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Conflicts between WTO Law and EC Law

- A study on antidumping legislation and direct effect

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Summary

Antidumping measures imposed by a member of the World Trade Organization are authorized under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement). The AD Agreement establishes substantive requirements that must be satisfied in order to impose an antidumping measure.

The legal basis for antidumping in primary EC law is Article 133 of the EC Treaty and the current EC antidumping legislation in force is the 1995 Basic regulation; Regulation No 384/96 of 22 December 1995. In accordance with this, a definitive measure has been implemented on footwear; Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam.

The rules concerning antidumping in the EC were adopted in accordance with existing international obligations and especially following Article VI of the General Agreement on Tariffs and Trade, the Agreement on Implementation of Article VI of the GATT (ADA) and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.

The Community rules have been modified in the light of the AD Agreement and it is the EC's desire to maintain the balance of rights and obligations, which the GATT Agreement establishes and therefore needs to take account of how they are interpreted by the Community's major trading partners.

The main difference between the WTO and the EC legislation on antidumping, is the special regard to developing countries but no specific action is mentioned. The method of sampling the companies in an investigation are also different from the WTO. Fair comparison is said to be different and many discussions has focused on the issue, but the term is used in both legislations. The EC only exercises the use of the terms Non-Market Economies and Market Economy Treatment.

There exist different views on the economic status amongst EU, US, World Bank etc. This shows that there is no coherence in world trade and that it can convey unfair treatment and that antidumping can be discriminatory.

In the decision on imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam, the EU decided to treat Vietnam as a Non-Market Economy. In an EU antidumping procedure, it is important to establish whether it is a Non-Market Economy or a market economy due to different treatment.

The EC Regulation No 905/98 states that there are certain circumstances that are important when deciding market economy treatment. The governmental or company control, accounting, financing, bankruptcy and property law are all vital areas of concern. State interference and costs of major inputs that substantially reflect market values will be important. The market signals need to reflect supply and demand in order to be treated as a market economy. The firms need to have a clear accounting and the production costs and the financial situation are not to be subjected to significant distortions. Bankruptcy and property laws must guarantee legal certainty and the exchange rate must be carried out on a market rate. In the EU Basic Regulation, individual treatment can be given when the applicant can show that foreign investors can repatriate capital and profits, the prices are freely determined, the majority of shares belong to private persons, exchange rate are carried out at market rate and state interference does not allow different duty to individual exporters.

In international law, proportionality is used to describe whether different measures are in proportion to the damage. In an antidumping procedure, it is vital to determine if the injury of dumped prices is in wider European economic interests in order to meet the demands of proportionality. In this particular case evidence show that the costs for imposing antidumping duties can be higher than the benefits.

Several arguments or claims were made against the definitive antidumping measure on footwear but they were all denied, due to no direct effect of the WTO law.

The domestic effect of a treaty has traditionally been determined in accordance with the constitutional law of each of the States, which is a party to a treaty. In a country, that has a dualistic approach to international law, the provisions of the treaty only binds the states at an intergovernmental level and when not implemented, it cannot be directly domestically invoked or enforced by citizens.

Several Advocates General and scholars have not yet ruled out the direct effect of World Trade Organization. However, the EC Courts have consistently maintained that General Agreement on Tariffs and Trade (GATT) and WTO law has no direct effect in the EC legal system. Some argues that the binding effect of the decisions from the Dispute Settlement Body, the nature of the legislation and the reason of the EC legislation to be in accordance with the WTO is a motive for direct effect.

Keywords; EC law, WTO law, antidumping, trade barriers, direct effect

Sammanfattning

Antidumpningsåtgärder som vidtagits av en medlem av Världshandelsorganisationen måste följa den lagstiftning som följer av detta medlemskap. Den lagstiftning som handlar om antidumping inom Världshandelsorganisationen (WTO) är Antidumping avtalet som är ett speciellt avtal om utförandet av artikel VI i GATT.

Grunden för antidumping inom EU är primärt Artikel 133 i EG fördraget och förordning No 384/96. Förenligt med detta har en antidumpingåtgärd införts mot import av skor från Kina och Vietnam (Rådets Förordning No 1472/2006).

När reglerna inom EU författades, gjordes detta enligt den internationella regleringen inom WTO och det är EU's mål att upprätthålla den balansen av rättigheter och skyldigheter som följer av medlemskapet till WTO.

Den största skillnaden mellan WTO's lagstiftning och EU's är det speciella hänsynstagandet till utvecklingsländer som återfinns inom WTO. En annan skillnad är användandet av stickprov av företag. EU använde metoden när man analyserade företagen i det ovan nämnda fallet då de var alldeles för många för att bedöma individuellt. En rättvis jämförelse är också debatterad att vara annorlunda, då man använder ett analogt land inom EU för att beräkna pris vid jämförelse. Termerna icke-marknadsekonomi och marknadsekonomi behandling används enbart inom EU ej inom WTO, men de senare har däremot accepterat användandet i flera bilaterala avtal för medlemskap inom WTO.

Det finns däremot stora skillnader på hur världen ser på olika ekonomier. Endast EU och USA använder begreppet icke-marknadsekonomier, medan andra länder och organisationer använder andra termer som kan uppfattas mindre stötande. Det visar också att det inte finns någon koherens inom världshandeln vilket kan konstituera orättvis behandling och att antidumping kan uppfattas som diskriminerande.

När EU införde den definitiva åtgärden om antidumpingstullar på skor från Kina och Vietnam, beslöt man att behandla länderna som icke-marknadsekonomier. Detta ger en annan effekt och oftast en högre tull än om man behandlat dem som en marknadsekonomi. Proportionalitet är också viktigt inom internationell rätt och vid antidumpningsåtgärder skall inte åtgärden vara dyrare att införa än det man vinner på den. I detta fall har undersökningar visat att åtgärden är mer kostsam än vinsten.

Ett flertal argument användes för att klaga på införandet av åtgärden, men de nekades då man inte erkänner WTO direkt effekt inom EU. Flera,

inklusive Generaladvokaten Alber vid Europeiska gemenskapernas domstol, är inte beredda att stå bakom den ståndpunkten.

Nyckelord; EG-rätt, WTO rätt, antidumping, handelshinder, direkt effekt

Abbreviations

ADB	Asian Development Bank
ADA	Anti Dumping Agreement
AG	Advocate General
ASEAN	Association of Southeast Asian Nation
ASEM	Asia Europe Meeting
CEPT	Common Effective Preferential Tariff
CFI	Court of First Instance
DGT	Directorate- General for Trade
DSU	Dispute Settlement Understanding
DSB	Dispute Settlement Body
EBA	Everything But Arms
EC	European Community
ECJ	European Court of Justice
ECT	Treaty Establishing the European Community
EU	European Union
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund
LDC	Least Developed Country
LEFASO	Leather and Footwear Association
MET	Market Economy Treatment
NME	Non-Market Economy
PNTR	Permanent Normal Trade Relations
SCM	Subsidies and Countervailing measures
Sida	Swedish International Development Cooperation Agency
SOE	State Owned Enterprise
SPS	Sanitary and Phytosanitary Measures
TDI	Trade Defence Instruments
TRIPS	Trade Related aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
WTO	World Trade Organization

1 Introduction

Recently the European Commission imposed a permanent anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China (China) and the Socialist Republic of Vietnam.¹

When deciding upon antidumping measures, it is necessary to determine if a product is considered as being dumped (see below).² The initiation on an antidumping proceeding has to be based upon a written complaint on behalf of the domestic industry. During the proceedings, an investigation is made to determine the existence, degree and effect of the alleged dumping.³ A provisional measure may be imposed during the proceedings to prevent injury until a definitive antidumping duty has been determined.⁴ A company can also be granted Market Economy Treatment, MET, which means that they are treated as situated in a market economy.

In the investigation prior to the decision on provisional anti-dumping duties, the Vietnamese companies were denied the status as market economy for the reason that they do not pay market rent for the land on which their facilities are situated. When imposing trade defence measures such as antidumping duties, the treatment of the target country can be of fundamental importance. In antidumping investigations, Members of the WTO often compare prices in Non-Market Economies with calculated prices of goods that originate in a market-oriented substitute country.⁵ In the WTO Anti-Dumping Agreement (ADA),⁶ there is no mentioning of Non-Market Economies but the term is used in a number of protocols concerning accession to the WTO.⁷

The treatment of Non-Market Economies is quite different from the treatment of market economies especially considering antidumping proceedings. Anti-dumping duties are largely imposed on exports from companies in countries with Non-Market Economies than exports from

¹ Commission Regulation (EC) No 553/2006 of 23 March 2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. OJ L 98, 6.4.2006.

² Article 2, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement, ADA) and Article 2 in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community Official Journal L 056 , 06/03/1996 P. 0001 – 0020 (Basic Regulation).

³ Article 5 ADA and Article 5-6 Basic Regulation.

⁴ Article 7 and 9 ADA and in the Basic Regulation.

⁵ Weeks, Ann M. Eu dumps PRC 'non-market' classification. *China Business Review*, 1998 vol 25, nr 4, page 4.

⁶ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

⁷ Horlick, Gary and Shuman, Shannon. Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws. *International Lawyer*. (1984), 18:4, page 834.

companies that have been granted market economy treatment. However, the classification of Non-Market Economy is not coherent.⁸

During the investigation, there were complaints about several aspects; among them was inconsistency with the WTO Law. The EC rejected the claim due to no direct effect.

EC Courts have so far sustained that GATT and WTO law does not have direct effect in the EC legal system. In *Portugal v. Council*, it is stated, “the WTO agreements are not, in principle, among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”.⁹ Even so, the EU and its Member States are all Members of the World Trade Organisation, WTO, and consequently need to follow the regulations in several international trade agreements.¹⁰

When implementing antidumping measures, the EU legislation needs to be in accordance with the WTO Anti Dumping Agreement (ADA), but there are some differences between them. This thesis will aim to describe these differences and the dissociation of direct effect.

1.1 Purpose

The purpose of this essay is to give an analysis on the antidumping measure towards China and Vietnam on footwear and particularly the complaints that were made against it and describe why the EC does not give direct effect to WTO legislation. In order to do that there are several matters that needs to be explained.

Questions that will be answered in this essay are;

- What is antidumping and why is it used?
- On what grounds did Vietnam complain on the decision and why was the complaints denied?
- On what grounds does the EC insist that WTO does not have direct effect?

1.2 Method and material

The method for this essay is the traditional legal method. The first part of the essay is descriptive and the second more analytical. The first part describes the antidumping legislation and why they are used. The second

⁸ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* Kommerskollegium. National Board of Trade. 2006-05-05. page 4.

⁹ Case C-149/96 *Portugal v. Council*, (1999) ECR I-8395, para.47.

¹⁰ http://www.eu-applysningen.se/templates/EUU/standardRightMenuTemplate_2541.aspx, 2006-03-31, 18:21.

part analyses the differences and by studying the case law, tries to find a reason for denying direct effect. The studies contain legal sources as treaties, cases and doctrine. The material comprises WTO and EC law. The doctrinal texts consist of both articles and books.

The websites I have used are well known and established. The EU commissions and the US government's website have provided useful information as well as the National Board of Trades website and the WTO.¹¹

The overall method is comparative studies between WTO and EC laws on antidumping and the classification on non-market economies. In the comparison, cases from the WTO Dispute Settlement Body (DSB) as well as the EC Courts will be presented.

