantic Economic Partnership</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<td>TTIP</td>
<td>Transatlantic Trade and Investment Partnership</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>URAA</td>
<td>Uruguay Round Agreements Act</td>
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<td>WCO</td>
<td>World Customs Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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II. Abstrakt


Über die letzten Jahrzehnte hinweg haben die Europäische Union, die Vereinigten Staaten und einige andere Länder Verhandlungen bezüglich der Abschaffung von Handelsbarrieren begonnen. Diese haben dazu geführt, dass die Bedeutung des Handels und vor allem die des internationalen Handels drastisch gestiegen ist.

Die Erweiterung des Anwendungsbereiches der Handelspolitiken ist notwendig um in den verschiedensten Märkten der Welt Wettbewerb zu erzielen. Liberalisierte Handelsordnungen spielen daher eine bedeutende Rolle in der Entwicklung wettbewerbsfähiger Handelsmärkte.


Solange die wesentlichen und prozeduralen Erfordernisse eingehalten werden sind deshalb Handelsrechtsmittel als legal angesehen. Und das, obwohl dieses Thema immer noch umstritten und kritisiert ist.

im Welthandel ableiten.

Handel spielt eine wahnsinnig grosse Rolle in der Entwicklung des Weltmarkts und die grössste Arbeit ist es, den Markt in einer Art und Weise zu regulieren, dass man soviel wie möglich aus der Entwicklung des Welthandels ziehen kann. Diese Handelsverordnungen sind notwendig um mit wirtschaftlichen Hindernissen bezüglich des Marktzugangs und Import-Export bezogenen Schwierigkeiten, welche eventuell ein Resultat von Regierungsinterventionen und weltweiten Marktverordnungen sind, umzugehen.

Ich würde mich gerne mit diesem Thema beschäftigen um herauszufinden, welches die Grundprinzipien und aktuellen Handelsverordnungen sind, und was ihr Einfluss auf den Weltmarkt von heute ist. In meiner Thesis werde ich die Vorgehensweise der Vereinigten Staaten und Europa bezüglich dieses Themas untersuchen und vergleichen und ein weiterführendes Verständnis bezüglich der Lösung von handelsbezüglichen Problemen durch diese zwei grossen Welthandelsmächte herbeiführen.


Zum Schluss möchte ich gerne erläutern, dass ich mein Bestes geben werde um einen möglichst vollständigen Überblick über die Handelspolitiken der Europäischen Union und den Vereinigten Staaten zu geben. Dies versuche ich durch die Analyse der jeweiligen nationalen Gesetzgebungen sowie das Erläutern ein paar internationaler Regeln, welche für
beide (EU und US) anwendbar sind und zeigen, ob sie es zustande bringen, die internationalen Handelsstandards zu befolgen.
III. Introduction

Trade, like every other aspect of the economy, aims at promoting prosperity. The development of trade, if properly managed, is an opportunity for economic growth, job creation, and establishment of wealth and reducing poverty. As the trade affects citizens, therefore, each country adopts its own trade policy in compliance of the country’s and its citizens’ demands. The European Union and the United States are the world's largest trading entities and therefore, their trade policies play enormous role in the development of the whole world's trading system, as well as in promoting welfare worldwide.

Over the past decades, the EU, the U.S. and some other countries have started negotiations to reduce barriers to trade, which lead to rise importance of trade and especially international trade. The expansion of the scope of trade policies is necessary in order to achieve competitiveness on different markets throughout the world, therefore, liberalized trade regimes play significant role in developing competitive trade markets.

At the international level, there is currently the same approach with respect to the use of trade remedy laws in order to protect and provide fair trade. Nowadays, all the countries try to adopt appropriate legislation to maintain safe market, which by itself, leads to better climate for trade and therefore, is attractive for businesses. Hence, when substantive and procedural requirements are met, trade remedy measures are considered to be legal, though, still this subject is quite controversial and criticized.

Taken into account all the information provided above, the main purpose of choosing the topic - ‘Trade Regulations: Comparative Analysis of U.S. and EU approaches’ – was to have a deep and brief investigations in these two giant trade players’ regulations, what are their attitudes to the main concepts of the trade and regulations, and what are similarities or differences between those two trade regimes. The interest to research those two countries’ trade legislations derived from their importance in trading throughout the world.

Trade plays enormous role in development of global market and the most important part is to regulate it appropriately in order to gain correctly developed world’s economy. These trade regulations are necessary to deal with commercial obstacles related to market access and
import and export-related difficulties that might be a result from government intervention and market regulations worldwide.

However, I would like to work on this topic in order to find out the basic principles and current regulations of trade and its influence on today’s world market. In my thesis I will examine and compare US and EU approaches on this subject and give a further understanding how these two major world market player regulate trade related problems.

The following paper contains seven chapters and is divided into several sub-paragraphs. At the beginning you see Introduction part, which is general overview of the following paper. The second chapter relates to the EU as a Customs union, which by itself contains Autonomous Trade Policy with four subparagraphs, such as Common Customs Tariff, Common Commercial Policy, Unilateral Trade Preference, and Trade Policy Instruments. The third chapter covers Remedies for Fair and Unfair Trade that is mainly concentrated on Dumping and Anti-dumping measures, Subsidies and Countervailing measures and Safeguards.

Then, I will discuss about The United States in the Global Trading System following with the U.S. Trade Law History review. Next chapter relates to the U.S. Antidumping, Countervailing and Safeguard legislations. The sixth Chapter examines EU – US Trade Relations and specifically Transatlantic Trade and Investment Partnership (TTIP), which is under negotiation now.

Finally, I would like to say that I will do my best to give a comprehensive overview of the EU and the U.S. trade regulations through the examination of their national legislations, as well as some international rules, which are applicable for both of them and show whether or not they manage to be in conformity with international requirements for fair trade.
IV. The EU as a customs union

TFEU provides 'four fundamental freedoms': freedom of goods, services, persons and capital, which are cornerstone of the EU and the freedom of goods specifically, is a central feature for the foundation of Internal Market.¹

The EU is a single customs union with a common trade policy and tariff between its member states. Customs union represents a further step from free trade area, which comprises a group of customs territories where duties are eliminated on trade in goods originating in such territories. Whereas, customs union adopted a common tariff in trade relations with the outside world.² Article 28 of TFEU stipulates that,

[T]he Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.³

According to that, customs duties and charges having equivalent effect abolished between Member States and this constitutes a fundamental principle of the common market. In addition, the TFEU in Articles 29 and 31 provides a common tariff to all imports in the territory of the Union and once a product has lawfully entered the Union territory is considered to be in free circulation.⁴

The EU Customs Union in line with Article XXIV GATT constitutes a single customs territory with an external common customs tariff and provides free movement of goods without tariff or non-tariff barriers.

A. Common External Tariff (common customs tariff)

¹ Margot Horspool, Matthew Humphreys, European Union Law, (7th edn, OUP 2012) 270
² Wyatt and Dashwood's, European Union Law (6th edn, Hart Publishing 2011) 392
⁴ Wyatt and Dashwood's, European Union Law (6th edn, Hart Publishing 2011) 392
Customs Union provides the harmonization of customs regulations on trade with third
countries and establishes common customs tariff (CCT), in order to eliminate customs duties
and other financial charges.\(^5\) In addition, Article 31 TFEU states that CCT can be fixed by the
Council on a proposal from the Commission.

External commercial relations of the Member States is ensured through the Community
Customs Code, which mainly concerns and compiles the rules, arrangements and procedures
applicable to goods traded between the European Union and non-member countries. Also,
Modernized Customs Code should be taken into account. However, CCT must be considered
in a wider context, especially in the light of the WTO, under which most tariff rates are
negotiated.\(^6\)

Generally speaking, customs tariff is a tax imposed on imported goods, also referred as
'customs duties', so that customs duties are not payable on acquisitions of goods that are in
free circulation. There are different types of customs duties, either ad valorem or non-ad
valorem. An ad valorem tariff on a good is an amount based on a fixed percentage of the
value of the good in contrast with non-ad valorem, which can be based on quantity or weight
of that good. As ad valorem duties are more transparent than non-ad valorem duties, therefore
it is by far the most common type of tariff.\(^7\)

In principle, it is important to pay attention to the main purposes of customs duties, in order
to analyze their character. First, they are a source of revenue for governments, as they are
easy to collect, especially important for developing countries. Secondly, they are used as a
protection mechanism for domestic industries. Thus, customs duties can be considered as an
instrument of economic development policy.\(^8\) However, customs duties are prohibited as
stated in Article 30 TFEU. They remain significant trade barriers, because they make
imported goods more expensive than the rival domestic product.

Furthermore, article I paragraph 1 GATT requires that with respect to customs duties any
advantage granted by any Member to any product originating in any other country shall be
accorded immediately and unconditionally to the like product originating in all other

\(^5\) Wyatt and Dashwood's, *European Union Law* (6\(^{th}\) edn, Hart Publishing 2011) 405
\(^6\) Margot Horspool, Matthew Humphreys, *European Union Law*, (7\(^{th}\) edn, OUP 2012) 270
\(^7\) Peter Van de Bossche, Werner Zdouc, *The law and Policy of the World Trade Organization*,
(3\(^{rd}\) edn, CUP 2013) 421
\(^8\) ibid 426
This principle is reflected in CCT, which aims to provide competitive environment for all products on the market despite the origin with imposing common tariff. But the rate of the tariff depends on the product type and its economic sensitivity.

