"Legal Challenges Of Anti-Dumping Regulation For the Eurasian Customs Union"

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<tr>
<td>AD</td>
<td>Anti-dumping</td>
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<tr>
<td>ADA</td>
<td>WTO Agreement on Implementation of Article VI of the GATT 1994</td>
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<td>ADC</td>
<td>Anti-dumping Advisory Committee</td>
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<td>ADM</td>
<td>Anti-dumping measures</td>
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<td>Agreement on TDM</td>
<td>Agreement on the Impostion of safeguards, anti-dumping and countervailing measures towards the third countries</td>
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<td>CCP</td>
<td>Common Commercial Policy</td>
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<td>CIS</td>
<td>Commonwealth of the Independent States</td>
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<td>CNV</td>
<td>Constructed Normal Value</td>
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<td>CPI</td>
<td>Corruption Perception Index</td>
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<td>DM</td>
<td>Dumping Margin</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>DSM</td>
<td>Dispute Settlement Mechanism</td>
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<td>ECU</td>
<td>The Customs Union of the Eurasian Economic Community</td>
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<td>EEC</td>
<td>Eurasian Economic Community</td>
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<td>EP</td>
<td>Export Price</td>
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<td>EU</td>
<td>European Union</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NV</td>
<td>Normal Value</td>
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<td>MS</td>
<td>Member States</td>
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<td>SES</td>
<td>Single Economic Space</td>
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<td>SPS Agreement</td>
<td>WTO Agreement on the Application of Sanitary and Phytosanitary Measures</td>
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<td>TBT</td>
<td>Technical Barriers to Trade</td>
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<td>TDM</td>
<td>Trade Defence Measures</td>
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<td>TFEU</td>
<td>The Treaty on the Functioning of the European Union</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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INTRODUCTION

“All happy families resemble one another, each unhappy family is unhappy in its own way.”


When paraphrasing the famous Russian writer Leo Tolstoy with the respect to the modern global economic situation, the meaning of the above mentioned quote will change, as all successful economies have different stories of their success, but they all have the same challenges to face and therefore may fail in the same notorious way.

Through the WTO legal order several mechanisms were created to ensure that the success patterns in trade can be preserved and unfair trade practices can be stopped from further harmful actions and the fair balance can be again restored. Above such defence mechanisms anti-dumping (hereinafter “AD”) actions are by far the remedy of choice\(^1\). However, in the crisis times there might be always a fear for governments to be on the edge of trade liberalisation and unjustifiable protectionism.

It is difficult to overestimate the importance and potential challenges in adoption of the well-operated AD mechanism in the respected legal system. In comparison with the trade tariffs that can be relatively easily changed and amended in legal and operational senses, AD mechanisms require much more efforts to finally end the AD investigation and let the AD duties be levied. In addition the anti-dumping measure (hereinafter “ADM”) is sometimes described as a “point target weapon”, as it aims to stop the exact chosen exporter from flooding importing country with dumped products and to recover domestic producers' damages from him.

The WTO Annual Report 2013 states, that there is a new trend in AD initiations, when even developing countries amount to the growing number of AD process. This trend, according to Matsushita, Schoenbaum, Mavroidis, is “cause of serious concern”\(^2\). Combined with political interests, different lobbying groups and chicane AD process requires the art of execution.

Certainly, the XXI century reality proves that it is no longer nations who play the leading role on the international arena, but cross border formations, i.e. unions, associations, transnational corporations that compete on the global markets. Among them the EU, NAFTA, WTO, are the real-life examples of such phenomena. Consequently, the latest trend is an objective globalisation requirement to reach the appropriate integration stage within a chosen region or a sphere of interests.