The thesis is partly conducted in Vietnam, where some meetings and interviews were held, see bibliography.

1.3 Delimitations

This essay is meant to give a presentation on antidumping and how the procedures differ in EC Law and WTO Law. The delimitations consist of mainly what Vietnam complained about in Commission Regulation (EC) No 553/2006 of 23 March 2006¹² and Council Regulation (EC) No 1472/2006 of 5 October 2006.¹³

The factors that describe antidumping proceedings and WTO are on the other hand immense and only a few of them can be portrayed in this essay.

In order to understand the differences in the treatment, antidumping proceedings need to be explained. Other trade barriers will not be described and this thesis will not portray antidumping measures fully.

This essay do not describe the procedures that are made after an antidumping has been determined, in the sense that is described in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, Official Journal L 056 , 06/03/1996 P. 0001 – 0020.

¹¹ www.kommers.se, www.wto.org etc.

¹² Commission Regulation (EC) No 553/2006 of 23 March 2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. OJ L 98, 6.4.2006.

¹³ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. Official Journal L 275, 06/10/2006 P. 0001 – 0041.

Delimitation is also the direct effect; it cannot be fully described in an EC context. In this thesis, it can only be described in relation to the WTO/GATT. Other factors as the injury in the European Community cannot be completely explored neither can the full effect of reciprocity.

Three reasons of denying the direct effect can be crystallised, but not all of them can be discussed fully in this thesis. The first is about the absence of direct effect of WTO agreements in other countries, reciprocity, which is discussed in chapter 6.4.1. The second is about the tolerance in the WTO dispute settlement system and the third reason is that the WTO agreements are not of such nature that they cannot be relied on directly in front of the national or Community Courts. The last two reasons of denying the direct effect cannot be investigated due to limits of both time and space.

Facts about the definitive antidumping duty on footwear Council Regulation (EC) No 1472/2006 cannot be presented fully due to limitation of space. If further information is required see the webpage www.kommers.se and ec.europa.eu/ on antidumping issues.¹⁴

1.4 Terminology and definitions

The terminology in this thesis is quite technical and some explanations might be necessary in order to make the text easier to read. Other terminology is explained in its proper context in the thesis.

The concept of antidumping in an economic perspective and legal can be quite different. In an economic sense *antidumping* can be defined as price discrimination. If the price differences are manufactured by special factors in international sales or other factors of non-pricing between sales in different national markets, dumping has not occurred.¹⁵ It is assumed that each individual firm acts on its own economic interests and most of the firms pursue the goal to maximize profit. If the elasticity of demand is not equal, the firm can increase the profits by setting prices that match the market. A profitable price discrimination can be a success if three conditions are fulfilled; the firm that intends to engage in price discrimination must have some market control over the prices, the different markets in which price discrimination operates must be separated by natural barriers and lastly, there must be unequal elasticity of demand in different markets.¹⁶ In a legal sense, it is decided by more specific rules (see below).

A *non-market economy* can be defined as:

“A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former

¹⁴ http://ec.europa.eu/trade/issues/respectrules/anti_dumping/pr230206_qa_en.htm, 2007-01-18, 19:35.

¹⁵ Wenxi Li. *Antidumping Law of the WTO/GATT and the EC. Gradual Evolution of Antidumping Law in Global Economic Integration*. Juristförlaget i Lund. (2003) Page 53.

¹⁶ Wenxi Li. (2003) Page 21-22.

Soviet Union, in contrast to a market economy, which depends heavily upon market forces to allocate productive resources. In a non-market economy, production targets, prices, costs, investment allocations, raw materials, labour, international trade, and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority. Hence, the public sector makes the major decisions affecting demand and supply within the national economy.”¹⁷

A *market economy* can be defined as:

“The national economy of a country that relies on market forces to determine levels of production, consumption, investment, and savings without government intervention.”¹⁸

Dumping can be defined as selling a product below its normal value.¹⁹ It is defined in GATT (General Agreement on Tariff and Trade) Article VI as

- 1) selling at an export price which is below the home market price
- 2) selling at an export price which is below the export price to a third country, or
- 3) selling at an export price, which is below the cost of production plus profit, and selling cost.²⁰

Dumping *margin* can be defined according to the Basic Regulation Article 2(d) (12)²¹ as the amount by which the normal value exceeds the export price.

The word antidumping can be portrayed in many ways depending on the different systems, such as Anti Dumping in WTO Law, etc. The distinct phrasing is used in its context to illustrate the different systems.

1.5 Disposition

The second chapter introduces EC law and WTO law on antidumping. The relation between them will be described and the current definitive antidumping duty on footwear from Vietnam and China.

The third chapter focuses on a comparison between EC law and WTO law on antidumping by describing the Basic Regulation and the Anti Dumping Agreement. The claims made by Vietnam on the antidumping proceeding and measure are also described.

¹⁷ US Department of State Glossary of Trade available at <http://usinfo.state.gov/products/pubs/trade/glossjr.htm#nonmareco> 2006-07-22,21:52.

¹⁸ <http://usinfo.state.gov/products/pubs/trade/glossjr.htm#mark>, 2006-07-22, 21:54.

¹⁹ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. Page 5.

²⁰ See for a full version http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm, 2007-01-18, kl 19:19.

²¹ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community .Official Journal L 056 , 06/03/1996 P. 0001 – 0020.

The fourth chapter gives a classification of Non-Market Economy, since the term is vital in the proceeding. When a market is considered to be a Non-Market Economy, it is given special treatment and more likely to be subject to antidumping. The classification of Non-Market Economy is also essential in the claims made from the targeted countries. If they were not Non-Market Economies, they might not have been the target of antidumping measures.

In chapter 5, Market Economy Treatment is described, which is an individual treatment towards a company in a market considered a Non-Market Economy. Being granted the treatment means that the basis of calculation antidumping will change. Some parties claimed due to they were not given the treatment.

The sixth chapter describes the case law on direct effect. In the actual proceeding against Vietnam and China, some of the complaints were rejected due to no direct effect. If the claims have no direct effect, it seems pointless to make complaints and the rule of law or legal security attenuates. In the chapter the difficulties described in chapter 3, is brought to another level where the targeted country's complaints have no effect.

The last and seventh chapter gives the results of the thesis and tries to conclude some thoughts about the claims made from the targets of the definitive antidumping duty on footwear Council Regulation (EC) No 1472/2006 and why they were denied.

2 EC Law and WTO Law on antidumping

The claims made from certain interested parties towards the decision on imposing antidumping duties on footwear were all denied. The claims were about the companies were not given Market Economy Treatment, undertaking requests, Non-Market Economy Treatment and this was basically denied due to no direct effect of WTO Law within the EC.

An antidumping measure is, in brief, based on the requirements that there exists dumped imports, material injury to a domestic industry and that there is a causal link between the dumped imports and the injury.²²

2.1 History of dumping and at present

Dumping started during the 18th century when increasing capacity of production and the desire for market expansion grew. After the World War II, the economic phenomenon of dumping increased because of the GATT and the advancements of technology and the emergence of newly industrialised countries.²³

Antidumping laws were first created in the early 20th century, Canada being the first in 1904 to introduce them.²⁴ The law gave the government the right to levy a special duty on goods and the 1921 British Safeguarding of Industries Act as well as the 1921 American Antidumping Act adopted cost of production and fair value as a substitute of the home market value.²⁵

In 1944, the Bretton Woods Conference was held wherein the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) saw life. The Havana Charter into the GATT 1947, Article VI, incorporated Antidumping. The purpose of the Article is however not to control the practice of dumping, but to regulate administration of antidumping measures.²⁶

²² http://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm, 2006-04-30, 14:30.

²³ Wenxi Li. (2003). Page 23-24 and also Viner, footnote 1, supra, pp.36-37.

²⁴ The Customs Tariff Act, an act to Amend the Custom Tariff, 1897, 4 Edw. VII, I Canada Statutes III (1904).

²⁵ Wenxi Li. (2003). Page 31.

²⁶ Wenxi Li. (2003). Page 33 and Article VI, GATT.

2.2 Antidumping in International law, WTO

Antidumping measures imposed by a member of the World Trade Organization are authorized under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement). “Antidumping measures are unilateral remedies which may be applied by a Member after an investigation and determination by that Member, in accordance with the provisions of the AD Agreement, that an imported product is “dumped” and that the dumped imports are causing material injury to a domestic industry producing the like product”.²⁷

The AD Agreement establishes substantive requirements that must be satisfied in order to impose an antidumping measure.²⁸ Detailed procedural needs concerning the conduct of antidumping investigations and the imposition and maintenance in place of antidumping measures must be fulfilled as well. A failure to respect either the substantive or the procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure.²⁹ Unlike the Agreement on Subsidies and Countervailing Measures, the AD Agreement does not establish any disciplines on dumping itself, primarily because dumping is pricing practice engaged in by business enterprises, and therefore not within the direct reach of multilateral disciplines.³⁰

The SCM Agreement (Subsidies and Countervailing measures) recognizes that subsidies can play an important role in the economic development of developing country Members, and provides special and differential treatment to such Members. Members in the process of renovation from a centrally planned market to a free-enterprise economy are given a seven-year period to phase out prohibited subsidies. These subsidies must, however, be reported in order for members to benefit from the special treatment. Members in renovation also receive preferential treatment with respect to actionable subsidies.³¹

²⁷ http://www.wto.org/english/tratop_e/adp_e/adp_e.htm, 2006-04-25, 11:37. Stated on “Understanding the WTO: The Agreements”.

²⁸ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

²⁹ The World Trade Organization dispute settlement and article 17 establishes that the Dispute Settlement Understanding is applicable to disputes under the AD Agreement.

³⁰ http://www.wto.org/english/tratop_e/antidum2_e.htm, 2006-04-30, 14:47.

³¹ http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto04/wto4_26.htm#note1, 2006-04-30, 14:59.

2.3 The relation between EC Law and WTO Law

EC Courts have so far sustained that GATT and WTO law does not have direct effect in the EC legal system.³² In *Portugal v. Council*, it is stated, “the WTO agreements are not, in principle, among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”.³³ There are however two exceptions and the first is where the Community intended to implement a particular obligation assumed in the context of the GATT/WTO (*Nakajima* exception)³⁴ or direct effect is acknowledged where a Community measure refers specifically to precise provisions of the GATT/WTO (*Fediol* exception).³⁵ There are however, scholars that support the opinion of direct effect e.g., Mendez,³⁶ Zonnekeyn,³⁷ and Alemanno.³⁸ In the case *International Fruit*, the Court of Justice stated that even though the GATT was binding on the Community:³⁹

“this agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of “reciprocal and mutually advantageous arrangements” is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.”

The denying of direct effect was based on reciprocity and granting it would reduce the capacity for tactic enjoyed by the Community with respect to its commercial partners.⁴⁰ See more in chapter 7.

³² Gianni, Fabrizio Di and Antonini, Renato. DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO System has come to an end? *Journal of World Trade* 40(4):777-793, 2006. Page 777.

³³ Case C-149/96 *Portugal v. Council*, (1999) ECR I-8395, para.47.

³⁴ Case C-69/89, *Nakajima All Precision Co. Ltd v. Council*, (1991) ECR I-2069, para.31.

³⁵ Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, (1989) ECR 1781, paras 19 to 22.

³⁶ The impact of WTO rulings in the Community legal order, *European Law Review* 517 (2004).