In addition, imported and exported goods must generally be classified according to the Combined Nomenclature (CN). The CN is a part of the CCT, which contains single custom tariff rates, preferential measures and other tariff measures of the Community. It is based on the Harmonized System (HS) administered by World Customs Organization (WCO), which comprises a 6-digit code and is applied by most of the trading nations. Beside the CN, The European Commission has established the Integrated Tariff of the European Community (TARIC), which contains additional information on tariff quotas, duty rates, tariff suspensions and other trade measures and provides further breakdown of the CN to a 10-digit level.

### B. Common commercial policy

Article 207 of the Treaty on the Functioning of the European Union (TFEU) attempts to provide a more balanced approach with regard to the relationship between internal and external competences, and a single legal basis for the adoption of all measures that are necessary for the operation and implementation of the Common Commercial Policy (CCP). It stipulates following,

> [T]he common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The

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9 ibid 429
11 ibid 105
common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.\(^{12}\)

According to that article, it is obvious that the common commercial policy plays an enormous role in forming the European Union (EU) and establishes uniform conduct by means of a common customs tariff and common import and export regimes. The CCP has traditionally been characterized by the goal of liberalization of international trade. However, trade policy is the exclusive responsibility of the EU, which aims to abolish trade and customs frontiers, therefore these objects are served by common commercial policy.

The Common Commercial Policy constitutes a field of the EU external action subject to the same principles and objectives as well as the same institutional rules that establish a common framework for EU external action.\(^ {13}\)

As I have mentioned above, Article 207 paragraph 1 includes trade in services, commercial aspects of intellectual property as well as foreign direct investment as exclusive competences of the EU, but despite substantial extension of EU competence in the area of CCP, paragraph 6 also provides general limitation clause,

[T]he exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization.

Moreover, the inclusion of FDI in the CCP entails that in principle the EU is solely competent to negotiate and conclude international agreements relating to the FDI. Important issue here is to define the scope of the ‘foreign direct investment’, which has been added to the power of the EU, as it can play essential role on trade related aspects. However, articles 206 and 207 TFEU do not provide any definition of this term.

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\(^{12}\) Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/140

\(^{13}\) Article 205 TFEU states that ‘the Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union’. 
1. **EU competence in the area of Foreign Direct Investment**

Even though there is no further clarification of the term in the TFEU, the concept of FDI should be interpreted with regard to EU rules on direct investment and also in accordance to the notion of FDI in International law.\(^{14}\) Furthermore, each BITs provide their own definitions for FDI, hence, IMF and OECD has developed general key concepts, which should be the starting point to provide appropriate definition of this term.

IMF Manual:

\[\text{[R]e}flecting the difference noted previously, a direct investment enterprise is defined in this Manual as an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise). Direct investment enterprises comprise those entities that are subsidiaries (a nonresident investor owns more than 50 percent), associates (an investor own 50 percent or less) and branches (wholly or jointly owned unincorporated enterprises) either directly or indirectly owned by the direct investor.\(^{15}\)

OECD Benchmark Definition:

“Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. The ‘lasting interest’ is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise. Direct investment may also allow the direct investor to gain access to the economy of the direct investment enterprise which it might otherwise be unable to do.


The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise”.16

On the basis of these definitions following three criteria can be determined:

1. It should be considered as a long-lasting investment,
2. it should represent at least 10% of the affiliated company’s equity capital/shares and
3. it should provide the investor with managerial control over the affiliated company’s operations.

As a result, portfolio investments, as well as other categories of foreign investment, are excluded from the scope of the new competence.

2. Historical background

The European Community’s Common Commercial Policy (CCP) has a long history dating back to the original Treaty of Rome in 1957. The scope of the Common Commercial Policy has been significantly changed in order to adapt to the new realities of international trade and economic relations.

The major goal of the Treaty of Rome in setting up the European Community was to create a common market, part of which included the creation of a customs union with a Common Customs Tariff (CCT). The Treaty contained clause that granted exclusive competence in trade matters to the Community. And as a result European Community has become a member of global trade system.17

By the 1980s, though, the Uruguay Round GATT negotiations began to address additional issues, including trade in services (leading to the General Agreement on Trade in Services, or GATS) and trade related intellectual property measures (TRIPs). This was a clear departure from previous trade rounds, which focused exclusively on trade in goods. Therefore, there

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17 Wyatt and Dashwood’s, European Union Law (6th edn, Hart Publishing 2011) 240
were strong differences of opinion between the Commission and the Member States regarding who had the competence to negotiate these new issue areas.

The ECJ’s Opinion 1/94, on the Agreement establishing the WTO, discussed the scope of the common commercial policy, the implied competence of the Community, and the ‘duty of cooperation’ between the Member States and Community institutions. The ruling established a new system of ‘mixed competence’ in trade in services and trade in intellectual property. However, rather than continue to expand the Community’s competence, the Court instead appeared to heed Member State objections and limited the scope of Community competence regarding the WTO. In so doing, the Court made a definitive break with its previous practice and ended its traditional role of extending the common commercial policy.\(^\text{18}\)

However, the EU legal provisions remained largely unchanged until the Treaty of Nice. Following Opinion 1/94 and its unclear delineation of competence, the Treaty of Nice, however, created a complex system of rules. It established shared and joined competence for only some services, and the explicit reference to international agreements, which implies that the adoption of autonomous measures in these areas is excluded.\(^\text{19}\)

Substantive changes brought by the Lisbon Treaty, signed on 13th December 2007, with regard to the scope and nature of Community competence and to decision-making rules in the field of the Common Commercial Policy. The Lisbon Treaty attempts to fill the remaining gaps and simplify the rules on the Common Commercial Policy.

C. The EU and WTO

As the trade is a way to develop and grow country's economy and increase an amount of working places, it is obvious such a significant importance has it for European Union. Due to this, to understand the concept of trade regulation better, it is necessary to know what

\(^{18}\) Opinion 1/94 WTO [1994] ECR I-5267

\(^{19}\) Alan Dashwood and others, *The Cambridge Yearbook of European Legal Studies*, vol 4 (Hart Publishing 2001) 61
Christoph W. Hermann, ‘Common Commercial Policy after Nice: Sisyphus would have done a better job’ (2002) 39 CML Rev 7
position has the EU in International Trade market and how is international rules related to national law within the EU.

At the international level, liberalization of trade through removing both tariff and non-tariff barriers was the basic objective for the GATT and subsequently consolidated and expanded by the WTO. This is the main principle and aim of the EU’s Common Commercial Policy as well, which plays a major importance for Community's prosperity, competitiveness and economic welfare. The conclusion of the Uruguay Round and the establishment of the WTO was a watershed for international trade. It replaced GATT as an international organization, though updated version of the General Agreement still exists as the WTO’s umbrella treaty for trade in goods, as an outcome of the Uruguay Round negotiations.

Even though, there are some obvious features shared between EU and WTO, still exists different opinions regarding to the connection of these two organizations. EC and WTO are considered as constitutional entities with similar roots by some authors. Whereas others see as the members of the EU and WTO have tied their hands in matters of trade policy and have tried to extend this tying to cover domestic policies that may affect trade. In addition, the relationship of WTO law with domestic law (including EC law) is in full line with the principles of general public international law. However, WTO agreements do not belong exclusively into the competence of EC, therefore both Member States and the Union is involved in the implementation of these agreements, in order to become it the part of their legal order.

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20 Marc Pallemaerts, *EU and WTO Law: How Tight is the Legal Straitjacket for Environmental Product Regulation*? (4th edn Vubpress 2006) 8
21 The WTO was established under the Marrakesh Agreement of April 1994 which was signed by 124 countries and the European Community.
1. The Relationship between EU law and National Law

a) Direct Effect and Supremacy of Union Law

The principle of direct effectiveness is a fundamental principle of European law, and is recognized as capable of producing independent legal effects within the national legal system. This means that individuals are able to invoke European law before national or European courts, independent of whether the Member State has adopted concerned act.\(^{26}\)

It is necessary to differentiate two confusing points in terminology, such as: 'directly applicable' and 'directly effective'. Direct application is the mechanism by which Community legislation can be considered to have been incorporated into the Treaty itself.\(^{27}\) Therefore, there is no need of specific incorporation by the Member State. Direct effect refers to the capacity of Union law to create legal rights which must be recognized and enforced within the domestic legal system.\(^{28}\)

Furthermore, the concept of direct effect has developed through case law of the European Court of Justice. In the judgment of Van Gend Loos of 5 February 1963, the principle of direct effectiveness has been enshrined. The court set forth: 'Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'\(^{29}\) and ' states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.'\(^{30}\)

Likely to principle of Direct Effectiveness, Supremacy of European Union law has no formal basis in the Treaty of European Community. Thus, it has been developed by ECJ, in its landmark case Flaminio Costa v. ENEL. In the judgment the court stated that: “by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which,
on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply".\textsuperscript{31}

Moreover, the Court argued that 'The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.'\textsuperscript{32} According to that, in this ruling the ECJ established a clear hierarchy between EC and national law, and the supremacy of Union law was ascertained.

\textit{b) The Supremacy clause in the United States}

Article VI para 2 of the constitution of the United States sets forth following:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

Therefore, when there is a conflict between a state law and a federal law, the supremacy clause operates to invalidate the state law in favor of the federal one as the federal law is found to be in pursuance of the Constitution.