\(^1\) As of 30.06.2013 there are 1299 AD measures in force vs. 124 Safeguards and vs. 82 Countervailing Duties. Retrieved from WTO official web page http://i-tip.wto.org/Forms/GraphView.aspx

Witnessing the establishment of the Customs Union of the Eurasian Economic Community (hereinafter “ECU”)\(^3\) in 2007 with the introduction of the supranational Customs Code in 2010, one the one hand, and Russia’s accession to WTO in 2012, on the other hand, gives the real understanding of the importance and latest trends in politics and economy in the Eurasian region. Evidently it opens broad perspectives for the ECU as a friendlier place for investments, but in fact it requires from legislatures harmonisation, improvement or even sometimes creation of a new legal order, which will protect the interests and freedoms of involved parties. It is subsequently the same challenge for the global players to get familiar with the new regime and new entity on the arena.

This paper intends to identify the challenges ECU is facing in the respect of AD regulation and develop a plan for measures to improve the current situation. It is said, that the current customs law of the ECU itself and the AD regulation in particularly are often characterised by legal scholars, practitioners and business representatives as an inconsistent, non-transparent system of legal norms with a loose connection among each other.\(^4\) This reflects the ECU practices and the record of initiated AD procedures. It clearly proves that there is a lot of place for improvement. Of course this shall be done not only in quantitative sense, but keeping in mind the level of juridical quality.

Due to the recent establishment of the ECU and the early phase of the formation of the common customs and trade legislation, the timeliness and up-to-date relevance of the presented paper’s findings make it of the major interest both for legal and business practitioners as well as for scholars. It is not only of domestic importance of the ECU MS to get familiar with trade defence instruments and their regulation, but EU representatives as well may benefit from the presented in this paper analysis to assert the rights and obligations in the effective manner.

The analysed topic has been almost never discussed on the monographic level, and only some articles represent the existing research response towards it. The fundamental eleven-year-old work was done by R.A. Shepenko in his work “Anti-dumping procedure”\(^5\). The recent and more related research is presented by O.M Saitova. In her work “The law and practice of anti-dumping procedures in the EU” the EU patterns of anti-dumping policy and its practical value for Russian regulation are discussed on monographic level \(^6\). But no ECU perspective is taken into account. In striking contrast with this the foreign researchers concentrate mostly on the EU and

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\(^3\) As of 26.07.2013 there are three Member States: Russian Federation, Belarus and Kazakhstan


Chinese regulation⁷, and when analysing developing countries ECU is left without due consideration. Thus in some part of this paper the descriptive analysis is of the same value as the analytical work, because the intricacy of ECU regulation is among the most notorious hurdles for its application.

The legal basis for this research consists of multination legal acts on ADM. The WTO agreements, EU directives, ECU international treaties and agreements, Russian laws represent the analysed legal framework. For the statistics and reference the database of WTO, Eurasian Economic Commission, European Commission, Eurasian Court, EUR-Lex were employed.

The paper consists of three Chapters. Chapter I devotes reader’s attention to the phenomenon of the Customs Union of Belarus, Russia and Kazakhstan, i.e. it comprises analysis of the integration development, the institutional framework, legal instruments and WTO accession issues. Therefore it builds up the basis for the political, legal, and economic environment of AD policy. Hereafter Chapter II provides theoretical overview of the notion “dumping” on multilateral level (WTO and EU), as a model for the future ECU policy. Chapter III subsequently reviews the AD policy in the ECU, considers the legal framework challenges and in the section 2 applies case study for the understanding of substantive AD regulation and its challenges. Conclusion finally offers the plan for improvement of AD regulation.

SCOPE and LIMITATION

The time and space constraints have predetermined the following limitations regarding the scope of the research:

Firstly, the procedural aspect of AD investigations is left for the future considerations and deemed to be conceptually resolved through the recent ECU initiatives, i.e. adopting of the rules of Order of the Eurasian Court and the Eurasian Economic Commission with its Committees. Thus, substantive part of AD regulation will be discussed throughout the research.

Secondly, the Russian national legal system is taken as an example of the national level of AD regulation in the ECU. Indeed the trade regulations of ex-soviet sister-states are considered to be mostly identical with minor particularities.