³⁷ EC Liability for non-implementation of WTO Dispute Settlement Decisions- Are the dice cast? *Journal of International Economic Law* 483 (2004).

³⁸ Judicial enforcement of the WTO Hormones Ruling within the European Community: toward EC liability for the non-implementation of WTO Dispute Settlement Decisions? 45 *Harvard International Law* (2004).

³⁹ Joined Cases 21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit*, (1972) ECR 1219, para.21.

⁴⁰ De May, Delphine and Colomo, Pablo Ibáñez. Recent developments on the Invocability of WTO Law in the EC: A wave of mutilation. *European Foreign Affairs Review* 11:63-86, 2006. page 64.

2.4 Antidumping proceedings in EC Law

Member States within the European Union (EU) have agreed on a common commercial policy in trade with non Member States (third countries). Articles 131- 134 of the EC Treaty provide for the legal basis for this policy.⁴¹ According to articles 131-134 (EC), Member States enter agreements on common grounds with other states and adopt regulations on import and export to and from the EU. Among these legal instruments, there are regulations on e.g. common taxes, product safety and subsidies. The Treaty, though, does not give a definition of the concept of trade policy. Important nevertheless, is that the EU and its Member States are all Members of the World Trade Organization, WTO, and consequently need to follow the regulations in several international trade agreements.⁴² The history behind this arrangement of “double” Membership in the WTO is explained below.

The competence of the EU is exclusive as for the Common Commercial Policy (CCP) is concerned. Member States cannot sign their own agreements with third countries on some areas of trade. The Council comes to an agreement but the Commission negotiates with third countries. The CCP includes trade but the agreements can also concern cooperation- and association agreements. The problem is however that the limits of the common commercial policy are not clearly defined in the EC Treaty.

The European Court of Justice has explained the limits for the European Unions authority in opinion of the Court of 15 November 1994.⁴³ In its opinion, the Court deals with the issue of the more exact limits of the competence of the Community to conclude international agreements concerning services and the protection of intellectual property rights (Article 228 (6) of the EC Treaty). The case started as a dispute between the Commission and the Member States on EU’s authority. The difference of opinion was that both parties agreed that the General Agreement on Tariffs and Trade was included in the exclusive authority, but could not agree on other areas within the Uruguay- round. According to the opinion of the Court, the exclusive competence within the field of trade in services, the Community has no exclusive competence due to that it would not further internal Community measures nor was it necessary for the attainment of internal Community objective.⁴⁴

⁴¹ Consolidated Version of the Treaty Establishing The European Community. Official Journal C 325 , 24 December 2002.

⁴² Article II (1-4), Scope of the WTO, Marrakesh Agreement Establishing the World Trade Organization 1994.

⁴³ Opinion 1/94 on the WTO Agreement ECR I-5267.

⁴⁴ Opinion 1/94 on the WTO Agreement ECR I-5267. for more information see Craig and De Búrca. *EU Law. Text, cases and materials*. 2nd ed. Oxford University Press (1998) page 117 and N. Emiliou and D.O’ Keeffe (eds.) *The European Union and World Trade Law- After the GATT Uruguay Round*. Wiley, 1996).

The European Union and the Member States share the authority on the areas that fall outside Article 133. Of these areas, the Member States as well as the EU can establish mixed agreements to be signed by the Council and ratified by the Parliaments of the Member States. The European treaties give the European Union the opportunity to sign three different kinds of agreements with other countries or organisations. The different agreements are trade-, cooperation- and association agreement, but they are often combined.⁴⁵

Trade agreements focus mainly on the free trade between the European Union and third countries. On the Commissions proposal, trade agreements are closed by the Council according to Article 133 of the Treaty establishing European Community, with qualified majority.⁴⁶

The legal basis for antidumping in primary EC law is Article 133 (1) of the EC Treaty, which provides that:

“The common commercial policy shall be based on uniform principle, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalism, export policy and measures to protect trade such as those to be taken in event of dumping or subsidies.”

The Article 133 Committee gives consultancy to the Commission and is composed of representatives from all Member States with the function to coordinate EU trade policy.⁴⁷ Under Article 133 ECT, the Council of European Communities adopted the first EC antidumping legislation in 1968.

The current EC antidumping legislation in force is the 1995 Basic regulation; Regulation No 384/96 of 22 December 1995.⁴⁸ The Regulation applies to imports from all countries that are not members of the European Community (EC) but the Community may adopt precise provisions in relation to countries without a market economy or whose economy is in transition.⁴⁹

Antidumping duties can according to Article 1 (1) Regulation No 384/96 be applied to any product whose release for free circulation within the Community causes injury. Article 3 defines determination of injury as material injury to the Community industry or threat of the same. The examination of the impact of dumped imports shall include “all relevant

⁴⁵ Article 133 (5) of the Treaty Establishing the European Community.

⁴⁶ Article 133 (4) of the Treaty Establishing the European Community.

⁴⁷ Article 133 (3 second paragraph) of the Treaty Establishing the European Community.

⁴⁸ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal L 056*, 06/03/1996 P. 0001 – 0020.

⁴⁹ Article 2(7) of Regulation (EC) No 384/96.

economic factors and indices having a bearing on the state of the industry”.⁵⁰

The determination of dumping is made in accordance with Article 2 where in (1) a normal value and (2) an export price shall be applied on the price. A fair comparison shall be made upon these prices (see more in chapter 7.3). The termination of injury and the definition of Community Industry are defined in Article 3 and 4, which is more described in chapter 4.2 and 6.1. If the measure has led to no movement, the investigation can be reopened according to Article 12.⁵¹

2.5 The definitive antidumping duty on footwear Council Regulation (EC) No 1472/2006

The actual investigation started on request by the European Confederation of Footwear Industry. They represent the shoe producers that complained which are covered by secrecy. The Italian shoe industry has however been the compelling force.⁵²

In regards of the Basic Regulation (Council Regulation (EC) No 384/96) and especially Article 9 thereof, a definitive antidumping duty has been imposed on certain footwear with uppers of leather originating in the People’s Republic of China and Vietnam. A provisional antidumping duty had been imposed (Regulation (EC) No 553/2006) but this is now replaced. The products concerned are footwear with uppers of leather other than sports footwear, slippers and footwear with protective toecap. (See more below).

The reason for the antidumping measure is due to dumped prices on footwear that causes injury to the Community industries. Three things are important during the investigation prior to the decision: 1) if dumping is taking place; 2) if injury is being caused to European products or producers; 3) if acting to remove that injury is in wider European economic interest.⁵³ After the anti-dumping measure, there have been discussions whether the measure is in proportion to the costs. Supplement A show that the costs are higher than the gain.

⁵⁰ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal L 056*, 06/03/1996 P. 0001 – 0020.

⁵¹ Council Regulation (EC) No 384/96.

⁵² National Board of Trade. Yttrande 2006-07-13. *Möte med EU: s antidumplingskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam.*

⁵³ http://ec.europa.eu/comm/trade/issues/respectrules/anti_dumping/pr230206_qa_en.htm, 2007-01-18, 19:31.

2.6 Summary and comments

Antidumping measures imposed by a member of the World Trade Organization are authorized under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement). The AD Agreement establishes substantive requirements that must be satisfied in order to impose an antidumping measure. This is however not without difficulties due to the reasoning on direct effect.

The legal basis for antidumping in primary EC law is Article 133 of the EC Treaty and the current EC antidumping legislation in force is the 1995 Basic regulation; Regulation No 384/96 of 22 December 1995. In accordance with this, a definitive measure has been implemented on footwear; Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. Antidumping and the reasons for imposing them will be explained below.

3 Comparison between EC Law and WTO Law on antidumping

There are indications that EC Law and WTO Law are not consistent and that disputes can occur when trying to establish these differences. In the EC, as described above, the primary legislation Article 133 in the Treaty Establishing the European Community and the Council Regulation (EC) No 384/96 (Basic Regulation) that is the foundation for antidumping legislation. in the WTO it is Article VI of the General Agreement on Tariffs and Trade and the Agreement on Implementation of Article VI of the GATT 1994 (ADA).

3.1 Basic Regulation

The rules were adopted in accordance with existing international obligations and especially following Article VI of the General Agreement on Tariffs and Trade, the Agreement on Implementation of Article VI of the GATT (ADA or hereinafter the AD Agreement) and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.⁵⁴ The Community rules have been appropriate amended in the light of the AD Agreement and it is the EC's desire to maintain the balance of rights and obligations, which the GATT Agreement establishes and therefore needs to take account of how they are interpreted by the Community's major trading partners.⁵⁵

The Council adopted the regulation that states in Article 1 the principles of antidumping. An antidumping duty may be applied to any product that is considered as dumped and whose release for free circulation in the Community causes injury.

In Article 2, the determination on dumping is established, by establishing the normal value, export price, making comparison and the dumping margin.

In Article 3, the determination of injury is launched. The injury constitutes material injury to the Community Industry, threat of material injury to the Community Industry or material retardation of the establishment of such industry.⁵⁶

⁵⁴ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, Official Journal L 056 , 06/03/1996 P. 0001 – 0020. Note (2).

⁵⁵ Council Regulation (EC) No 384/96. (Note 3-4).

⁵⁶ Council Regulation (EC) No 384/96. Article 3 (1).

The regulation also gives a definition of Community Industry in Article 4 and the initiation of proceedings is stated in Article 5. Any natural or legal person or any association not having legal personality acting on behalf of the Community Industry shall initiate the investigation upon a written complaint.⁵⁷ The complaint shall also provide for the evidence, injury and causal link between the alleged dumped imports and the injury.⁵⁸ The Commission thereafter examines the accuracy and adequacy of the evidence.⁵⁹

The Commission then commence investigation acting in cooperation with the Member States.⁶⁰ The complainants, importers and exporters will inspect all information made available, upon a written request.⁶¹

A provisional measure can be imposed, as in the described case, if the proceedings have been initiated.⁶² Without the imposition of provisional or definitive duties, investigations may be determined upon receipt of satisfactory voluntary undertakings from any exporter, which means that the injurious effect of dumping is eliminated.⁶³ The Commission can suggest undertakings, but no exporters are forced to enter undertakings.⁶⁴

In Article 17 it is stated that sampling may be used where the numbers of complainants, exporters or importers is too large. The Commission makes the final selection, but preference shall be given to choose samples by the parties concerned.⁶⁵

Article 21 states that the determination as to whether it is of the Community's interest to invoke intervention, shall be based on an appreciation of all various interests taken as a whole. Information in the decision to impose measures or not has to be provided to the Commission.⁶⁶

3.2 The Anti Dumping Agreement

Members of the World Trade Organization has agreed on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

Article 1 state that an antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and it shall be

⁵⁷ Council Regulation (EC) No 384/96, Article 5 (1).

⁵⁸ Article 5 (2).

⁵⁹ Article 5 (3).

⁶⁰ Article 6(1).

⁶¹ Article 6 (7).

⁶² Article 7 (1).

⁶³ Article 8 (1).

⁶⁴ Article 8 (2).

⁶⁵ Article 17 (2).