As the Constitution sets up a federal government, it outcomes that the citizens are subject to a power of several governmental units. Due to this, supremacy clause has a significant importance, in order to deal with the battle between different powers and provides express definition of the relationship between federal law and state law

\textsuperscript{31} Flaminio Costa v ENEL [1964] ECR 585 Case 6/64
\textsuperscript{32} ibid
D. Unilateral Trade Preferences

Unilateral trade preferences are tariff concessions and provide one of the most important instruments offered by the EU to foster developing country exports.\textsuperscript{33} The concept had its origin in the broader principle of special and differential treatment for developing countries in multilateral trade agreements, which was then rationalized under United Nations Conference on Trade and Development (UNCTAD) in 1968 and the Generalized System of Preferences (GSP) was launched.\textsuperscript{34}

GSP assists developing countries to reduce poverty by helping them to generate revenue through international trade. It provides duty-free access for non-sensitive products and special tariff reductions for sensitive ones. It is a unilateral measure by the EU based on the clearly defined rules of WTO.\textsuperscript{35}

Additionally, the existing scheme has proliferated and the EU has provided Everything but Arms (EBA) initiative and "GSP+". The aim of the reform is to concentrate on those countries most in need. The EBA is formally part of the GSP and grants some least developed countries duty-free access to the EU market for all products, except arms and ammunition, without any restrictions.\textsuperscript{36}

And the third separate regime is ‘GSP+’, which offers full removal of tariffs for vulnerable countries that ratified and implemented international conventions mainly related to human and labor rights, environment and good governance.\textsuperscript{37}

\textsuperscript{33} Peter Van de Bossche, Werner Zdouc, The law and Policy of the World Trade Organization, (3\textsuperscript{rd} edn, CUP 2013) 438
\textsuperscript{35} European Commission Memo, Revised EU trade scheme to help developing countries applies on 1 January 2014 \textless http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152015.pdf\textgreater accessed 10 June 2015
\textsuperscript{36} ibid
\textsuperscript{37} ibid
Tariff concession is a result of tariff negotiations, which for its part should be governed by the two main principles, such as: 1) the principle of reciprocity and mutual advantage; and 2) the most-favored-nation (MFN) treatment obligation.\textsuperscript{38}

There is not specific method to measure reciprocity, so that each Member determines for itself whether or not there is a balance between received tariff reduction and the tariff reduction granted. This principle does not apply to its full extent to tariff negotiations between developed and developing countries.\textsuperscript{39} As noted above, MFN treatment obligation governs tariff negotiations as well. The MFN clause set out in Article I of the GATT 1994 establishes equality of trading opportunity among the Member States.

In addition to the rules for the protection of tariff concessions, WTO also provides rules for imposition of customs duties, but in this case determination must be made on the basis of the analysis of the following three elements: 1) the proper classification of the imported goods; 2) customs value of the imported goods and 3) the origin of the imported goods.\textsuperscript{40}

As the provisions regarding of these requirements are implemented into the EU Customs Code, therefore it has significant importance to define what is meant under them.

WTO law does not specifically set forth rules for classifying goods for customs purposes, but Member States indisputably have to consider general obligations, such as MFN treatment obligation, which I have discussed above. However, the International Convention on the Harmonized Commodity Description and Coding System (‘HS Convention’) do contain more specific rules and the most WTO Member States are party to it.\textsuperscript{41}

In contrast, rules on customs evaluation are provided in WTO agreement. Article VII paragraph 2 (a) GATT 1994 stipulates: "The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values. Also, Customs Valuation Agreement\textsuperscript{42} should be taken into consideration, which provides primary basis for the customs value in

\textsuperscript{38} Peter Van de Bossche, Werner Zdouc, \textit{The law and Policy of the World Trade Organization},(3\textsuperscript{rd} edn CUP 2013) 475
\textsuperscript{39} ibid 429
\textsuperscript{40} ibid 453
\textsuperscript{41} ibid
\textsuperscript{42} WTO agreement on the Implementation of Article VII of the GATT 1994
Article 1 – ‘The customs value of imported goods shall be the transaction value that is the price actually paid or payable for the goods when sold for export to the country of importation’. If it cannot be established in this manner, then alternative methods, set out in the Customs Valuation Agreement, are applicable.\(^4^3\) These agreements are transposed into the Community Customs Code.

In reference to the origin of goods two types of distinction are provided in WTO Agreement on Rules of Origin: Non-preferential and preferential rules of origin. Non-preferential origin of a product exists in WTO terms if the countries wish to apply WTO rules on anti-dumping duties, countervailing measures, safeguard measures or origin labeling. Otherwise, non-preferential origin is only important for the collection of trade statistics.\(^4^4\) Preferential rules of origin are set out under the preferential trade arrangements, which facilitate trade from developing countries or between contracting parties by offering a reduced or zero rate of duty to goods exported from there.\(^4^5\)

E. Trade Policy Instruments

The concrete targets of the trade policy is shaped by the EU institutions, such as the European Commission, the Council of Ministers and the European Parliament, but also private actors including non-governmental organizations (NGOs) should be taken into account in regard with forming this field. However, the latter’s participation varies according to the trade policy instrument used and the European Commission acts as a leading voice in trade policy. Its responsibility covers not only trade negotiations, but as well enforcing trade agreements. Trade policy instruments should contribute fully to the Community's economy through the achievement of proper access to third country markets.\(^4^6\)

\(^4^5\) ibid para 6
The defensive trade policy instruments aim to ensure fair trade and defend the interests of the EU companies in foreign markets by providing different measures, such as anti-dumping, anti-subsidy and safeguard measures.⁴⁷ Anti-dumping action may be taken only when there is a possibility that dumping may cause material injury to an industry, due to this, it seeks to restore market conditions by raising the price of imports. Following a similar reasoning, anti-subsidy measures combat subsidies by imposing countervailing duties. As for the safeguard measures, they may temporarily restrict imports in order to protect domestic industry.⁴⁸ All these measures will be further described and explained below.

The offensive trade policy instruments, sometimes so-called proactive measures, intend to open foreign markets and eliminate obstacles to trade. These measures are Trade Barrier Regulation and Market Access Strategy.⁴⁹ The Trade Barriers Regulation (TBR) was adopted in 1994 and is a legal instrument, which enables EU companies to lodge the complaint with the European Commission about the violation of trade rules which has adverse impact on trade on the EU market, as well as on the third countries markets.⁵⁰ It establishes the right of private parties to complain about illegal trade practices that are incompatible with international trade rules, and to request from the EU authorities to intervene effectively.⁵¹ Therefore, under the TBR were further strengthened with regard to complaints.

The second offensive remedy is the Market Access Strategy, which was launched in 1996 with the aim to provide businesses with information on market access conditions and a framework within which to tackle the barriers to trade in goods, services, intellectual property

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⁴⁸ ibid
⁴⁹ ibid
⁵⁰ ibid
and investment. The main operational tool of this strategy was The Market Access Database to aid to fulfill the objects of it.52

V. Remedies for Fair and Unfair Trade

A. Dumping and Anti-dumping measures

1. Dumping Determination

The definition of dumping involves several elements, which must be defined properly in order products to be considered as dumped. Dumping always depends on a comparison made between the price at which the product is offered in the imported country and the home-market price, thus there must be a discrepancy between domestic and export prices.53 This definition neither requires government conduct, nor involves predatory pricing necessarily.54

Within the WTO framework, Article VI para 1 of GATT 1994 defines dumping as following:

"The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry".

According to that definition, WTO gives permission the importing member to impose an anti-dumping duty on the dumped product, if the imported products are dumped and the dumped prices cause injury to the industry.55 However, GATT does not provide any mechanism for punishment; therefore anti-dumping duty can be considered as a remedy as it tends to bring the paid price back to the ‘normal value’. This remedy can be deemed to be against the

54 The act of deliberately setting prices low in an attempt to distort the competition and thereafter raising prices
55 Henrik Andersen, EU Dumping Determinations and WTO Law, vol18 (Kluwer 2009) 1
overall aim of the WTO, to enhance production, to eliminate discriminatory behavior, etc. by
removing trade barriers, as anti-dumping measures serve more likely as trade-restricting
instruments, rather than trade-advancing. Though, they are designed to eliminate and
restrict unfair trade, in order to protect competition on the relevant market.

Moreover, the EU has adopted Basic Regulation, which provides protecting rules against
dumped imports and is based on the Article 133 of the Treaty Establishing European Union.
This regulation endows specific power to the EU institutions in the procedures before
imposing anti-dumping duty, and defines their role in this process.

To identify dumping, the Commission and the Council go through the four determining
elements:

a) The allegedly dumped product is defined;
b) the normal value is evaluated

c) the export price is determined; and

d) a comparison between last two elements is made.

2. Product definition

In line with WTO legislation, there is no specific definition for the product scope neither in
the EU legislation. Even though, the Basic Regulation states the Commission's obligation to
indicate the product concerned. On the EU level may be found some guidelines, that can be
considered during the determination process or different factors, such as physical, technical

56 ibid 8
dumped imports from countries not members of the European Community, OJ L343/51
58 The Treaty Establishing The European Community [2009] OJ C325/33, art133
59 Henrik Andersen, EU Dumping Determinations and WTO Law, vol 18 (Kluwer 2009) 2
60 ibid 80
see also: Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection
against dumped imports from countries not members of the European Community
or chemical characteristics, which are main determinants used by the Commission and the Council.\footnote{Henrik Andersen, \textit{EU Dumping Determinations and WTO Law}, vol 18 (Kluwer 2009) 98}

The 'physical' criteria can be controversial, while the Commission and the Council specifically stress the physical resemblance between the product concerned and the like product, whereas under WTO law 'characteristics closely resemblance' provided by the Article 2.6 of the ADA\footnote{Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade[1994] (Anti-Dumping Agreement - ADA) article 2.6: "Throughout this Agreement the term 'like product' (‘produitsimilaire’) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". \<https://www.wto.org/english/docs_e/legal_e/19-adp.pdf> accessed 16 June 2015}, does not necessarily means physical.