Finally, bearing in mind the economic significance and fatal calculations of dumping, the possible economic considerations will be only touched upon without deepen into economic rationale of AD and customs union theories.

CHAPTER I - THE CUSTOMS UNION OF THE EURASIAN ECONOMIC COMMUNITY (ECU)

The Customs Union of the Republic of Belarus, the Russian Federation and the Republic of Kazakhstan has the same objectives as ones identified in the XIX century by the German economist Friedrich List (1789-1846) when he developed the idea of the German Customs Union by abolishing the customs barriers within the German Confederation. The ideas of List were finally implemented by Otto Bismarck with the subsequent success in customs union operation; the long-term results are always referred to as a German “economic miracle”.

Certainly, the fatality of the final implementation is difficult to overestimate. ECU authorities, however, tend to identify the objective of the ECU in more political rather than economic sense. Still ECU is the next integration step towards Eurasian Economic Union (hereinafter “EEU”), which is planned to function from 1 January 2015. All in all 1.5 year have authorities and officials to develop the unification among MS and to achieve the desired outcome with a harmonized legal regime. Among other constraints are WTO future accession of the rest MS and implementation of already taken commitments from Russia.

The formations of the ECU and its viable operation not only on the declarative basis have proved to be of the high significance in geo-political sense. By contrast with its predecessors, the ECU has “better institutional framework, proven commitment to implementation and introduction of a system of rules harmonized with international norms and WTO regime”. Meanwhile the integration history shows that EEC has given rise to the ECU, the latter then is a fundament for the SES, which itself is the prerequisite for the Eurasian Union.

The future pattern of economy and politics depends on the finality of the ECU’s formation and operation. The way the ECU put its action and initiatives in the appropriate legal clothes will amount to the final criterion of its success and further regional integration, culminating in EEU.

1. ECU: Background and Origins

“No, here, you see, it takes all the running you can do, to stay in the same place. If you want to get somewhere else, you must run at least twice as fast as that!”

Lewis Carroll (1832-1898), "Through the Looking-Glass and What Alice Found There"

The history of former Soviet states has witnessed several attempts to integrate former “sister-countries” in the economically and sometimes politically sustainable union. In the myriad of

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inter-state agreements, memorandums and initiatives it is hardly possible to identify the concrete date of customs union establishment. Annex I consists of information on the integration stages within the Eurasian region after the demise of the USSR, which proves the significance of the ECU and illustrates the patterns of continuity.

It is analysed and deduced that the first ideas to form the customs union on the post-soviet arena can be deemed in 1995, when Belarus and Russia reached an agreement on customs union between two states.\(^\text{10}\) Shortly after, Kazakhstan joined the initiative on customs union\(^\text{11}\). And two next years were marked by joining of Kyrgyzstan and Tajikistan. In spite of such high level of alignment the union was missing cohesion and for these reason it is usually referred as “declaratory initiative with no change to the ineffective CIS institutional formula”\(^\text{12}\).

The further development of the integration ideas were implemented on 10 October 2000, when Russia, Belarus, Kazakhstan together with Kyrgyzstan and Tajikistan concluded a Treaty on the establishment of the Eurasian Economic Community (hereinafter “EEC”). From this step onwards the formal basis for customs union, as an integrated customs area that forms the part of EEC, is set up and further development of its legal framework proceeds. However it is usually noticed that “in practice the EEC MS did not get beyond the level of a free trade area in which 60% of customs tariffs were unified and some anti-dumping procedures were applied”\(^\text{13}\) and no corresponding international bodies were formed to ensure the decision-making mechanism.

The next remarkable step towards ECU was made in September 2003, when the presidents of Russia, Belarus, Ukraine and Kazakhstan signed the Agreement establishing Single Economic Space (hereinafter “SES”). It was noted, that “the Agreement was almost simultaneously ratified by parliaments of the four states in April 2004. This appears to be the most ambitious integration project in the post-Soviet territory”\(^\text{14}\).