⁶⁶ Article 21 (2).

conducted in accordance with the provisions of this Agreement. The Appellate Body in the US-1916 Act stated that an antidumping measure encompasses all measures taken against dumping.⁶⁷

Article 2 establishes the determination of dumping which means that if the export price of the product is less than the comparable price in the ordinary course of trade, it is considered as being dumped. The comparison can be made with a like product when exported to a third country when it is not possible in the domestic market.⁶⁸ A fair comparison shall be made between the export price and the normal value. Due allowance shall be made in each case.⁶⁹ In the interpretation of the Articles, the Panel explained in *US-Stainless Steel*, the relation between Articles 2.1, 2.3 and 2.4 as follows:⁷⁰

“...When determining whether dumping exists, Article 2.1 usually requires a comparison of the *export price* with the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Article 2.3, however, authorizes a Member to *construct* the export price where, *inter alia*, the actual export price is unreliable because of association between the exporter and the importer...”

The fair comparison of export price and normal value has in *Egypt- Steel Rebar* been determined by the Panel to ensure a fair comparison through various adjustments as appropriate of export price and normal value.⁷¹

In Article 3, it is stated that a determination of injury shall be made and the investigation authorities shall consider whether there has been a significant increase of dumped imports.⁷² The examination shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry.⁷³ In the case *EC- Bed Linen*, the Panel stated that because the investigating Member (in this case the European Community) chose to consider a sample of the domestic industry, it could not close its eyes to ignore other factors of concern.⁷⁴

Article 4 gives a definition of Domestic Industry. The EC often uses samples and in the case *EC- Bed Linen* the Panel examined whether the EC

⁶⁷ United States – Anti – Dumping Act of 1916. DS 136. Complainant European Communities and respondent United States.

⁶⁸ Agreement on Implementation of Article VI of the GATT 1994 (ADA). Article 2.2.

⁶⁹ Article 2.4.

⁷⁰ *Stainless Steel*, United States – Imposition of Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WTO Document, WT/DS179/R. paras. 6.90-6.91.

⁷¹ *Egypt- Definitive anti-dumping measures on steel rebar from Turkey*. WT/DS211/R. para. 7.335.

⁷² Article 3. and 3.2.

⁷³ Article 3.3.

⁷⁴ WT/DS141/R. European Communities- Anti-Dumping duties on imports of cotton-type bed linen from India. Panel Report on EC - Bed Linen, para. 6.181.

was precluded from considering information relating to producers not within that sample, or not within the Community industry.⁷⁵

An investigation shall be initiated upon a written application by or on behalf of the domestic industry in accordance with Article 5. An application shall include evidence of dumping, injury and a casual link between these.⁷⁶

Evidence is described in Article 6 and a provisional measure can be applied before determining on a definitive duty.⁷⁷

The imposition and collection of antidumping duties are decisions to be made by the authorities of the importing Member. An antidumping duty shall be on a non-discriminatory basis and the amount shall not exceed the dumping margin established under Article 2.⁷⁸

The Anti- Dumping Agreement gives specific regard to developing countries and states in Article 15 that developed countries must give special regard to the special situation of developing country Members.⁷⁹ There is however, no specific legal requirements for special action as stated in US-Steel Plate. “The first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action” according to the Panel.⁸⁰

Consultation and Dispute Settlement is established in Article 17. The Panel had then stated that “the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, ... that replaces the more general approach of the DSU”.⁸¹ The Appellate Body rejected the finding though and found that Article 17 does not replace the “more general approach of the DSU”.⁸²

The relation between Article VI of the GATT 1994 and the AD Agreement is as stated in the Panel on US-1916 Act, an “inseparable package of rights and disciplines”. “In application of the customary rules of interpretation of international law, we are bound to interpret Article VI of the GATT 1994 as part of the WTO Agreement and the Anti-Dumping Agreement is part of the context of Article VI”.⁸³

⁷⁵ WT/DS141/R. European Communities- Anti-Dumping duties on imports of cotton-type bed linen from India. Panel Report on EC- Bed Linen. Para. 6.182.

⁷⁶ Agreement on Implementation of Article VI of the GATT 1994 (ADA). Article 5.2.

⁷⁷ Article 7.

⁷⁸ Article 9.1-3.

⁷⁹ Article 15.

⁸⁰ WT/DS206/R. United States Anti-Dumping and countervailing measure on steel plate from India. Panel Report on US-Steel Plate, para 7.110.

⁸¹ Appellate Body Report on Guatemala – Cement I, para. 58, quoting from the Panel Report on Guatemala –Cement I, para 7.16.

⁸² Appellate Body Report on Guatemala – Cement I, para. 67.

⁸³ WT/DS136/R. United States- Anti-Dumping Act of 1916. Complaint by the European Communities. Panel Report on US-1916 Act (EC), para 6.97.

3.3 Claims made by Vietnam on the antidumping proceeding and measure

Some parties argued that the samples were not representative given the exclusion of certain footwear.⁸⁴ The argument was rejected due to the agreement of these authorities on the sample compositions were sought and obtained.⁸⁵ Parties also claimed that the selection of representative domestic sales in the sample is inappropriate since none of the exporters qualified for Market Economy Treatment, (MET). This argument was however deemed irrelevant since the decision on MET is taken subsequently to the selection of the sample.⁸⁶

Various interested parties claimed a breach of Article 17 of the Basic Regulation, alleging that the sample of Community producers is not representative.⁸⁷ The claims made by the various parties were rejected and the legal validity of the sample is hereby confirmed since the sample is representative and was selected in full compliance with Article 17 of the basic Regulation.⁸⁸

Certain interested parties claimed that the Commission failed to disclose on an individual basis for each of the non-sampled Chinese and Vietnamese exporters.⁸⁹ According to their claim the Commission is obliged to make individual determinations with regard to submitted MET claims irrespectively whether an exporter is sampled or not. It is however considered that the existing provision on sampling (Article 17) fully includes the situation of companies claiming MET.⁹⁰ As stated in the Regulation imposing a definitive duty on footwear, a representative sample was used to establish the duty to be applied to the cooperating exporters not selected in the sample like in all anti-dumping cases.⁹¹

Seven of the Vietnamese exporting producers claimed that they should have been granted MET but they produced no new evidence so this was rejected.⁹² Six of the exporting producers claimed that should have been granted Individual Treatment, but this was denied due to the ratio was not freely determined and no new evidence were presented.⁹³

⁸⁴ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. Official Journal L 275, 06/10/2006 P. 0001 – 0041. Para. 42.

⁸⁵ Para. 49.

⁸⁶ Para. 51.

⁸⁷ Para 53.

⁸⁸ Para 59.

⁸⁹ para 60.

⁹⁰ Paras. 60-61.

⁹¹ Para. 69.

⁹² Para. 79.

⁹³ Para. 91.

There was a complaint about that it was not appropriate to have chosen Brazil as analogue country due to the representatives of the domestic sales.⁹⁴ “As regards other factors invoked by interested parties, such as the socio-economic and cultural developments or the labour costs, they were not deemed relevant for determining whether Brazil is an appropriate analogue country. Moreover, in terms of economic development Brazil is not very different from other proposed analogue countries such as Thailand and Indonesia. The choice of Brazil was therefore not deemed unreasonable”.⁹⁵

Soma parties argued that not all relevant details to conduct a comparison had been disclosed and that the Commission did not disclose the exact figures on which basis the adjustments was calculated.⁹⁶ This was rejected due to all relevant details were presented to all companies concerned by this proceeding.⁹⁷

Certain importers and exporters claimed that the imposition of measures would not be in the interest of the Community Industry. The investigation clearly established the existence of dumping causing injury to the Community industry and was therefore denied.⁹⁸ Certain exporting producers claimed that they did not agree with the findings concerning the limited impact of measures on consumers, and that those measures would result in a major increase in household costs and limit consumer’s choice. Nevertheless, this was also rejected.⁹⁹

Other claims were made but denied because WTO rules are not directly applicable in the Community.¹⁰⁰

3.4 Summary

The rules concerning antidumping in the EC were adopted in accordance with existing international obligations and especially following Article VI of the General Agreement on Tariffs and Trade, the Agreement on Implementation of Article VI of the GATT (ADA) and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.

The Community rules have been modified in the light of the AD Agreement and it is the EC’s desire to maintain the balance of rights and obligations, which the GATT Agreement establishes and therefore needs to take account of how they are interpreted by the Community’s major trading partners.

⁹⁴ Council Regulation (EC) No 1472/2006 Para. 105.

⁹⁵ Para. 106.

⁹⁶ Para 126. and 130.

⁹⁷ Para. 131.

⁹⁸ Para. 243.

⁹⁹ Para. 249.

¹⁰⁰ Paras. 85. and 87.

The main difference between the WTO and the EC legislation on antidumping is the special regard to developing countries but no specific action is mentioned. The use of sampling the companies in an investigation are also different from the WTO. Fair comparison is said to be different and many discussions has focused on the issue, but the term is used in both legislations. The use of the terms Non-Market Economies and Market Economy Treatment are only exercised by the EC and the US as described in the following chapters.

Several arguments or claims were made against the definitive antidumping measure on footwear but they were all denied. In the next chapters, the complaints will be described further. After that, an explanation on direct effect will follow.

4 Classification of non-market economy

Some parties argued that they should have been granted Market Economy Treatment and Individual Treatment, but to understand the terms it is fundamental to start describe the concept of Non-Market Economy, NME.

The idea of Non-Market Economy treatment is based on the system where free trade only works if the trading is maintained on a free market. This idea originates from a time where there was a clear distinction between Non-Market Economies and market economies.¹⁰¹ The only Members of the WTO who uses the term Non-Market Economy are the EC and the US.

4.1 Special treatment of non-market economies

In an anti-dumping investigation, the price at which the good is sold in the exporting company's "home" market is compared to the price at which the good is sold in the market of the importing country. In a non-market economy, the price in the home market may however be relatively low, due to for instance different types of subsidies. The investigation may therefore depart from the price at which the good is sold in the home market if the exporting country is a Non-Market Economy. As an alternative the value may instead be determined based on the price or constructed value in a third country that is a market economy, or the price from this country to other countries, or where those are not probable, on any other reasonable basis.¹⁰² This makes it easier for the importing country to prove that dumping has occurred. The companies in the exporting country are however normally interested in having their country considered as a market economy and they therefore often try to put forward arguments that support the classification of the country at issue as a market economy.

In an antidumping investigation it is thus of great importance to establish whether the exporting country is a market economy or not. The EC decision to impose a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and the definitive measure was based on the conclusion that Vietnam is still a Non-Market Economy. In a comparable antidumping case concerning Vietnamese exports of certain fish products to the United States - the so called "cat-fish- case"¹⁰³ - the US

¹⁰¹ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 5.

¹⁰² Article 2(7) of Regulation (EC) No 384/96.

¹⁰³ Decision Nov 8, 2002 US DOC (Department of Commerce) of frozen Fish Fillets From the Socialist Republic of Vietnam.

came to the same conclusion and treated Vietnam as a Non- Market Economy.¹⁰⁴ These decisions have been much debated and have caused considerable tensions in trade between on the one side Vietnam and on the other side the EU and the US countries.

The International Trade Organisations Charter after the World War II mentioned the system of Non-Market Economy treatment where the Soviet Union was to be a party. The Charter had a suggestion on “Expansion of Trade by Complete State Monopolies of Import Trade” that stated that a minimum value needed to be agreed upon in imports. The US and the Soviet Union had a bilateral agreement already stating this in order for the Soviet Union to be treated as most favoured nation.¹⁰⁵

The Soviet Union did not join GATT and the provision was cut out of the GATT. A non- discrimination requirement on state trading enterprises was made in GATT 1947, article XVII.¹⁰⁶

In the antidumping rules in the GATT, there is a reference to state trading economies:¹⁰⁷

“It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.”