However, Article 1 paragraph 4 of the Basic Regulation defines 'like product'\footnote{For the purpose of this Regulation, 'like product’ means a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration}, which is a reproduction of Article 2(6) of the ADA. Like product determination is important, as it should be compared in relation to the price of the dumped product, in order to establish the fact of dumping. In addition, the lack of precise implication to the determination of the product ambit, gives discretion to the authorities to make a decision.

3. **Normal value**

The primary focus in made on the comparison between the export price and the price in domestic market in question, though it is not easily defined by just mentioning to the actual domestic price. In some cases, normal value cannot be based on the actual domestic price as it is unreliable, mainly related to the state interference in price, and the general rule is not sufficient, then alternative means are used for evaluation, for instance cost of production, sales, general and administrative costs, and a reasonable profit.\footnote{Henrik Andersen, \textit{EU Dumping Determinations and WTO Law}, vol 18(Kluwer 2009) 4}

Basically, EU regulations regarding the conditions for the normal value are the same as WTO law. The only difference is found in the condition of 'destined for consumption' that is the
part of the definition of dumping under WTO law, which cannot be found in the dumping definition provided by the Basic Regulation, but is reflected in other provisions of it.\textsuperscript{65}

Moreover, under the general rule of WTO legislation all conditions must be met in order to take into account the actual price in the normal value determination. These are following four elements:

I. Comparable prices

II. Ordinary course of trade

III. Like product

IV. Destined for consumption.\textsuperscript{66}

This means that the sales must be comparable between the dumped and the domestic products, but there is no further definition in the GATT 1994 or in ADA. Nevertheless, Article 2.2 of the ADA should be taken into consideration in the scrutiny of the comparison issue, which sets two main grounds that 'do not permit a proper comparison': 'particular market situation', that must have an impact on the domestic prices and is assumed to be in discretion of investigating authorities, because of the absence of rules, and the 'low volume of sales', which is absolutely defined in Article 2.2 of the ADA and sets up minimum 5\% threshold for domestic sales.\textsuperscript{67}

The concept of 'ordinary course of trade' involves actual domestic sales transactions. Common bases for finding the transaction not in the ordinary course of trade are when the sale is between associated parties and when the sale is below cost. The problem arises from the sales between associated parties is that in such circumstances, the sales price might be fixed according to criteria which are not those of the marketplace.\textsuperscript{68}

Therefore, the price must not be affected by their relationship to be in the ordinary course of trade and the association does not serve by itself as a basis for excluding. Regarding to the sales below cost of production, determination must be done in accordance with Article 2.4 of

\begin{flushleft}
\textsuperscript{65} ibid 120
\textsuperscript{66} ibid 102
\textsuperscript{67} ibid 103
\textsuperscript{68} see also: article 2(2) of the ADA
\end{flushleft}
the Basic Regulation: “Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value, only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time. The extended period of time shall normally be one year but shall in no case be less than six months, and sales below unit cost shall be considered to be made in substantial quantities within such a period when it is established that the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20% of sales being used to determine normal value”, which is nearly identical to the Article 2.2.1 of the ADA.

Due to this, sales are disregarded as not being in the ordinary course of trade: if below cost sales are in substantial quantities within the extended period of time and they must not provide for recovery of all costs within the reasonable period of time.69

As I have already mentioned the concept of 'like product' and its characteristics, I will not stop on it now. In regard to the fourth requirement - ‘destined for consumption’- Article 2.2 of the Basic Regulation states: ‘Sales of the like product intended for domestic consumption shall normally be used to determine normal value’. This statement is further strengthened in Article 5.1, which requires that the producers must provide the Commission with 'information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export'.70

Except of this general rule, there are alternative methods on which the normal value can be based, in case of disregarded circumstances discussed above or when the producer produces only for export markets and the home-market of sales does not exists. Under EU law, Article 2.1 of the Basic Regulation provides: ‘where the exporter in the exporting country does not

69 Henrik Andersen, *EU Dumping Determinations and WTO Law*, vol 18(Kluwer 2009) 124
70 ibid 125
see also: Article 5(1) of the Basic Regulation
produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.’

Thus, Article 2.3 sets forth: "When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative". Therefore, alternative from the actual domestic price is prices from other sellers or producers if the producer does not produce or sell the product and the reasons for applying this alternative is the same as I discussed above.

4. Export price

The export price determination is rarely challenged in comparison with the normal value determination. The principle of evaluation of export price is the same as it is in case of normal value, therefore it must be determined in which cases can be export price disregarded and what alternatives are used in such circumstances.

EU legislation, within the framework of article 2.8 of the Basic Regulation, explicitly defines the concept of export price. It stipulates:

‘The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community’.

Additionally, the reason for departing from the actual export price is the same as it was in case of normal value determination. Therefore, if the parties are affiliated, or if a compensatory agreement exists, then the price paid by the first independent customer is determinative for the export price.\footnote{Henrik Andersen, \textit{EU Dumping Determinations and WTO Law}, vol 18(Kluwer 2009) 204}
5. **Comparison between normal value and export price**

The definition of dumping margin under article 2 para 12 of the Basic Regulation is following:

‘The dumping margin shall be the amount by which the normal value exceeds the export price. Where dumping margins vary, a weighted average dumping margin may be established’.

Compared to this, WTO law defines the margin of dumping as the difference between normal value and export price. Although, anti-dumping duties can be imposed only under the circumstances stipulated under the EU provision.\(^{72}\) However, the principle of fairness provided by Article 2.4 of the ADA is reflected into the EU Basic Regulation as well.

As for the methodology of the calculation of dumping margins, there are two principal methods: weighted-average-to-weighted-average method or the transaction-to-transaction method. However, according to the Article 2.4.2 of the ADA, weighted average normal value to export prices in individual transactions may occur if: there is ‘targeted dumping’ and the investigated authorities provide an explanation as to why either of these two methods cannot be used to catch dumped price.\(^{73}\)

In addition, EU legislation approaches this issue the same way as outlined under the WTO law. Although, the requirement to state grounds when the weighted-average-to-transaction is not apparently provided in the Basic Regulation, still it follows from Article 253 of the EC Treaty.\(^{74}\)

Regarding to the individual or general dumping margins, the EU’s attitude is to decide on individual bases, except when producers are related to each other or even if the producer does not cooperate. In that case general rule is applicable.\(^{75}\)

Furthermore, emphasize must be made on the injury made by the dumped product to the importing country's industry. Therefore, before imposing anti-dumping duties, investigating

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\(^{72}\) ibid 260


\(^{74}\) Henrik Andersen, *EU Dumping Determinations and WTO Law*, vol 18(Kluwer 2009) 286

\(^{75}\) ibid 287
authorities are obliged to establish both dumping and injury caused from it. Thus, it is not 'dumping' by itself that is at issue, but rather 'injurious dumping'.

The question to be assessed is whether the dumped import caused or may cause adverse impact on the domestic industry. However, the ADA defines 'injury' to mean one of these things: 1) material injury; 2) threat of material injury; or 3) material retardation of the establishment of a domestic industry. At the outset, Article 3.1 of the ADA states:

"A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products".

According to that, injury test is mainly based on the assessment of the volume of the dumped products and its effect on the importing market prices by the means of ‘positive evidence’ and the ‘objective examination’. 'Positive evidence' relates to the 'quality of the evidence', which must be an affirmative, objective and credible. Also, all the relevant factors should be taken into account and be evaluated in the process of 'objective examination'.

However, according to the articles 7.1 and 9.4 of the Basic Regulation imposition of anti-dumping duty is in the interest of the Community, which must be based on an appreciation of all the interests taken as a whole. This rule is in compliance with WTO law, which sets out in Article 9.1 of ADA that "The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member", which means that even though the conditions are met, investigating authorities can decide not to impose anti-

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see also: Article 7(1) and 9(4) of the Basic Regulation
dumping measure on the dumped good. Therefore, both ADA and the Basic Regulation approve the same approach regarding that issue.

The last point must be made on the causality between the dumped goods and the injury. Under Article 3.5 of the ADA ‘the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities’ and contains a 'non-attribution' requirement, which means that investigating authorities must examine other factors that are injuring the domestic industry and they must not attribute this injury to the dumped imports.\(^8^0\)

In conclusion, all these above noted conditions and elements should be analyzed attentively, and all the relevant factors should be taken into a deep consideration in order to establish the fact of dumping on imported products and therefore, to impose anti-dumping measures.

**B. Anti-dumping measures**

Anti-dumping duties are a recognized exception to a number of core WTO principles. For example, the ‘most-favored-nation’ (MFN) principle means that a member commits to impose the same tariff on the same product for all WTO member countries. Anti-dumping duties, in contrast, can vary across countries for the same product.

However, in line with WTO law, the EU legislation sets out the principle of so-called ‘lesser duty rule’. Article 7.2 of the Basic Regulation states: "The amount of the provisional anti-dumping duty shall not exceed the margin of dumping as provisionally established, but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry".\(^8^1\) Therefore, anti-dumping measures are used to such extent that are sufficient to remove the injury and must not exceed the margin of dumping.

\(^8^0\) Peter Van de Bossche, Werner Zdouc, *The law and Policy of the World Trade Organization*, (3\(^{rd}\) edn, CUP 2013) 709

\(^8^1\) see also: article 9(4) of the Basic Regulation and article 9(1) of the ADA
The ADA provides for three kinds of anti-dumping measures: 1) provisional measures; 2) price undertakings; and 3) definitive anti-dumping duties.\(^8^2\) These duties are laid down in the EU legislation as well.