The SES not only provided for a free flow of goods, services, capital and labour on the principles of fair competition in a common market, but also possible introduction of a single currency, coordinated trade, fiscal, monetary and credit systems, with the subsequent harmonisation of the respected regulation and formation of a supranational institute –the Commission - on trade and tariffs\(^\text{15}\).


\(^{12}\) Dragneva R., Wolczuk K. (2012) p.4

\(^{13}\) Simon György Jr. (2010) p.11


\(^{15}\) Simon György Jr. (2010) p.11
Eventually, the customs union, as a form of economic integration that calls for the common customs territory within geographical limits of the three states, was finally laid down on 6 October 2007 by the Treaty on Common Customs Territory and on Formation of the Customs Union, signed by Belarus, Kazakhstan and Russia\textsuperscript{16}. This Treaty also established a Commission of the Customs Union, which was a permanent governing body of the Customs Union\textsuperscript{17}.

Through 2008-2010 the framework of multilateral agreements was adopted regarding the whole system of tariff quotas, the process of granting tariff reduction, the applicable rules of origin of the goods importing from developing countries, licensing requirements, transition periods etc. The “culmination” of the joint legislative work was marked by the adoption at the end of 2009 Treaty on the Customs Code of the Customs Union\textsuperscript{18}. It is treated as a fundamental step and the most prominent prerequisite in the successful functioning of the ECU with the established Common Customs Tariff.

The 1\textsuperscript{st} January 2010 is regarded as an ECU’s birthday; evidently it was able to operate on the common legal basis only after the subsequent effectiveness of the Customs Code provisions in all signatories, i.e. from July 2010. From this moment customs authorities began to invoke the ECU’s legal act and not the internal customs codes.

In the essence the ECU’s initial aim was to create single economic space among three signatory states. They reached it by 1 January 2012, when the creation of the SES was officially announced. Accordingly, its unified legislation is deemed to be the ultimate basis for the ensuring the free movement of goods, capital, labour and services and sustainable development of all ECU MS.

The potential members to join ECU are Ukraine, Armenia, Uzbekistan, Tajikistan, and Kirgizstan. They could help ECU’s further extension and regional integration. Ukraine in this sense is a remarkable example of the contemporary geo-political interests, as she is like between the devil and the deep blue sea, i.e. between EU’s initiative to form a free trade area and the ECU’s invitation to join it.

In the end to make ECU extension feasible attention shall be drown to the wise course of politics and accurate legislation, especially the legitimate mechanisms of domestic market defence. After looking back to all efforts made to address key issues in the past, the ambitious plans to start the Eurasian Economic Union from 2015 seem not to be as ambitious as it might

\textsuperscript{16} The Treaty came into force for Russia on 10\textsuperscript{th} October 2008 through its ratification by adopting the federal statute “On ratification of Treaty on Common Customs Territory and Formation of the Customs Union” / Федеральный закон 27 октября 2008 г. N 187-ФЗ “О ратификации Договора о создании единой таможенной территории и формировании Таможенного союза” // Российская газета. 2008. 29 октября.


\textsuperscript{18} 27 November 2009 Treaty on the Customs Code of the Customs Union. The Customs Code came into force on 1\textsuperscript{st} July 2010 in Russia and Kazakhstan and on 6\textsuperscript{th} July 2010 in Belarus / Договор о Таможенном кодексе Таможенного союза от 27 ноября 2009 г.
sound. But there is still a lot of to do and AD challenges lift only half of the veil of all problems ECU still have.

2. Institutional Overview

Institutional patterns of the EEC and ECU is the inevitable part of this research. The absence of the institutional system understanding may cause lots of questions. Trying to foresee possible concerns of the reader this section will give insight to the operational structure of the ECU and provide additional information about the legal acts they are entitled to adopt. The findings to the full extent are applicable to AD regulation.