In the 1995, WTO Anti-dumping Agreement there is no mention of non-market economies, but there is an acceptance of the use.¹⁰⁸

The US incorporated its first antidumping investigation that involved planned economy in 1960 and the EU first used its rules on Non-Market Economies in 1979.¹⁰⁹

¹⁰⁴

<http://www.aquaculturemag.com/siteenglish/printed/archives/issues03/03articles/pastprespfucatfishUS3.pdf>, 2006-05-01, 12:08.

¹⁰⁵ Polouektov, Alexander. Non- Market Economy Issues in the WTO Anti- Dumping Law and accession Negotiations Revival of a Two-tier Membership? (2002) *Journal of World Trade* 36(1): 1-37, page 6.

¹⁰⁶ Polouektov, Alexander. (2002), page 6.

¹⁰⁷ Second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994. The Antidumping Agreement subsequently re-affirms this provision by stating that “This Article [2.7] is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.” Noted in *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. Kommerskollegium. National Board of Trade. 2006-05-05. page 8.

¹⁰⁸ Horlick, Gary and Shuman, Shannon. Nonmarket Economy Trade and U.S. Antidumping/ Countervailing Duty Laws. *International Lawyer*. (1984) 18:4 page 834.

¹⁰⁹ Horlick, Gary and Shuman, Shannon. (1984). page 808 and Van Bael & Bellis. *Antidumping and other Trade Protection Laws of the EC*, 4th ed. (2004).

4.2 Criteria for Non-market economies

Different countries use different criteria for what constitutes a market economy as well as a Non-Market Economy. These differences indicate that there is no coherent problem that the treatment of Non-Market Economy seeks to address.¹¹⁰

In the WTO it is more common with the term transition economy than market economy.¹¹¹ The World Bank sees Viet Nam as a start-up market where all developing economies are called emerging markets.¹¹² The emerging markets are then divided in low income countries and middle income countries. The stock and capital markets of such economies which are growing are then divided into three sections. There are emerged markets as Singapore and South Korea and emerging markets. The last is start-up markets that just started emerging from a non-capital market. Viet Nam is an example of start-up but is quickly moving into emerging market if not already according to Mr. Akamatsu at the World Bank.

The UNCTAD states in a report on Greening Trade in Viet Nam that it is a market oriented economy but has not yet integrated in the global economy.¹¹³ It is one of Viet Nam's most important objectives to integrate into the world economy and trade and investment is important in the process.¹¹⁴

Asia Development Bank (ADB) was founded in 1966 and is dedicated to reduce poverty in the Asia and Pacific region through pro-poor sustainable economic growth, social development and good governance.¹¹⁵ Viet Nam joined in 1966 but paused for 23 years due to the conflict of war. ADB states that Viet Nam is one of Asia's fastest growing economies and that it is opening up through international and regional economic integration initiatives. During the years 1993 and 2004, two thirds of the poverty was reduced from 58 % to 19.5 %. ADB calls Viet Nam a socialist market-based economy which has evolved from central planning.¹¹⁶

To establish whether a market is market oriented, Business Monitor International Ltd looks at three measures. They look at openness, tax environment and governmental intervention. They want to know to what

¹¹⁰ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 20.

¹¹¹ Horlick, Gary and Shuman, Shannon. (1984). page 808 and Van Bael & Bellis. *Antidumping and other Trade Protection Laws of the EC*, 4th ed.(2004).

¹¹² Regional meeting, Sofitel Plaza Hanoi, 8-10 October 2006. Noritaka Akamatsu, Regional advisor for Capital development, East Asia and Pacific Region World Bank, Hanoi.

¹¹³ Dr. Veena Jha. *Greening Trade in Viet Nam*. UNCTAD/DITC/TED/8. page 12 and 76.

¹¹⁴ Dr. Veena Jha. page 12.

¹¹⁵ Breakfast meeting on the Business Opportunities with the Asian Development Bank, 11 October 2006, Hanoi. Ayumi Konishi, Country Director.

¹¹⁶ Breakfast meeting on the Business Opportunities with the Asian Development Bank, Ayumi Konishi, Country Director.

extent state intervention precludes the functioning of a free market economy. The openness is the same thing as to how the economy is linked to the outside world through trade. Competition from other countries, wage inflation, international links, innovation and creativity in business are signs of openness as well as developed trade infrastructure. The magazine assesses openness through the economy's financial and bureaucratic barriers to trade. Government intervention can sometimes bring justification for official participation but mostly it creates preventions for developments. Hong Kong, Singapore and Taiwan is number 1, 2 and 4 on a scale that measures market economy status, where UK is number 54 and US on 4th place.¹¹⁷

Asia has an average score of 52.6 compared with other emerging markets at 47.3 in the area of market orientation and state intervention. The region scores well at openness, but low corporate tax rates are a major feature. Communist rule and state intervention are more apparent and many sectors that are state owned could be privatized.¹¹⁸

4.4 Summary

There exist different views on the economic status amongst EU, US, World Bank etc. This shows that there is no coherence in world trade and that it can convey unfair treatment and that antidumping can be discriminatory.

In the decision on imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam, the EU decided to treat Vietnam as a Non-Market Economy. In an EU antidumping procedure, it is important to establish whether it is a Non-Market Economy or a market economy due to different treatment.

If a country is seen as a Non-Market Economy, a company can still be granted Market Economy Treatment as observed in the next chapter.

¹¹⁷ The Vietnam Business Forecast Report Q4 2006. Published by Business Monitor International Ltd. ISSN 1745-0764. page 22-23.

¹¹⁸ The Vietnam Business Forecast Report Q4 2006.. Page 26.

5 Market Economy Treatment, (MET) for individual companies

A company can be granted Market Economy Treatment within the EU and when given the grant they will be treated as situated in a market economy. No Vietnamese companies in the antidumping proceeding were given this treatment and several complaints concerned this subject.

5.1 Provisions on Market Economy Treatment

When individual companies seek to be granted the treatment, they have to prove that:¹¹⁹

1. “decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,
2. firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,
3. the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,
4. the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
5. exchange rate conversions are carried out at the market rate.^{120,,}

The possibility to be granted Market Economy Treatment, MET, was first introduced for companies in China and Russia in the EU antidumping regulation in 1998.¹²¹ The reason for the treatment was the change in Russian and Chinese economies. In literature there are nevertheless little said about the reasons of granting market economy treatment to individual companies.

¹¹⁹ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 12-13.

¹²⁰ Exchange rate is the State Bank of Vietnam (SBV) monetary policy tool. The Vietnam Business Forecast Report Q4 2006. page 16.

¹²¹ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 13.

The EU relies on a positive list stated in the antidumping regulation, of what countries are NME: s but there is no criteria for granting MET. There is no uniform definition of market economies but both the EU and US give significant importance to state interference. The EU does not connect state ownership though with state interference. The EU has clear rules on set of accounts, while the US does not. However, the US does not grant MET to individual companies so the issue does not arise. The US Department of Commerce has the authority to assign individual industries that are market economy adjusted.¹²²

Looking at the definition in the Anti Dumping Agreement (ADA), firms can sell at a profit even when they are dumping. This is the main argument to defend antidumping instrument, because companies can choose to use so low prices that their competitors cannot manage the competition. When the competitors are gone, they make a larger profit than they would have with market prices. But in Non-Market Economies it is different. The companies do not make profit maximizing, but are instead obliged to abide rules of production by the state.¹²³

In the Basic Regulation it is stated that companies granted MET should be compared with their domestic selling price when determining individual dumping margins. Domestic sales have to be done in the ordinary cause of trade in order to use normal value as domestic selling price.¹²⁴ This means in EU practice that there needs to be a volume of profitable sales in the home market. In order to determine if it is profitable, one needs to calculate the cost of production. In a NME it is believed that the cost of production cannot be calculated.¹²⁵

When the costs of production are set by the state in terms of labor and land, price of inputs etc. and the price are lower than it would be in a market situation, it is considered as subsidized. This means that the price paid in a NME will represent the actual cost of production. If they sell at a price that is above the cost of production, it is classified as in the ordinary cause of trade, as stated in the AD Regulation. Two problems arise in NME's; either the companies dump prices because the state order them or the government gives subsidized inputs.¹²⁶

¹²² US Government Accountability Office, January 2006, U.S. – CHINA TRADE. *Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*, page 26.

¹²³ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. (2006). page 13.

¹²⁴ Basic Regulation Article 2 (a) (1).

¹²⁵ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. (2006). page 14.

¹²⁶ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. (2006). page 14.

5.2 EU denial of Market Economy Treatment

The European Commission denied all companies that applied for Market Economy Treatment but one Chinese company the status of market economy.¹²⁷ It believed that in all cases there was clear evidence of state intervention or non-standard accounting practice. The Commission also found evidence of non-commercial loans from the state, non-enforcement of international accounting standards, improper evaluation of assets and non-commercial conditions for land-use.¹²⁸

In the Council Regulation (EC) No 1472/2006 a representative sample was used due to the high amount of exporting producers. It was impossible to make an individual assessment according to the Commission. This was done in accordance with Article 17 of the Basic Regulation which sets out a method to deal with a large number of companies involved. The governments of the exporting countries had themselves chosen these samples to represent all exporters.¹²⁹ The companies that claimed they were not granted MET held investment licenses which imposed quantitative sales restrictions and therefore denied the treatment.¹³⁰ The individual treatment was claimed to be in conflict with WTO Law, but that claim was rejected due to WTO rules are not directly applicable in the Community.¹³¹

The success rate of Market Economy Treatment varies between countries but that can also be compared to what products are under investigations. The most frequently given explanation as to why companies are refused MET is because they are under state influence or does not keep adequate accounts. 58 % failed due to these circumstances, 38 % failed because of “carry-overs” from Non-Market Economy system and the rest because they were not subject to bankruptcy and property laws.¹³²

¹²⁷ *Möte med EU: s antidumpningskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam.* (2006). Page 3.

¹²⁸ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam Official Journal L 275 , 06/10/2006 P. 0001 – 0041. Para 79-81.

¹²⁹ Council Regulation (EC) No 1472/2006 notes 61-69 and Council Regulation (EC) No 384/96. Article 17.

¹³⁰ Council Regulation (EC) No 1472/2006. Para 81.

¹³¹ Para 86-87.

¹³² *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 23.

Table 1 Success rate of the 200 MET- applications examined¹³³

Country	Number of applications	MET refused		MET granted	
China	180	115	64 %	65	36 %
Russia	8	2	25 %	6	75 %
Ukraine	4	2	50 %	2	50 %
Vietnam	8	6	75 %	2	25 %
Totalt	200	125	63 %	75	38 %

Both the European Community and the Swedish National Board of Trade have done surveys on companies in Vietnam in order to determine whether they should be treated as market economies. The National Board of Trade has stated that it does not accept the Commissions calculations when not granting any Vietnamese companies Market Economy Treatment.¹³⁴

5.3 Summary

The EC Regulation No 905/98 states that there are certain circumstances that are important when deciding market economy treatment.¹³⁵ The governmental or company control, accounting, financing, bankruptcy and property law are all vital areas of concern. State interference and costs of major inputs that substantially reflect market values will be important. The market signals need to reflect supply and demand in order to be treated as a market economy. The firms need to have a clear accounting and the production costs and the financial situation are not to be subjected to significant distortions. Bankruptcy and property laws must guarantee legal certainty and the exchange rate must be carried out on a market rate.¹³⁶

In the EU Basic Regulation, individual treatment can be given when the applicant can show that foreign investors can repatriate capital and profits, the prices are freely determined, the majority of shares belong to private persons, exchange rate are carried out at market rate and state interference does not allow different duty to individual exporters.