Provisional measures are the means for ensuring payment of anti-dumping duties on goods that are imported during an investigation.\(^8^3\) Article 7 of the ADA gives permission for the imposition of 'provisional' duties. Before applying this measure, investigating authorities are obliged to make a preliminary affirmative determination of dumping, injury and causation.\(^8^4\) This is a kind of notification to importers that after a certain period of time their imports may become a subject to anti-dumping measures.

Besides, the Basic Regulation stipulates in Article 7 conditions and time frame when the provisional measures might be applied. The Commission may impose this measure on its own or at the request of the Member State and it must consult or at least inform Member States about the adopting of this duty.\(^8^5\) With respect to time frame for the application of the provisional measures, Article 7(7) of the Basic Regulation sets forth:

"Provisional duties may be imposed for six months and extended for a further three months or they may be imposed for nine months. However, they may only be extended, or imposed for a nine-month period, where exporters representing a significant percentage of the trade involved so request or do not object upon notification by the Commission".

Price undertakings are alternative options to the imposition of anti-dumping duties. Article 8 of the ADA provides possibility for undertakings to revise prices or cease exports at the dumped price, only after affirmative preliminary determination of dumping have been made by the investigating authorities.\(^8^6\) The reason and the purpose of this remedy is to save time and resources, as anti-dumping investigations are quite costly burdensome procedure for involved parties.

\(^8^2\) Peter Van de Bossche, Werner Zdouc, *The law and Policy of the World Trade Organization*, (3\(^{rd}\) edn, CUP 2013) 723
\(^8^3\) Simon Lestner and others, *World Trade Law, Text, Materials and Commentary*, (2\(^{nd}\) edn, Hart Publishing 2008) 506
\(^8^4\) Peter Van de Bossche, Werner Zdouc, *The law and Policy of the World Trade Organization*, (3\(^{rd}\) edn, CUP 2013) 724
\(^8^5\) Van Bael& Bellis, *EU Anti-dumping and Other Trade Defense Instruments*, (5\(^{th}\) edn, Kluwer 2011) 512
\(^8^6\) Peter Van de Bossche, Werner Zdouc, *The law and Policy of the World Trade Organization*, (3\(^{rd}\) edn, CUP 2013) 724
With regard to definitive anti-dumping duties, the Basic Regulation recognizes them as having exceptional and temporary character, as they remain in force only as long as it is necessary to mitigate the effects of the dumping. Article 9.4 of the Basic Regulation states: "Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee".

Due to this, the majority of investigations, which establish dumping with causing injury, outcomes to the imposition of definitive anti-dumping duties. The rule of 'lesser duty' is applicable to this kind of measure as well.

An anti-dumping measure only remains in force as long as is necessary to counteract the dumping which is causing injury, but it terminates after five years from its imposition. Both, the Basic Regulation and the ADA consists the same provision regarding duration and termination of anti-dumping duties.

C. Subsidies and Countervailing measures

1. Definition and identification of subsidy

According to Article 2 of the AS Regulation a product is considered to be subsidized if "it benefits from a countervailable subsidy as defined in Articles 3 and 4. Such subsidy may be granted by the government of the country of origin of the imported product, or by the government of an intermediate country from which the product is exported to the Community, known for the purpose of this Regulation as 'the country of export'". Therefore, the concept of 'subsidy' involves payments by government; hence, it can be

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87 Van Bael& Bellis, EU Anti-dumping and Other Trade Defense Instruments, (5th edn, Kluwer 2011) 537
88 see also: article 11 of ADA and article 11 of the Basic Regulation
90 ibid art 2 (a)
offered by other means as well. The emphasize must be done on the notion of 'benefit', which must be set in order to establish the concept of subsidy.

In addition, Article 1.1 of the SCM Agreement\textsuperscript{91} sets out two requirements, which must be met in order a subsidy to be deemed to exist. These conditions are cumulative, which means that both of them are necessary to constitute a subsidy. The same is reflected in the AS Agreement as well. The Article stipulates following:

"For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as ‘government’) or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred”.

As an outcome, a financial contribution or any form of price support by government or any public body and a thereby benefit are essential factors to amount for a subsidy.

To go into details, the same Article elaborates four categories of financial contribution:

(i) Government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) Government provides goods or services other than general infrastructure, or purchases goods;

(iv) Government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;\textsuperscript{92}

\textsuperscript{91} Agreement on Subsidies and Countervailing Measures

\textsuperscript{92} SCM , art 1(1)
With regard to income or price support, they are used in the sense of agricultural products and serve to guarantee farmers' incomes through government payments, or to support prices of products.\(^93\)

As already noted above, a financial contribution must confer a benefit to establish a subsidy. This is a fundamental element which is defined by both, the AS Regulation and the SCM. In brief, a 'benefit' arises if the recipient has received a 'financial contribution' on terms more favorable than those available to any recipient in the market.\(^94\)

Furthermore, interesting issue is related to notion of 'public body'. The essential criterion which must be taken into account in the process of determination of 'public body' includes: a) if a company or an organization provides public policy objectives; and b) government control goes beyond ownership.\(^95\)

2. Prohibited, Actionable and Non-actionable subsidies

The first paragraph of Article 4 of the AS Regulation states: ‘Subsidies shall be subject to countervailing measures only if they are specific’, therefore, specificity is a major requirement for countervailable subsidies.

In addition, Article 4.5 of the Regulation says that ‘Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence’. The expression of 'positive evidence' I already discussed above with regard to injury determination. However, a subsidy does not need to be limited to the product in order to be specific.\(^96\) The main idea of the concept of specificity is to exclude broadly based general welfare programs from regulation, as they have less distorting effect on trade and even


\(^95\) Edmond McGovern, *EU Anti-Dumping and Trade Defence Law and Practice*, (Globefield Press 2015) 32:2

\(^96\) ibid 34:1
though, sometimes they have negative impact on trade, are necessary to promote legitimate policy goals.\textsuperscript{97}

According to Article 4.2 of the AS Regulation, the existence of specificity is based on certain principles, which are explicitly laid down in it. All these principles should be taken into account during inquiry of a particular subsidy, as only specific subsidy may be countervailed.

The SCM Agreement in II part addresses so-called ‘prohibited subsidies’ in two forms: export subsidies and domestic subsidies.\textsuperscript{98} However, the AS Regulation deals with the same subject as well in Articles 3.3 and 3.4. Additionally, all subsidies have a potential to have a strong trade-distorting effects, but the effects caused by these two are considered as particularly egregious.\textsuperscript{99} In fact, the SCM Agreement considers these subsidies as prohibited.

Regarding export subsidies, Article 3.4 of the AS Regulation contains two overriding principles on specificity to export contingency and contingency on use of domestic goods.\textsuperscript{100} However, contingency on export performance exists when the subsidy and the volume of the export sales are proportional. Exception from this rule is when the exports are trigger that releases the subsidy. In this case, contingency still exists.\textsuperscript{101}

Even though, there are not specific and clear rules on contingency of the use of domestic goods in this article, still it might not be considered as specific. Unlike in Article 4.4 (a), the words ‘in law or in fact’ is absent from Article 4.4(b), therefore the issue whether or not it covers both subsidies ‘in law’ and subsidies ‘in fact’ is unclear. The difference between ‘in law’ and ‘in fact’ subsidies is that the first one is more legally contingent, whereas the second is tied to actual or anticipated exportation.\textsuperscript{102} Nevertheless the absence of these terms, U.S. Appellate Body clarified, that Article 3.1(b) of the SCM covers both kinds of domestic

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\textsuperscript{97} Simon Lestner and others,\textit{World Trade Law, Text, Materials and Commentary}, (2\textsuperscript{nd} edn, Hart Publishing 2008) 427

\textsuperscript{98} ibid 430

\textsuperscript{99} ibid

\textsuperscript{100} Edmond McGovern, \textit{EU Anti-Dumping and Trade Defence Law and Practice}, (Globefield Press 2015) 34:3

\textsuperscript{101} ibid

\textsuperscript{102} Simon Lestner and others,\textit{World Trade Law, Text, Materials and Commentary}, (2\textsuperscript{nd} edn, Hart Publishing 2008) 430
\end{flushleft}
content subsidies.\textsuperscript{103} This applies to the AS Regulation as well, as it is absolutely the same in regard to this subject.

The second type of subsidy is actionable subsidies, which are subject to challenge in the event that they cause adverse impact on the interests of another Member.\textsuperscript{104} Article 5 of the SCM Agreement distinguishes three types of adverse effect that may be caused: “(a) injury to the domestic industry of another Member; (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994; (c) serious prejudice to the interests of another Member”.

In addition, when the subsidized imports cause injury to the domestic industry producing the like product, then it is considered as 'actionable'. However, the concept of 'injury' and it's relation to the 'domestic industry' and 'like products', I have already discussed above regarding identification of dumping, therefore I do not go through it now.

As for the second form of negative effect - subsidies causing nullification or impairment, this may be the case with respect to the benefits from tariff concessions. This means that subsidization may diminish improved market access, which is an outcome from a tariff concession.\textsuperscript{105}

The third kind of effect appears, when the subsidized imports cause serious prejudice to the interests of another Member. An interesting issue is related to the notion of 'serious prejudice'. Article 6.3 of the SCM Agreement states conditions from which one or several should apply in order to arise 'serious prejudice'.\textsuperscript{106} Additionally, it is concerned with adverse

\textsuperscript{103} ibid 441
\textsuperscript{104} Peter Van de Bossche, Werner Zdouc, \textit{The law and Policy of the World Trade Organization}, (3\textsuperscript{rd} edn, CUP 2013) 779
\textsuperscript{105} ibid 785
\textsuperscript{106} “Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply: (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member; (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market; (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market; (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted". 
effects on the interests of Member in respect of a product, or negative impact on price, or a combination thereof, in different product and geographic markets.  