The supreme body of the union is the Supreme Eurasian Economic Council. Before 2011 it used to be the Interstate Council EurAsEc, which was a supranational institution under the Treaty of ECC from 10 October 2000. But this integration initiative due to political inconsistency was claimed to be not effective. Now the Supreme EurasEc Council operates on two levels - Heads of MS and Prime Ministers. Some powers of the old council are now transferred to the newly formed standing body – the Eurasian Economic Commission. Annex II provides comprehended structure of the current institutional system.

The future institutional patterns of the Eurasian Economic Union by 2015 will have changed and been represented with the Parliamentarian Assembly, the Supreme Eurasian Economic Council, the Eurasian Economic Commission and the Eurasian Court. The fundamental principles and functions will be set forth in the single codified act – the Treaty on the Establishment of the Eurasian Union.

Obviously, this will give rise to the succession challenges. At the present there is no operational division between the EEC on the one hand and the ECU together with the SES on the other hand. What is going to be with the EEC and its regime after 2015 is a significant political concern as interpenetration of both regimes has reached the high level. This question deserves the attention in the separate paper due to its complexity and gravity.

2.1. The Eurasian Economic Commission

18 November 2011 is the official date of the enactment of Agreement on the Eurasian Economic Commission (hereinafter “EurasEc Commission”). From 2 February 2012 this supranational institute is the sole standing regulatory body of both ECU and SES. The detailed procedural rules of Commission’s operation are vested in the Rules of Order of EurasEc Commission.

The EurasEc Commission has superseded the old administration system, established through the legal framework 2008-2010, and namely the Customs Union Commission with its weak

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20 Available in the legal database EurasEc Commission http://www.eurasiancommission.org/ru/docs/Pages/default.aspx
powers and national interest concentration. Accordingly, the main objective of its activity shall be the ensuring of the functioning of ECU and SES and developing proposals for further economic integration within ECU and SES. No more national interests are taken into account but ECU and SES shared plans and values. The EurasEc Commission has powerful mechanisms to enable the law enforcement within the whole single economic territory of three states.

The scope of its activities has been enlarged. The Customs Union Commission used to deal only with the customs matters, whereas the EurasEc Commission has the broad specter of regulation areas, including integration and macroeconomics, economics and financial policy, industry and agro-industrial complex, trade, general technical regulation issues, customs cooperation, energy and infrastructure, and competition and anti-monopoly regulation.

The most important principle to the Commission is the development of the mutual beneficial dialogue with the strategic partners. The first level is international, where dialogue is conducted with the national authorities and administrative bodies with a view to enhancing interaction in the decision-making process. The second point of collaboration is interaction with business community, its associations and representatives.

The most outstanding trait of the Commission is that all its decisions are based on the collegiality principle. This reflects into the operational structure and voting. EurasEc Commission is divided into the Council and the Collegium for the operational reasons. The EurasEc Commission may also establish the structural units – departments, and representative divisions in MS, third countries and international organisations.

The Collegium\textsuperscript{22} is an executive body with the main task to facilitate integration within ECU and SES. Collegium consists of 9 Ministers - three members from each Member State. One member is designated as a Chairman of the Collegium. They get their office through the Supreme Eurasian Economic Council appointment for a four-year renewable term.

The Collegium meets minimum once per week. The session is eligible when the 2/3 of its members is present. The decisions and recommendations of the Collegium may be enacted either through consensus procedure or through 2/3 qualified voting. However there is no provision on how the method of voting is picked up, as there is no list of questions which shall be adopted through the designated method. This is a serious blank in the law which must be filled in the nearest future.

The Collegium has a far-reaching control and monitor powers over its structural divisions - departments. The administrative system is structured according to the functional dimensions; each dimension is managed by the Minister. The dimension is nothing but the set of economic

\textsuperscript{22} Article 14 , Agreement on the Eurasian Economic Commission
sectors and spheres. Accordingly the departments are formed as an institutional reflection of the economic reality and demand.