¹³³ Source of the table is *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. Kommerskollegium. National Board of Trade. 2006-05-05. page 23.

¹³⁴ *Möte med EU:s antidumpningskommitté den 16 mars 2006: Länderskor från Kina och Vietnam*. (2006).

¹³⁵ Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, *OJ L 128*, 30.4.1998, p. 18–19.

¹³⁶ Polouektov, Alexander. (2002). pages 18-19.

6 Case law on direct effect

In the case of Vietnamese footwear, some of the complaints were rejected due to no direct effect of WTO Law in the EC Law system. The denying from the European Court of Justice of direct effect was based on reciprocity and granting it would reduce the capacity for tactic enjoyed by the Community with respect to its commercial partners.

6.1 Position of the EC case-law

The European Community has developed into an organization of States with a relatively autonomous legal system, but much of this is not due to the agreements of the States. It is brought through the interpretive practice and influence of the European Court of Justice (ECJ). The Court has developed a nature of EC law and it is rather different from that which has governed the domestic treatment of norms of international law between States.¹³⁷

In countries, that has adopted a dualistic approach to international law, international agreements and treaties do not themselves give rise to rights or interests, which citizens can plead and have enforced, before national courts where States are signatories. The provisions of these treaties bind only the states at an intergovernmental level and when not implemented it cannot be directly domestically invoked or enforced by citizens.¹³⁸

According to the case, *Portugal v. Council* the position is as follows: “the WTO agreements are not, in principle, among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”.¹³⁹

There are however two exceptions and that is (i) direct effect is recognized where the Community intended to implement a particular obligation assumed in the context of the GATT/WTO (*Nakajima* exception)¹⁴⁰ and (ii) where a Community measure refers expressly to precise provisions of the GATT/WTO (*Fediol* exception)^{141 142}.

Flexible and imprecise agreements do not confer rights that citizens can invoke in domestic courts.¹⁴³ Although GATT is binding on the

¹³⁷ Craig and De Búrca. *EU Law. Text, cases and materials*. 2nd ed. Oxford University Press (1998) page 117 and N. Emiliou and D.O’ Keeffe (eds.) *The European Union and World Trade Law- After the GATT Uruguay Round*. Wiley, (1996). Page 163.

¹³⁸ Craig and De Búrca. (1998) page 163.

¹³⁹ Case C-149/96 *Portugal v. Council*, (1999) ECR I-8395, para. 47.

¹⁴⁰ Case C-69/89, *Nakajima All Precision Co. Ltd v. Council*, (1991) ECR I-2069, para.31.

¹⁴¹ Case 70/87, *Fédération de l’industrie de l’huilerie de la CEE (Fediol) v. Commission*, (1989) ECR 1781, paras 19 to 22.

¹⁴² Gianni, Fabrizio Di and Antonini, Renato. (2006). Page 777.

¹⁴³ Case C-149/96 *Portugal v. Council*, (1999) ECR I-8395.

Community, its nature of reciprocal and mutually advantageous arrangements' combined with the great flexibility gives the possibility of derogation.¹⁴⁴

The Court of Justice has rejected direct effect and created a kind of dualism in respect of the WTO Agreement but at the same time accepted that as far as possible, Community law must be interpreted in conformity with the GATT/WTO.¹⁴⁵ The Dispute Settlement Mechanism (DSM) may produce binding decisions on WTO Members but it is unclear whether the Dispute Settlement Body (DSB) Reports are binding if they find that a rule has been violated.¹⁴⁶

The *locus classicus* for direct effect of treaty provisions in the EC is the *Kupferberg* judgement and it states a number of basic rules regarding monism and direct effect.¹⁴⁷ The basic rules on monism and direct effect are as follows:¹⁴⁸

- Community law is open to international law.
- The criteria for recognizing direct effect of treaty provisions is the same as for provisions of Community law: direct, precise, no further implementation necessary, unconditional and capable of being invoked before and applied by a court.
- The international rules on interpretation; text, context, object and purpose, play an important part.¹⁴⁹

The Community is an important factor in international relations and particularly in the WTO due to its presence at the creation.¹⁵⁰ The *Kupferberg* case law has however been adjusted in *Portugal v. Council* and *Van Parijs*.¹⁵¹ In the latter case, the Court recognizes that implementation of WTO obligations may have to be reconciled with other international obligations of the Community.¹⁵²

The case *Fediol*, gives a judgement that states that the trade barriers regulation confers on undertakings and individuals the right to lodge a complaint about the commercial practices of third countries that are not in accordance with WTO law.¹⁵³ The *Nakajima* case law is however more interesting for this thesis due to its matter on antidumping. The case deals

¹⁴⁴ Joined Cases 21-24/72 *International Fruit Company v. Produkschap voor Groenten en Fruit*, [1972] ECR 1219, para.21.

¹⁴⁵ Kuijper Pieter Jan and Bronckers Marco. WTO law in the European Court of Justice. *Common Market Law Review* 42: 1313-1355. (2005). Page 1316.

¹⁴⁶ Gianni, Fabrizio Di and Antonini, Renato. (2006). Page 778.

¹⁴⁷ Case 104/81, *Kupferberg*, [1982] ECR 3659. Supra note 5.

¹⁴⁸ Kuijper Pieter Jan and Bronckers Marco. (2005). Page 1317-1318.

¹⁴⁹ Case 104/81, *Kupferberg*, [1982] ECR 3659. para 23.

¹⁵⁰ Kuijper Pieter Jan and Bronckers Marco. WTO law in the European Court of Justice. *Common Market Law Review* 42: 1313-1355. (2005). Page 1322.

¹⁵¹ Case C-377/02, *Léon Van Parijs v. Belgisch Interventie- en Restitutie Bureau*. [2005].

¹⁵² *Léon Van Parijs v. Belgisch Interventie- en Restitutie Bureau*. Para 52.

¹⁵³ Regulation 3286/94, O.J. 1994, L 349/71. See also Kuijper Pieter Jan and Bronckers Marco. WTO law in the European Court of Justice. *Common Market Law Review* 42: 1313-1355. (2005). Page 1324.

with an antidumping measure of the Council, where the regulation was challenged of illegality (under Article 184, now Article 241) due to violation of the GATT.¹⁵⁴

The Court held that there was no direct effect but investigated the plea of illegality because the basic regulation was adopted specifically for the implementation of the Antidumping Code.¹⁵⁵ The Community had to ensure compliance between the GATT and its implementing measures on the one hand and EC legislation on the other. Due to this, the Court had to determine whether the Council in establishing the antidumping basic regulation had gone beyond this legal framework.¹⁵⁶

The idea behind the case was that the Community itself implicitly could grant WTO law direct effect. There are also hints that there is no desire to give the Anti-dumping Agreement direct effect.¹⁵⁷ In a dualistic system, treaties are converted into national law. However, in this case, the Court has found a measure of dualism for the WTO within a monistic system.¹⁵⁸

Nakajima submits three pleas in law: infringement of essential procedural requirements, breach of the Agreement on Implementation of Article VI of the General Agreement on tariffs and Trade and finally breach of certain principles of law.¹⁵⁹ The alleged failure to state reasons in explanations was rejected due to that Article 190 of the Treaty does not require the Community authorities to justify specifically every provision, which may result in discrimination, since a breach of the principle of equal treatment constitutes an independent ground for annulment of the provision in question.¹⁶⁰ *Nakajima* also submitted that retroactive application of the regulation was made, but this was rejected since the regulation only codified previous practice.¹⁶¹

Concerning the second plea, the Council states that the Anti-Dumping Code, as well as the GATT, does not confer on individual rights, which may be relied on before the Court and that, the provisions of that Code are not directly applicable within the Community.¹⁶² The Court continues: “It should, however, be pointed out that *Nakajima* is not relying on the direct effect of those provisions in the present case. In making this plea in law, the

¹⁵⁴ Kuijper Pieter Jan and Bronckers Marco. (2005). Page 1324.

¹⁵⁵ The Basic Anti-dumping Regulation No 2423/88 and the Agreement on Implementation of Article VI of the General Agreements on Tariff and Trade (1979 Anti-Dumping Code).

¹⁵⁶ Case C-69/89, *Nakajima All Precision Co. Ltd v. Council*, (1991) ECR I-2069, supra note 14, paras. 30-32. Found in Kuijper Pieter Jan and Bronckers Marco. WTO law in the European Court of Justice. *Common Market Law Review* 42: 1313-1355. (2005). Page 1324.

¹⁵⁷ Kuijper Pieter Jan and Bronckers Marco. (2005). Page 1325.

¹⁵⁸ Kuijper Pieter Jan and Bronckers Marco. (2005). Page 1325.

¹⁵⁹ Judgment of the Court of 7 May 1991. *Nakajima All Precision Co. Ltd v Council of the European Communities*. Dumping - Definitive duty - Imports of serial-impact dot-matrix printers originating in Japan. Case C-69/89. para. 11.

¹⁶⁰ *Nakajima*. Para 20.

¹⁶¹ *Nakajima*. Paras 22-23.

¹⁶² *Nakajima*. Para. 27.

applicant is in fact questioning, in an incidental manner under Article 184 of the Treaty, the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely that of infringement of the Treaty or of any rule of law relating to its application”.¹⁶³ “It ought to be noted in this regard that, in its judgment in Joined Cases 21 to 24/72 *International Fruit Company NV and Others v Produktschap voor Groenten en Fruit* [1972] ECR 1219, the Court ruled (at paragraph 18) that the provisions of the General Agreement had the effect of binding the Community. The same conclusion must be reached in the case of the Anti-Dumping Code, which was adopted for the purpose of implementing Article VI of the General Agreement and the recitals in the preamble to which specify that it is designed to “interpret the provisions of ... the General Agreement” and to “elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”. ”¹⁶⁴

Unlike the provisions under Article 34 of the Treaty Establishing the European Union (TEU), the texts of the EC Treaties make no suggestion to the effect, which their provisions should have. The doctrine of direct effect concerns the Community, not the European Union as a whole. The ECJ has no jurisdiction over the provisions of the second pillar. There are also many varieties of Community law and not all of them entail direct effect.¹⁶⁵

In one of the most important cases, the case *Van Gend en Loos*, the Advocate General Roemer stated:¹⁶⁶

“Very impressively, [the Commission] submitted that, judged by the international law of contract and by the general legal practice between States, the European Treaties represent a far-reaching legal innovation and that it would be wrong to consider them in the light only of the general principles of the law of nations...

Having regard to this situation it is in my opinion doubtful whether the authors, when dealing with a provision of such importance to customs law involved in the principle of direct application, consequences which do not accord with an essential aim of the Community”.¹⁶⁷

6.2 The *Biret* case

The Advocate General of the European Court of Justice (ECJ) proposes in the *Biret* case that the EC may be held liable under EC law for non-implementation of WTO dispute settlement decisions within a reasonable

¹⁶³ *Nakajima*. Para 28.