Last category of subsidies is 'non-actionable', which only includes non-specific subsidies, to which the SCM Agreement rules do not apply. The same can be said with regard to the AS Regulation, which does not contain any provisions for non-actionable subsidies and does not consist even this term. Furthermore, 'non-actionable' subsidies are likely to have minimal trade distorting effects and the policy goals they pursue are considered as desirable. Due to this, such subsidies are exempted from countervailing duties or from actionable subsidies provisions.

3. Countervailing duties

The role of countervailing measures is to counteract reductions caused by subsidies affecting imports. The reason to impose restraints on subsidies is that they have adverse impact on domestic market and are considered to be a form of ‘unfair’ trade. According to the elements examined above, in order to impose countervailing duties there must be subsidized imports, injury to the domestic market of the like products and causal link between subsidized imports and the injury. These measures constitute additional duties to the standard tariff rate, which are calculated on the basis of the amount of subsidy.

The AS Regulation includes two types of countervailing measures that can be imposed: provisional duties and definitive duties. However, general principles that apply to the imposition of countervailing duties are the same as it was with respect to anti-dumping duties.

As indicated by Article 12 of the AS Regulation, provisional duties can be used if an ‘affirmative determination has been made that the imported product benefits from

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109 ibid 453
110 ibid
111 Van Bael & Bellis, EU Anti-dumping and Other Trade Defense Instruments, (5th edn, Kluwer 2011) 703
countervailable subsidies and of consequent injury to the Community industry’ and ‘the Community interest calls for intervention to prevent such injury’. 112

Furthermore, countervailing duties shall not exceed the total amount of countervailable subsidies as provisionally established. However, they can be less than that amount if they are sufficient to remove the injury. 113 Compared with anti-dumping duties, countervailing duties cannot be extended and are valid during four months period. 114

Pursuant to Article 16.1 of the AS Regulation, that is a reproduction of the Article 20.1 of the SCM Agreement, countervailing duties may not be applied retroactively, which means they may not be applied to products imported after the decision to impose measures entered into force. 115 Countervailing duties remain into force as long as it is necessary to counteract the countervailable subsidies which are causing injury. 116

Furthermore, with regard to voluntary undertakings, governing rules are the same as offered in anti-dumping procedures, but the difference is that AS Regulation sets out undertakings offered by the government of the foreign country concerned. 117 The AS Regulation offers two types of undertakings in an anti-subsidy proceeding:

(a) The country of origin and/or export agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) Any exporter undertakes to revise its prices or to cease exports to the area in question as long as such exports benefit from countervailable subsidies, so that the Commission is satisfied that the injurious effect of the subsidies is thereby eliminated. 118

113 ibid art 12(1)
114 ibid art 12(6)
117 Van Bael & Bellis, EU Anti-dumping and Other Trade Defense Instruments, (5th edn, Kluwer 2011) 706
118 AS Regulation, art 13(1)
However, undertakings may not be accepted unless a preliminary affirmative determination of subsidization and injury caused by it, have made.  

D. Safeguard Measures

Apart from the anti-dumping and anti-subsidy or countervailing duties, the EU allows to impose other trade defense mechanisms on imports, such as safeguard measures. Unlike of them, safeguard measures are not specifically focused on whether the trade is fair or not, therefore more strict and careful adjustment must be done before using such measures. Safeguard measures are intended to protect industries from economic harm on a temporary basis through the raising of bound tariff levels, tariff quotas or quantitative restrictions.  

However, the EU provides safeguard policy that enables EU institutions to adopt safeguard measures in order to protect domestic industries. It is characterized to shelter troubled industries from the harm caused by unexpected surges in imports. Safeguards provide a ‘breathing space’ which allows protected industries to improve their competitiveness.  

As an outcome of the liberalization and high level of integration of the EU internal market, safeguard measures no longer exist between the member states and the EU safeguards can be approached only externally. However, the Import Regulation provides exemption and sets forth that “the Commission, after having examined alternative solutions, may exceptionally authorize the application of surveillance or safeguard measures limited to the region(s)


120 Simon Lestner and others, World Trade Law, Text, Materials and Commentary, (2nd edn, Hart Publishing 2008) 521
121 ibid
122 Sanford E. Gaines, BirgitteEgelund Olsen and KarstenEngsigSørensen (eds), Liberalizing Trade in the EU and the WTO: A Legal Comparison (CUP 2012) 471
concerned if it considers that such measures applied at that level are more appropriate than measures applied throughout the Community”.\textsuperscript{124}

Furthermore, the purpose of the Import Regulation is to liberalize trade between the EU and the third countries. Article 1(2) of the Import Regulation states that “The products referred to in paragraph 1 shall be freely imported into the Community and accordingly, without prejudice to the safeguard measures which may be taken under Chapter V, shall not be subject to any quantitative restrictions”.\textsuperscript{125}

This is the general principle, which exempts certain types of products, such as textile and products from specific third countries, but follows the main aim of TFEU, which sets out in Article 29 that “Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges”.

In addition, WTO Agreement on Safeguards and Article XIX of the GATT, provide permission to all WTO members to impose safeguard measures in certain circumstances, where increases in imports cause serious injury or a threat of injury to domestic industries of a similar product, whose importation is increasing.\textsuperscript{126} Yet, both WTO Agreement on Safeguards and the Import Regulation set out several conditions, which must be fulfilled to apply for safeguard measures. These requirements are related to:

\begin{itemize}
  \item[a)] increased imports;
  \item[b)] unforeseen developments;
  \item[c)] serious injury; and
  \item[d)] causation.
\end{itemize}

\textsuperscript{124} Import Regulation, art18
\textsuperscript{125} ibid Art 1(2)
\textsuperscript{126} Michael J. Trebilcock, Robert Howse, The Regulation of International Trade, (3\textsuperscript{rd} edn, Routledge 2005) 300
a) Increased imports

Article 16 para 1 of the Import Regulation states that the imports into the Community must be made ‘in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, serious injury to Community producers’ in order to set safeguard measures. Also, ‘increased imports’ requirement is the major principle in WTO law on safeguards. In WTO practice, the leading statement on the increased imports was given by the Appellate Body in Argentina- Footwear case, where the determination was made if there exists threshold for quantities of such increase.127

In this report Appellate Body stated that ‘the increase in imports must have been recent enough, sudden enough, sharp enough and significant enough both quantitatively and qualitatively, to cause or threaten to cause 'serious injury’.128 However, European Commission takes into consideration the volume, prices and market shares of imported goods in the process of determining the increase in imports, which seems to be in compliance with the opinion of the Appellate Body.129

b) Unforeseen developments

According to Article XIX of the GATT, the imports must be increased due to unforeseen developments and incurred obligations, including tariff concessions. This means that the serious injury, which is caused or is threatened to be caused must not be expected. The same approach is provided in the Import Regulation as it sets out in article 10(2) that ‘Where a threat of serious injury is alleged, the Commission shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury’. As for the 'effect of the obligation incurred', in Korea- Dairy the Appellate Body elaborated, that it must be demonstrated ‘as a matter of fact’ before imposing safeguard measures.130

127 Simon Lestner and others, World Trade Law, Text, Materials and Commentary, (2nd edn, Hart Publishing 2008) 525
128 ibid 526
129 Sanford E. Gaines, BirgitteEgelund Olsen and KarstenEngsigSørensen (eds), Liberalizing Trade in the EU and the WTO: A Legal Comparison (CUP 2012) 476
Additionally, from the EU perspective, the emphasize must be made on the causal link between the tariff concession and the increased imports, which must be obviously demonstrated. However, as the Import Regulation does not imply to 'unforeseen developments', therefore, the EU Commission does not have any obligation to argue this requirement.

c) Serious injury

The term 'serious injury' is defined by the Import Regulation as ‘a significant overall impairment in the position of Community producers’. \(^{131}\) Despite this definition, the Import Regulation in Article 10 provides non-exhaustive list of factors which must be evaluated during the assessment procedure. All these factors and even other relevant ones should be attentively and rigorously checked by the European Commission before setting out the fact of 'serious injury'. In addition to this, under the WTO Agreement on Safeguards the Appellate Body interpreted 'relevant factors' and put them into discretion of investigating authorities to decide whether or not the fact is relevant case-by-case. \(^{132}\)

In practice, with regard to the concept of 'threat of serious injury' the European Commission does not apply for safeguard measures. Instead, surveillance mechanism is used, when an actual injury to the domestic producers is not ascertained. \(^{133}\)

At this stage, Community interest test should be appraised as the Import Regulation focuses on it. As I have already discussed this subject further in relation to anti-dumping duties, therefore I will not stop at this issue now, as the same approach applies in this circumstance as well.

d) Causation

And the final step is to establish the link between the increase in imports and the cause or threaten to cause serious injury. In fact, the most essential part is to determine whether the injury is certainly related to the increased imports and is an actual outcome of them.

\(^{131}\) Art 5(3)(a) of the Import Regulation  
\(^{133}\) Sanford E. Gaines, BirgitteEgelund Olsen and KarstenEngsigSørensen (eds), *Liberalizing Trade in the EU and the WTO: A Legal Comparison* (CUP 2012) 482
According to above discussed issue, these elements play essential importance and must be achieved, in order to establish appropriate safeguard measures.

VI. The United States in the Global Trading System

After the end of the World War II, the U.S. has started developing international liberalized trading rules and become the world leader in promoting the reduction of tariffs and non-tariff trade barriers among nations, especially after signing the GATT, which was the predecessor of the WTO.