¹⁶⁴ *Nakajima*. Para 29.

¹⁶⁵ Craig and De Búrca. (1998) page 164.

¹⁶⁶ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*. [1963] ECR 1; [1963] CMLR 105. paras. 19, 20, 24.

¹⁶⁷ Found in Craig and De Búrca. (1998) pages 165- 166.

time.¹⁶⁸ In the two identical opinions, the General Advocate suggests that the WTO law has direct effect and can thus be invoked by private parties in proceedings before the European courts.¹⁶⁹

The origin of the *Biret* case started with the *hormones* dispute between the EC and the United States.¹⁷⁰ The US brought dispute settlement proceedings before the competent WTO organs with the argument that the restrictions on export to the EC of beef and veal was in breach of the obligations the EC had entered into within the framework of the WTO. The Panel concluded that the EC was in breach of various provisions of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS).¹⁷¹ The EC was however granted a period of 15 months to fully comply with its WTO obligations.¹⁷²

In June 2000, *Biret* was seeking compensation for damages suffered because of the prohibition on the import into the EC of hormone treated beef and brought action against the Council before the Court of First Instance (CFI). The CFI dismissed the application for damages due to the established case law, which stated:¹⁷³

- (i) the WTO Agreements do not in principle form part of the rules by which the ECJ and the CFI review the legality of acts adopted by the EC institutions under Article 230 EC Treaty.
- (ii) that individuals cannot rely on them before the court, and
- (iii) that any infringement of them will not give rise to liability on the part of the EC.¹⁷⁴

The reason for imposing that decision was according to the CFI that “the purpose of the WTO Agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals”¹⁷⁵.¹⁷⁶ An appeal by *Biret* was introduced in the ECJ requesting

¹⁶⁸ Case C-93/02 P, *Biret International v Council* and Case C-94/03 P, *Établissements Biret and Cie SA v Council*.

¹⁶⁹ Zonnekeyn, Geert A. EC liability for the non-implementation of WTO Dispute Settlement Decisions- Advocate General Alber proposes a “Copernican innovation” in the case law of the ECJ. *Journal of International Economic Law* 6(3), 761-769. Oxford University Press (2003). Page 761.

¹⁷⁰ See D. Wüger, The Never-Ending Story: The implementation Phase in the Disputes between the EC and the United States on Hormone-Treated Beef, *Law & Policy in International Business* 777-825 (2002). Found in Zonnekeyn, Geert A. EC liability for the non-implementation of WTO Dispute Settlement Decisions- Advocate General Alber proposes a “Copernican innovation” in the case law of the ECJ. *Journal of International Economic Law* 6(3), 761-769. Oxford University Press (2003). Page 761.

¹⁷¹ WT/DS26/R/USA, *EC – Measures Concerning Meat and Meat Products (Hormones)*, report of the Panel of 18 August 1997.

¹⁷² WT/DS26/15, *EC – Measures Concerning Meat and Meat products (Hormones)*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator of 29 May 1998.

¹⁷³ Zonnekeyn, Geert A. (2003). Page 763.

¹⁷⁴ Case T-174/00, *Biret International SA v Council*, ECR [2002] II-17, para. 61 and Case T-210/00, *Établissements Biret et Cie SA v Council*, ECR [2002] II-47, para 71.

¹⁷⁵ Case T-174/00, *Biret International SA v Council*, ECR [2002] II-17, para. 62 and Case T-210/00, *Établissements Biret et Cie SA v Council*, ECR [2002] II-47, para 72.

¹⁷⁶ Zonnekeyn, Geert A. (2003). Page 763.

that all or part of the WTO Agreements have direct effect. The Advocate General Alber disagrees in the case and states that the WTO primarily governs market access rules such as Article 25 EC Treaty, which is directly applicable within the EC legal order. Companies are the real actors in international trade law and the main beneficiaries of free trade.¹⁷⁷ The Panel in the *Section 301* case also refers to the composition of the multilateral trading system as a means for individuals and private operators.¹⁷⁸

The Advocate General (AG) Alber argues that the relevant WTO rules should have direct effect and should have as their objective the protection of the individual in order for the liability claim to be successful.¹⁷⁹ The author and member of the Belgian Competition Council, Zonnekeyn, disagree. There seems to be no requirement that the measure invoked must have direct effect by looking at the case law of the ECJ with regard to the liability of the EC Member States for infringement of EC law.¹⁸⁰ The binding nature of the Dispute Settlement Body (DSB) decisions is also an object of debate. Adopted Panel and Appellate Body reports after the reasonable period has lapsed are despite the other objections on WTO law binding.¹⁸¹

AG Alber grounds the reasoning on a constitutional principle he calls the principle of legality. The idea is that through the ratification of the WTO agreements, the Union has decided in favour of international juridification and therefore in favour of the principle of legality in international trade relations.¹⁸² International juridification means mostly the submission to an obligatory dispute settlement and the duty to change the municipal law to correspond to the results of the dispute settlement.¹⁸³

6.3 The reasoning of the European Court of Justice

The Court has used the same arguments when denying individuals the possibility of judicial review based on WTO rules as denying Member States the same effect. The Court has stated that the main trading partners of the Community do not recognize direct effect of WTO rules in their internal legal system. An argument for this position is the preamble of the Council Decision with which the WTO agreements were approved in 1994, where it

¹⁷⁷ Zonnekeyn, Geert A, (2003) page 767.

¹⁷⁸ WT/DS152/R, *United States- Sections 301-310 of the Trade Act of 1974*, report of the Panel of 22 December 1999. paras. 7.73, 7.76 and 7.77.

¹⁷⁹ Zonnekeyn, Geert A, (2003) page 764.

¹⁸⁰ Zonnekeyn, Geert A, (2003) page 764.

¹⁸¹ Zonnekeyn, Geert A, (2003) page 766.

¹⁸² Bogdandy, Armin von. Legal Effects of World Trade Organization decisions within European Union Law : A contribution to the Theory of Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC. *Journal of World Trade* 39(1): 45-66, (2005). Page 51. and paragraphs 87, 103 in the AG Alber opinion.

¹⁸³ Bogdandy, Armin von. (2005). Page 51.

is stated that these agreements are not of such a nature that they can be relied on directly before national or Community Courts.¹⁸⁴

Three reasons of denying the direct effect can be crystallised, but not all of them can be discussed fully here. The first is about the absence of direct effect of WTO agreements in other countries, reciprocity, which is discussed below. The second is about the tolerance in the WTO dispute settlement system but closer inspections demonstrates that the WTO system is further developed than that of most other treaties, which the Court indeed did hold to have direct effect.¹⁸⁵ This is mentioned in the thesis, where for example the Advocate General pointed out the binding effect of the dispute settlement system. However, it cannot be portrayed any further due to limitations.

The third reason is that the WTO agreements are not of such nature that they cannot be relied on directly in front of the national or Community Courts. It is however debated whether a consideration in a preamble can have such far-reaching consequences. WTO is binding for both the Member States and the Community under Article 300(7) EC, and the Member States are given the right to have the European Court to review the legality of Community actions under Article 230 EC.¹⁸⁶ This issue contains so much information that it will become another thesis if investigated here, so it cannot be presented any further.

6.4 Reasons for rejecting a direct effect

The determination in accordance with the constitutional law of each of the States, which is a party to a treaty, has traditionally been the domestic effect of a treaty. In a country, that has a dualistic approach, the provisions of the treaty only binds the states at an intergovernmental level and when not implemented, it cannot be directly domestically invoked or enforced by citizens.¹⁸⁷ In the case *Costa v ENEL* the Court ruled that whereas Article 37(1) (now 31(1)) of the EC Treaty imposed an obligation on Member States to adjust.¹⁸⁸ The obligation in the second paragraph was unconditional and not dependent on any implementing national act and capable of direct effect. The criteria of precision, unconditional and absence of further implementation have not however been closely hold on to by the Court.¹⁸⁹

¹⁸⁴ Case C-149/96 *Portugal v. Council*, [1999] ECR I-8395 and C-280/93, *Germany v Council*, [1994] ECR I-4973.

¹⁸⁵ E.g. the dispute settlement system of the Lomé convention laid down in Art. 352 Convention, O.J. 1991, L 229/3. Compared to the WTO system the Lomé system can be called elementary; neither has the Lomé system ever been applied. Nevertheless the Court recognized the direct effect of the provisions of the convention. See Case C-469/93, *Chiquita Italia*, [1995] ECR I-4533, paras 31-36. Found in Kuijper Pieter Jan and Bronckers Marco. (2005). Page 1344.

¹⁸⁶ Kuijper Pieter Jan and Bronckers Marco. (2005). Page 1345.

¹⁸⁷ Craig and De Búrca. (1998) page 163.

¹⁸⁸ Case C-6/64, *Flaminio Costa v ENEL* [1964] ECR 585, [1964] CMLR 425.

¹⁸⁹ Craig and De Búrca. (1998) page 169.

When legislation has direct effect, individuals in a court can invoke it and claim the rights of that legislation. When the Vietnamese companies complained to the Commission due to breach of WTO legislation, they rejected the claim due to no direct effect. It means that the companies have no right to make the claim because the legislation has no direct effect in the EC. In this sense, the companies have no legal security and whether or not they have a foundation for their claim, the Vietnamese companies are denied the rights from the WTO antidumping legislation.

Treaties can be seen as traditional international agreements binding only the States or organisations that sign them or individuals could use them as acts of the Community directly effective and enforceable. The Court have however as seen above stated that in *certain circumstances*, an international legislation can have direct effect.¹⁹⁰

6.4.1 Reciprocity

In the antidumping proceedings towards Vietnamese footwear, some of the complaints were rejected due to no direct effect. The denying of direct effect was based on reciprocity and granting it would reduce the capacity for tactic enjoyed by the Community with respect to its commercial partners.

Reciprocity is defined as the exchange or bilateral acceptance of privileges between nations, states, associations or individuals. The ideas of non-discrimination and reciprocity have contributed substantially to the progressive reduction of trade barriers among the countries that dominated trade relations.¹⁹¹

Since the Uruguay Round in the WTO, there have been two changes in the nature of reciprocity as an idea guiding multilateral trade relations. The first change is the broadened content of trade negotiations and the second is the influential participations of developing countries.¹⁹² The developing countries were given an exceptional status when the Generalised System of Preferences was introduced. Some groups were given this treatment while specific exports from developing countries were given restrictions and the spirit of the GATT was disregarded.¹⁹³

The revenues from exports are much larger than aid when it comes to foreign exchange in the developing countries. This is also valid for the African countries that are dependent on aid and are comparatively marginalized in world trade. The importance of trade is increasing and even faster than the total amount of production in the world which is an important

¹⁹⁰ Craig and De Búrca. (1998) page 179.

¹⁹¹ Brown, Andrew G. and Stern, Robert M. Global Market Integration and National Sovereignty. *The World Economy*. Vol 29 :3 257-279.(2006). page 260.

¹⁹² Brown, Andrew G. and Stern, Robert M. (2006). Page 261.