The WTO serves an important bulwark against protectionism and has long been a vital aspect of the United States' trade policy, given its important function in setting the rules that govern the global trading system. In addition, the US promotes and strengthens WTO's core functions, in order to support the expansion of its membership.\(^1\)

More broadly, the U.S. still develops new policy tools to be more efficient for expanding trade and in compliance with WTO rules. It is obvious, that international trade agreements help to expand trade and establish transparent rules in a country’s trade relationships, in order to maintain better governing rules for trade. However, the U.S. trade policy is aimed at providing open markets, but also acts aggressively against ‘unfair’ trade practices.

The authority to regulate of trade policy in the U.S. is divided between the president and the Congress. Therefore, Congress has given power to control trade policy negotiations, while the president is responsible for international agreements and sign them on behalf of the U.S.\(^2\)

A. US Trade Law History

U.S. Trade Laws are quite complex and therefore difficult to understand. They contain several statutes which provide remedies in case of unfair trade benefits for foreign goods in the U.S. market.

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\(^2\)David Hanson, *Limits to Free Trade: Non-Tariff Barriers in the European Union, Japan and United States*, (Edward Elgar Publishing 2010) 54
As a historical background, the U.S. started to reduce trade barriers after the World War II, in order to develop not only its own economy, but to establish better economic relations with other nations and to maintain competition on the market. These changes were based on the principle of open economies, which was leading to the creation of global trading framework.

The main trade laws of the U.S. still remain the Tariff Act of 1930 and the Trade Act of 1974, but each has been so thoroughly amended that neither of them have a resemblance to how they appeared when first enacted. The main purpose of the Smoot-Hawley Tariff Act was to protect U.S. producers and farmers against foreign agricultural imports, but as a result of sharp increase of the U.S. tariffs, it caused economic crisis which gripped not only the United States but mostly whole world. As for the Trade Act of 1974, it was aimed at elimination of trade barriers and disputes, and provided improved relationship with developing economies. It was a relief from injury caused by import competition and constituted other adjustment assistance for workers and firms.

Moreover, further power of reducing tariffs was given to the U.S. president by Trade Agreements Act of 1934, which was extended several times in 1937, 1940 and 1943 without any new tariff reducing authority. This legislation was aimed to reduce tariffs by 50 percent over a three year period via reciprocal negotiations with other countries.

Another major change resulting from the 1974 act was the authorization of the U.S. Generalized System of Preferences (GSP) that permitted designated developing countries to export certain goods duty-free to the United States. The primary purpose of this scheme is to assist and encourage developing countries economic growth.

In addition, Trade and Competitiveness Act of 1988 set forth the authority of the U.S. Trade Representative to take actions against unfair trade practices and also, provided new

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136 Also known as ‘Smoot-Hawley Tariff Act’
137 The U.S. Trade Act of 1974, PL 93-618 [1975]
negotiating issues such as trade in services, intellectual property rights, workers’ rights, foreign direct investment and dispute settlement.\textsuperscript{140}

However, the U.S continued to liberalize trade with ratifying a North American Free Trade Agreement (NAFTA) and completing the so-called Uruguay Round of multilateral trade negotiations. Except from the tangible and quantifiable reductions in barriers to trade and the establishment of the World Trade Organization, the liberalization process has resulted in a legacy of conventions and procedures intended to reduce the possibility of reversals of trade liberalization commitments.\textsuperscript{141}

\section*{VII. The U.S. Trade Remedy Laws}

The core element in the U.S. trade policy is trade remedy laws, which are necessary to enforce in order to protect the U.S. businesses from unfair competition within the U.S. It can be resulted from unfair price policy or subsidies from governments to foreign businesses. Antidumping and countervailing duty laws are administered jointly by the U.S. International Trade Commission and the U.S. Department of Commerce.

\subsection*{A. Anti-dumping Law}

However, if industries with strong economies charge lower prices than the cost of production of the goods, or to foreign customers than to the domestic ones, this kind of pricing is construed as dumping by international law.\textsuperscript{142} In order to avoid possible outcomes of such price discriminations, special laws are enacted to provide remedies for unfair trade.

The first legislation that was enacted specifically for the prohibition of dumping was The Anti-dumping Act of 1916. However, this act contained the requirement to demonstrate intent

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\textsuperscript{141} ibid

of dumping on foreign goods in the United States, which was quite difficult to meet - "That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States".\(^{143}\) The above mentioned act was amended several times. The Antidumping Act of 1921 provided statutory basis for alleged dumping practices and appropriate antidumping duties until 1979.

Furthermore, the United States drafted proposal on dumping during the negotiations establishing WTO, which was based on the Antidumping Act of 1921. That draft proposal formed fundamental principle for Article VI of the GATT, which is spread worldwide as a model for antidumping laws.\(^{144}\)

In addition, The GATT Antidumping Code of 1967 was enacted on the concept of Article VI of The GATT and then was amended to conform to the Agreement Relating to Subsidies and Countervailing Measures after revision of the Article VI of The GATT in the 1970s. This revised article was implemented in Trade Agreements Act of 1979, enacted by the Congress, which was then followed by the Tariff Act of 1984 and the Omnibus Trade and Competitiveness Act of 1988.\(^{145}\)

Most recently, antidumping law of the U.S. was amended by the Uruguay Round Agreements Act (URAA) in 1995, which modified not only respective provisions with regard to material injury, threat of material injury, critical circumstances, regional industry, related parties, and cumulation, but added clauses for captive production and negligible imports as well.\(^{146}\)

As I have already discussed above in respect to the EU trade policy, WTO provides guidelines for its member countries on the implementation of Antidumping and Countervailing duty policies, but leaved some gap for interpretation on the domestic level in order to be in compliance with respective national laws.

\(^{143}\) WTO, 'United States – Anti-Dumping Act of 1916 (Original Complaint by the European Communities)', (WT/DS136/ARB 24 February 2004) ch 2.3  

\(^{144}\) Catherine B. DeFilippo, 'Antidumping And Countervailing Duty Handbook' (14\(^{th}\) edn, Washington, DC 20436, 2015) 89  

\(^{145}\) ibid

\(^{146}\) ibid
The specificity of the U.S. Antidumping law arises with respect to the institutional responsibilities for determination of 'dumping' and 'material injury'. This implicates, that the U.S. International Trade Administration of the Department of Commerce (DC) is liable to determine 'dumping', whether the U.S. International Trade Commission (the ITC) is responsible for defining the concept of 'material injury'.\(^{147}\) According to the U.S. Department of Commerce definition, 'dumping' occurs when, ‘... a good is sold for less than its 'fair value,' generally meaning it is exported for less than it is sold in the domestic market or third country markets or it is sold for less than production cost'.\(^{148}\) However, neither the U.S., nor WTO ADA defines the concept of material injury explicitly, so that it is a subject of interpretation by national authorities. Due to the U.S. law, 'material injury' is 'a harm which is not inconsequential, immaterial, or unimportant'; therefore, the outcome of the investigation and injury determination cannot be predicted.\(^{149}\)

Above mentioned institutional system is absolutely different from the EU approach, where only the EU Commission is responsible for all the investigations of alleged dumping and then imposition of antidumping duties. However, the EU considers Union's interests regarding infliction of antidumping duties, compared to the U.S. where the legislation does not contain any provision in respect of public interest.

Moreover, there are different means of characterization of dumping, such as: predatory pricing, international price discrimination, intermittent dumping. The U.S. antidumping legislation prohibits predatory pricing, as well as international price discrimination. The same attitude has the EU regarding these characterizations. As for intermittent dumping, it lasts for several months or years and therefore is systematic. This kind of dumping is also penalized under the U.S. legislation.

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\(^{147}\) Michael J. Trebilcock, Robert Howse, *The Regulation of International Trade*, (3\(^{rd}\) edn, Routledge 2005) 245


The calculation of dumping is important inquire before imposing antidumping duties on foreign imports and can be based on different examination methods. Generally, the antidumping statute indicates that comparing U.S. and home-market prices is the preferred method of calculating dumping margins.\textsuperscript{150} In case of specific conditions, alternative methodologies may apply. These conditions cover situations when the domestic market is considered as viable or non-viable and therefore, the price will be compared to some third-country market or another export market will be chosen as a comparison market. Additionally, antidumping duties must be equal to the amount by which the import price falls below the 'fair value', which in most cases is the cost of producing the good or the price of the good on the domestic market of importer firms.\textsuperscript{151} Duties are mandatory once it has been determined that imported goods are dumped and last as long as it continues.