¹⁹³ Brown, Andrew G. and Stern, Robert M. (2006). Page 261-262.

aspect of globalization.¹⁹⁴ Developing countries import of goods grew even faster than exports and it is similar with the service sector. This growth has increased the upper middle income countries as Brazil, Chile, Korea and Malaysia.¹⁹⁵

There is however no WTO obligation to apply WTO law directly. There are no mechanisms to safeguard a homogenous interpretation and application, which can safeguard legal equality between economic operators acting under different municipal legal orders. The legal equality would therefore be endangered.¹⁹⁶ The ECJ states the possibility of disuniform application of the WTO rules as a reason for excluding direct effect (see above).¹⁹⁷

It is likely that another side of reciprocity will occur when the EU imposed antidumping duties towards Vietnam.¹⁹⁸ In the ordinance on antidumping of imports into Vietnam, it is stated that antidumping taxes will be imposed if imports threatens to cause material injury to a domestic industry.¹⁹⁹

Pursuant to Article 27 of the Ordinance on antidumping the provisions of international agreements to which Vietnam is a party, will prevail over Vietnamese antidumping legislation in the event of conflict. Vietnam is arguing therefore, that its legislation on antidumping complies fully with the WTO Agreement on Subsidies and countervailing measures. So far, no trade remedy cases have been initiated in Vietnam though.

Vietnam has also confirmed that it would not apply antidumping measures after its WTO accession until its legislation is in conformity with the relevant WTO Agreements and the amendments have been notified and implemented.²⁰⁰ In this case however, the measures were implemented before the accession to the WTO.²⁰¹

Vietnam is dismantling tariffs in order to meet WTO accession goals, but import tariffs normally constitute high regional standards. Within the ASEAN region, Vietnam has agreed to comply with ASEAN's Common Effective Preferential Tariff (CEPT) on manufactured goods which means rates on 0-5 % range. At one of the WTO meetings Vietnam had to propose a revision of excise duties to end discrimination against imported motor

¹⁹⁴ Trade and Development – An introduction. (2005).Page 9.

¹⁹⁵ Sida. Trade brief on.. Trade and Poverty. February 2004. page 1.

¹⁹⁶ Bogdandy, Armin von. (2005). Page 53.

¹⁹⁷ Case C-149/96 *Portugal v. Council*, (1999) ECR I-8395, para 45.

¹⁹⁸ Regional meeting, Sofitel Plaza Hanoi, 8-10 October 2006. Commercial Counsellors meeting, Hanoi.

¹⁹⁹ Ordinance on antidumping of imports into Vietnam, passed on 29 April, 2004 by the Standing Committee of the XIth National Assembly of the Socialist Republic of Vietnam. No. 20/2004/PL-UBTVQH11 of April 29, 2004.

²⁰⁰ Katarina Kuehn, Intern at Baker & McKenzie LLP, Hanoi Branch Office, 2006-10-18.

²⁰¹ The General Council of the WTO approved Vietnam's membership in November 2006 and has now ratified the membership agreements to become the WTO's 150th member in January 2007. Source: http://www.wto.org/english/thewto_e/acc_e/al_vietnam_e.htm. 2006-12-16, 15:45.

vehicles, beer, conformity in products that are produced in free zones and the reduction of restrictions on trading rights as oil, sugar, tobacco etc.²⁰²

Antidumping policies have spread to developing countries and the question is whether it is a necessary safety measure that ensures broad trade liberalisation or whether it is an obstacle to trade. Antidumping rules can constitute compensation in the absence of quality standards and regulations to keep away dumped product or “dodgy” merchandise.²⁰³ There are also results that question the former results that antidumping duties impose a high welfare cost on consumers and that the tax addresses no essential market failure (see for example Gallaway et al., 2000; Prusa, 2001). Other researchers suggest that dumping is a profit-maximizing strategy for some firms, which would indicate antidumping duties as welfare reducing (e.g. Gruenspecht, 1998). However, there are analyses that show no high costs for consumers and little distortion on trade flows (e.g. Fischer and Prusa, 1999).²⁰⁴

6.5 Summary

The domestic effect of a Treaty has traditionally been determined in accordance with the constitutional law of each of the States, which is a party to a treaty. In a country, that has a dualistic approach, the provisions of the treaty only binds the states at an intergovernmental level and when not implemented, it cannot be directly domestically invoked or enforced by citizens.

Several Advocates General and scholars have not yet ruled out the direct effect of World Trade Organization. However, the EC Courts have consistently maintained that General Agreement on Tariffs and Trade (GATT) and WTO law has no direct effect in the EC legal system.

Some argues that the binding effect of the decisions from the Dispute Settlement Body, the nature of the legislation and the reason of the EC legislation to be in accordance with the WTO is a motive for direct effect.

²⁰² *The Vietnam Business Forecast Report Q4 2006*. Page 38.

²⁰³ Niels, Gunnar and Kate ten Adriaan. Antidumping policy in developing countries: safety valve or obstacles to free trade? *European Journal of Political Economy* 22 (2006) 618-638. page 625.

²⁰⁴ Crowley, Meredith A. Do safeguard tariffs and antidumping duties open or close technology gaps? *Journal of International Economics* 68 (2006) 469-484. page 481.

7 Results

Member States within the European Union (EU) have agreed on a Common Commercial Policy in trade with non Member States (third countries). According to articles 131-134 (EC), which provide for the legal basis for this policy, Member States enter agreements on common grounds with other states and adopt regulations on import and export to and from the EU. The Treaty does not give a definition however of the concept of trade policy. Important nevertheless, is that the EU and its Member States are all Members of the World Trade Organization, WTO, and consequently need to follow the regulations in several international trade agreements.

The European Commission denied all companies that applied for Market Economy Treatment but one Chinese company the status of market economy in the antidumping proceeding on Chinese and Vietnamese footwear. The Commission believed that there was clear evidence of state intervention or non-standard accounting practice in all cases. The Commission also found evidence of non-commercial loans from the state, non-enforcement of international accounting standards, improper evaluation of assets and non-commercial conditions for land-use.

In the Council Regulation (EC) No 1472/2006 a representative sample was used due to the high amount of exporting producers. It was impossible to make an individual assessment according to the Commission. This was done in accordance with Article 17 of the Basic Regulation which sets out a method to deal with a large number of companies involved. Some parties argued that the samples were not representative given the exclusion of certain footwear. The argument was rejected due to the agreement of these authorities on the sample compositions were sought and obtained. Parties also claimed that the selection of representative domestic sales in the sample is inappropriate since none of the exporters qualified for Market Economy Treatment, (MET). This argument was however deemed irrelevant since the decision on MET is taken subsequently to the selection of the sample.

Some importers and exporters claimed that the imposition of measures would not be in the interest of the Community Industry. The principle of proportionality means that the goals that are achieved and the means to achieve them have to be in balance. The costs it will render for a trade measure has to be in proportion to the gains of the measure. In international law, proportionality is used to describe whether different measures are in proportion to the damage. In an antidumping procedure, it is vital to determine if the injury of dumped prices is in wider European economic interests. In this case, evidence show that the cost can be higher than the gain (see supplement A).

The predictability is also an important issue e.g., how the importers and exporters can predict the tariffs on certain goods. Within the WTO, there is

a right to dispute trial and the AD Agreement states that all national legislation includes rules that all members should have a trial organ when it comes to final decisions on anti dumping tariffs. In the WTO dispute settlement procedure there is a limitation though, which is that individual companies cannot have their cases tried, only member states.

Other claims were made but denied because WTO rules are not directly applicable in the Community. This means that the companies cannot have their case tried in the EC. In this case, the companies have no rights to enforce in front of neither the EC Courts nor the WTO Dispute Settlement Body.

Antidumping measures imposed by a member of the World Trade Organization are authorized under the Anti Dumping Agreement. The AD Agreement commences requirements that must be satisfied in order to impose an antidumping measure. Detailed procedural requirements concerning the conduct of antidumping investigations and the imposition and maintenance in place of antidumping measures must be fulfilled as well. A failure to respect either the substantive or the procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure.

The European Community has developed into an organization of States with a relatively autonomous legal system, but much of this is not due to the agreements of the States. It is brought through the interpretive practice and influence of the European Court of Justice (ECJ). The Court has developed a nature of EC law and it is rather different from that which has governed the domestic treatment of norms of international law between States.

EC Courts have so far sustained that GATT and WTO law does not have direct effect in the EC legal system. In the case *Portugal v. Council*, it is stated, “the WTO agreements are not, in principle, among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”. There are however two exceptions and the first is where the Community intended to implement an obligation assumed in the context of the GATT/WTO (*Nakajima* exception) and the second is when direct effect is acknowledged where a Community measure refers specifically to precise provisions of the GATT/WTO (*Fediol* exception). In the case *International Fruit*, the Court of Justice stated that even though the GATT was binding on the Community it was far too flexible.

The denying of direct effect was based on reciprocity and granting it would reduce the capacity for tactic enjoyed by the Community with respect to its commercial partners. The nature of reciprocity has however shifted to a system where some developing countries can benefit from e.g. the Generalised System of Preferences and some will be target of trade barriers.

The binding nature of the Dispute Settlement Body (DSB) decisions is however an object of debate. Adopted Panel and Appellate Body reports

after the reasonable period has lapsed are despite the other objections on WTO law, binding. The Advocate General Alber argues that the relevant WTO rules should have direct effect and should have as their objective the protection of the individual in order for the liability claim to be successful. Companies are the real actors in international trade law and the main beneficiaries of free trade.

Supplement A

Statistics from a Danish calculation on costs and revenues

Member State	A Producer surplus 1000 Euro	B Consumer/importer surplus 1000 Euro	B-A Net effects 1000 Euro	Price changes %	Consumer/ Producer ratio
France	1936,6	25080,3	23143,7	1,1	13,0
Netherlands	3659,9	31189,5	27529,6	3,8	8,5
Fr Germany	2397,5	63534,9	61137,4	2,9	26,5
Italy	13290,1	35990,8	22700,7	1,0	2,7
Utd. Kingdom	884,1	66731,5	65847,4	3,4	75,5
Ireland	109,9	577,7	467,7	0,4	5,3
Denmark	762,0	8085,4	7323,4	2,2	10,6
Greece	250,5	3442,6	3192,2	1,1	13,7
Portugal	3513,4	845,4	2668,0	0,4	0,2
Spain	4515,8	19802,5	15286,8	1,6	4,4
Belgium	2096,3	12007,5	9911,2	2,1	5,7
Luxembourg	110,5	110,5	0,0	0,4	1,0
Sweden	135,5	5952,4	5816,8	2,9	43,9
Finland	180,4	1823,1	1642,7	1,1	10,1
Austria	1019,5	4755,4	3735,9	0,9	4,7
Malta	-	60,4	60,4	0,9	-
Estonia	60,6	359,0	298,4	1,4	5,9
Latvia	8,8	461,2	452,4	1,6	52,2
Lithuania	30,0	886,7	856,7	2,1	29,5
Poland	639,6	5446,3	4806,7	2,0	25,3
Czech Rep.	133,0	3360,8	3227,8	2,0	25,3
Slovakia	794,4	761,4	32,9	1,3	1,0
Hungary	153,1	927,0	773,9	1,1	6,1
Slovenia	45,9	605,5	559,7	1,3	13,2
Cyprus	3,3	311,2	307,9	1,3	94,0
Sum EU 25	36730,9	293109,3	256378,4		

Column A shows the expected improvements within the protected industry.
Column B shows the expected costs for importers and consumers.

Source: Danish calculation on injury taken from Swedish National Board of Trade: *Möte med EU:s antidumpingskommitté den 16 mars: Läderskor från Kina och Vietnam*. Yttrande 2006-03-14. Page 16

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