**B. Countervailing Duty Law**

The first U.S. Countervailing Duty Law passed in 1897 and remained unchanged until 1979. When the agreement was reached in the Tokyo Round of Multilateral Trade Negotiations, then Countervailing Duty law had to be in compliance with it. During the Tokyo Round of Multilateral Trade Negotiations, an agreement concerning the use of subsidies and countervailing measures, commonly known as the Subsidies Code, was completed under Article VI of the GATT and was signed by the U.S. According to this Agreement, evidence of injury is necessary in order to impose countervailing duty. However, the injury test was not required to be fulfilled in the previous legislation. The Trade Act of 1974 extended the application of the countervailing duty law to duty-free imports, subject to a showing of injury.\textsuperscript{152}

Further amendments in countervailing duty law of the U.S. were done by the Omnibus Trade and Competitiveness Act of 1988, which modified provisions regarding to critical

\textsuperscript{150}Brink Lindsey, 'The U.S. Antidumping Law Rhetoric versus Reality' (Trade Policy Analysis 7, 16 August 1999) 5
\textsuperscript{151}Bruce Gregory Arnold, 'How the GATT Affects U.S. Antidumping and Countervailing-duty Policy' (Congress of the United States, Congressional Budget Office 1994) 4
\textsuperscript{152}Catherine B. DeFilippo, 'Antidumping And Countervailing Duty Handbook' (14\textsuperscript{th} edn, Washington, DC 20436, 2015) 91
circumstances, material injury and threat of material injury. However, most recent changes has been done in 1995 by the URRAA, that added new clauses related to negligible imports and a determination of revocation of countervailing duties after certain period of time.\textsuperscript{153}

Despite of all the mentioned changes, some modifications have been done with respect to the language of the law. To be more specific, current language of the U.S. countervailing duty legislation is the same as used in WTO’s Uruguay Round Agreement on Subsidies and Countervailing Measures. This means that it speaks in terms of benefits and uses the word "subsidy", whereas the previous statute used the words ‘bounty’ and ‘grant’.\textsuperscript{154}

Subsidies constitute financial transfer of state resources to specific companies and can distort competition and trade in same way as abusive behavior of dominant companies. Under WTO Subsidies are prohibited if they require recipients to meet certain export targets, or to use domestic goods instead of imported goods, i.e. they are specifically designed to distort international trade.\textsuperscript{155} Prohibited subsidies must be invoked immediately, in order not to be taken counter measures by complaining country. In case, subsidies cause harm to domestic producers, countervailing duty can be imposed.

However, the U.S. does not have any specific rules to control subsidies. Constitution of the United States of America provides Commerce Clause in Article 1, Section 8, Clause 3, which gives the Congress the power ‘to regulate commerce with foreign nations, and among the several states, and with the Indian tribes’. Furthermore, Congress can act to limit state subsidies if they limit interstate trade, but actual control does not exists.

U.S. law includes provisions allowing countervailing duties to be imposed against upstream subsidies, which constitute domestic subsidies:

1. bestowed by a foreign government with respect to ‘input products’ used in the manufacture or production of the goods under investigation;

2. that significantly lower the cost of production and thus bestow a competitive benefit on the goods; and

\textsuperscript{153}ibid
\textsuperscript{155}Agreement on Subsidies and Countervailing Measures, Article 3(1) <https://www.wto.org/english/docs_e/legal_e/24-scm.pdf> accessed 4 July 2015
3. that have a significant effect on the cost of manufacturing or producing the merchandise.\textsuperscript{156}

All these elements must be fulfilled in order to exist upstream subsidies. Upon determining that an upstream subsidy exists, Commerce imposes a countervailing duty equal to the amount of any competitive benefit or the amount of the upstream subsidy being bestowed, whichever is less.\textsuperscript{157}

C. Safeguard measures

Section 201 of the U.S. Trade Act of 1974 set forth that the President "shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs".\textsuperscript{158} According to that article, the President has an authority to instate temporary trade barriers to protect domestic industries from increased imports that 'substantial cause of serious injury or the threat, thereof.'

In addition, there are several differences between the U.S. and the EU law as well. The most notable differences are related to the concept of serious injury and a threat thereof, and a causal link between an injury and increased imports. Those relevant factors, provided in article 4.2 of the SA, for the determination of serious injury are missing in U.S. law, but are stated in EU law. As for the causal link, U.S. law knows the term 'substantial cause', which is quite broad and includes both an increase in imports and other factors, whereas under EU law, the causal link must be based solely on an increase in imports.\textsuperscript{159}

As I have discussed above, safeguard measures are permitted under the GATT and is known as ‘escape clause’ from GATT obligations. However, the U.S. law is not fully in compliance with GATT and WTO principles with respect to safeguards. The principle of parallelism has


\textsuperscript{157} ibid


\textsuperscript{159} Rüdiger Wolfrum, Peter-Tobias Stoll, Michael Köbele (eds), WTO: Trade Remedies (BRILL, 2008) 854
to be taken into account while imposing safeguard measures, which means that the all necessary determinations must be done before exclude any import from the measure. This principle is linked to the principle of non-discrimination, which means that the measures apply to all WTO members without discrimination. Unlike U.S. law, the WTO requires safeguards to be implemented only in response to ‘unforeseen developments’. Several investigations have been done and ruled out that in some cases the U.S. safeguard measures are inconsistent with WTO requirements.

VIII. EU - US Relations

The EU and the U.S. diplomatic relation dates back to early fifties, but this cooperation was only endorsed with the Transatlantic Declaration in 1990. In addition, the main principle of the Transatlantic Declaration was to achieve their common goals. It stated: "To achieve their common goals, the European Community and its Member States and the United States of America will inform and consult each other on important matters of common interest, both political and economic, with a view to bringing their positions as close as possible, without prejudice to their respective independence. In appropriate international bodies, in particular, they will seek close cooperation".

Moreover, for the development of transatlantic trade and economy, the Transatlantic Economic Council (TEC) was created in 2007 under the framework of New Transatlantic Agenda (NTA) and in line with the Transatlantic Economic Partnership (TEP), which were adopted respectively in 1995 and 1998. The purpose of the TEC is to bring together governments, the business community, and consumers to work together and bring rewards on both sides of the Atlantic.

In addition, the EU is the US's largest trading partner, while the United States is the EU's second largest trading partner, with 17.6 % and 13.9 % respectively of each other's trade in

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160 Transatlantic Declaration on EC-US Relations (1990)  
161 EU Relations with the United States of America  

According to the given importance of the trade relations between those two major trade partners, it is obvious that both the EU and the U.S. are interested in strengthening cooperation among them and for the sake of this, in 2013 the Council adopted a mandate to start negotiations for a comprehensive trade and investment agreement with the U.S. - Transatlantic Trade and Investment Partnership, which is aimed at creating jobs and promoting growth in the EU, the U.S. and in the whole world.

\textbf{A. Transatlantic Trade and Investment Partnership – TTIP}

TTIP is a trade and investment agreement, which is currently being negotiated among the European Union and the United States. Customs duties, red tape and restrictions on investment on each side of the Atlantic can make it difficult to buy and sell goods and services on the other. TTIP would remove these trade barriers, and thus, make it easier for EU and US firms - large and small - to export goods and services and conduct investments in the counterpart.

Furthermore, the EU, the US and transatlantic business interests coincide, which means that they emphasize on the removal of tariff barrier and are concerned more broadly on non-tariff barriers. Therefore, regulatory issues are more crucial factor for the agreement. However, this does not mean that they agree on every issue.\footnote{163Tereza Novotna and others (eds), The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World (Ashgate Publishing 2015) 75} To make it more obvious, both parties of the TTIP pin-points on different subjects, e.g. the EU tries to put in the agreement provisions related to procurement and investment regulation, whereas the U.S. prefers to include sanitary and phytosanitary provisions in it.

Overall, the TTIP negotiations are in line with business demands and therefore, both countries, the EU and the U.S., positions are in compliance with these.
There are several reasons why it became necessary to start TTIP negotiations. Nowadays, the role of China and some other countries are essential in the world trading system. They have a potential to increase their power, as they are economically rising countries and constantly gain more and more importance in the world. This is one of the main factors among others that lead the EU and the U.S. to the agreement. And also, long-lasting economic crisis which covered the whole world should have been taken into consideration and has become the basis for the TTIP.\(^{164}\)

Additionally, trade and competition is densely linked to each other. Competitive market is quite attractive for all businesses. Therefore, there is a hope that the introduction of TTIP will foster competitiveness and creates better climate for business entities, which has an immense importance for both countries.

All in all, we can say that the transatlantic agreement aims at providing competitive environment for trade and gaining higher welfare with reducing non-tariff barriers.

\(^{164}\)Ramona Mayer, Transatlantic Trade and Investment Partnership (TTIP) A Discussion about Benefits and Drawbacks (GRIN Verlag, Feb 6, 2015) ch 2(2)
IX. Conclusion

To come to the conclusion, countries with developed foreign trade usually use only the import fees not as a fiscal, but rather as essential instruments of a trade policy. In practice, all the states impose specific duties for the goods when they cross the customs border of the country, which is regulated by its national legislation. Thus, Customs union is exception and therefore, member states are exempted from general rule. This means that Common Customs Tariff applies to all members of the Customs Union, e.g. European Union is a customs union as I have discussed about it above.

As we can see, nowadays countries try to adopt liberalized trade policy, which is a cornerstone for prosperity and economic growth. Liberalized trade and its regulation is a benefit not only for countries’ economies, but also for business industries as it facilitate competition and creates healthy environment to compete on the market; Therefore, it is beneficial for consumers, because it leads to reduce prices of goods and increase the quality and range of them.

According to the EU and the U.S. approach to trade and its regulation, it is obvious that both of them try to liberalize it by the mean of removing trade barriers, which on the one hand helps to gain prosperity, and on the other hand raises competitiveness on trade markets.

As far as I researched the topic, I can say that these two countries legislations are mainly in conformity with WTO rules. Only a few differences could be found in the U.S. law, whereas the EU law is absolutely in compliance with them. Their trade regulations intend to deal with commercial obstacles related to market access and import and export-related difficulties that might be a result from government intervention and market regulations worldwide. Due to this, both the EU and the US do their best to reduce or remove tariff or non-tariff trade barriers, in order to achieve fair trade regimes on the market.

Furthermore, as the world trading system increases from day to day, therefore, the EU and the US need to be in close cooperation in trade aspects in order to remain their positions in this fast-growing system. The outcome of this inevitability is current negotiations on adoption of TTIP.
All in all, I would like to say that taken into consideration all current processes in the world, such as globalization and economic development, importance of trade relations is vital among nations throughout the world. The main goal of this research was to show how trade is regulated under the EU and the US legislations, which measures they use for unfair trade practices and how they cooperate together to accomplish main goals of trade, in general.
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