Through departments the interaction between with national administrative bodies is efficiently exercised. At the present moment there are 23 departments and further 17 advisory committees for working on proposals for the Collegium and consulting officials of the MS wherever they have concerns. This system can be characterised as a clear structure with transparent subordination, all what the previous integration initiatives lacked.

Among 23 departments the *Department of the Internal Markets Protection* is in charge of the trade defence measures and ADM namely. This department belongs to the Trade dimension with two other more: the Department of Trade Policy and the Department of Customs-Tariff and Non-Tariff Regulation. The Department of the Internal Markets Protection is the only designated body for the invoking trade defence mechanisms within the ECU territory after conducting investigation.

Among 17 committees the *Advisory Committee on Customs Regulation* is the one that a vital power of regulating the discrepancies among designated officials of MS on the implementation of EurasEc Commission decisions. Its activities have been vital from the earliest days of the ECU functioning and during the transitional period.

*The Council* is the body responsible for the general regulatory activities in the integration processes and for the general supervision. It consists of 3 Deputies Prime Ministers from each three MS respectively. The Council meets at least once in quarter. The Collegium’s Chairman and other Ministers regularly take part in the meetings of the Council.

Among the most significant powers of the Council are the power to change the tariffs rate of the most sensible groups of products, to apply bans and quotas, licencing decisions, competition and anti-monopoly regulation etc. The Annex to the Rules of Order of the EurasEc Commission contains the exhaustive list of the Council’s spheres of power and areas of regulation. The Collegium on the other hand has no list of spheres and is responsible for the non-mentioned areas.

### 2.1.1. Legal Acts and Other Instruments of the Eurasian Economic Commission

The EurasEc Commission has two main sources. It is entitled to issue *recommendations*, as non-obligatory acts, and *decisions* which are obligatory acts with the direct effect in the ECU territory. Decisions form the legal basis of the whole ECU framework. Both the Council and the

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23 The Provision on Advisory Committee on Customs Regulation adopted by the Eurasian Economic Commission 31 May 2012 № 52 / Положение о Консультативном комитете по таможенному регулированию, утвержденное решением Коллегии Евразийской экономической комиссии от 31 мая 2012 г. N 52.// available on the official web page of Eurasian Economic Commission http://www.eurasiancommission.org/ru/Lists/EECDocs/%D0%9A_%D0%A0_52.pdf

24 Article 8, Agreement on the Eurasian Economic Commission 18.11.2011
Collegium are responsible for adoption of decisions. Each vote in both unites is rested within one person/official of this division.

Unfortunately, the Agreement on the EurasEc Commission contains not enough information on the procedural aspects. It refers to the respected Rules of Order. There are two ways for the decisions adoption. The first one is when the Collegium makes drafts of the Commission’s decisions and the Council approves them on its session. The adoption or the voting on the drafts proceeds by the consensus method. When no consensus is reached, the question shall be transmitted to the Supreme Eurasian Economic Council for its consideration and final decision. The second opportunity is when the Collegium votes for the decision itself on the questions not exclusively referred to the Council’s authorities. This is true for the decisions on AD investigations.

After the analysis of the relevant clauses and practices, it is clear that ADM are concentrated in the decisions of the Collegium that are adopted after the Department of the Internal Markets Protection finishes its investigation. The Department itself may only issue notification as a non-binding act where the general information about the investigation is concentrated and the final decision of the Collegium is announced. The decisions of the Commission may be subject to further juridical challenge in the Court of EEC and may be contested not only by public entities but also by businesses.

2.2. The Court of the EEC

It is almost impossible to imagine operation of the integrated entity without judicial institute, which would ensure the unified interpretation of the common EEC legislation and promote the integrational values in practice. When dealing with investigation and possible liabilities issues, the judicial review is the guarantee of the independent and fair process. This is at the same time true to ADM invoking. Integration processes within the EEC, ECU and SES have boosted the law mechanisms operation on a very different level than before.

1 January 2012 is the official date when the Court of EEC, as a supreme judicial body within its competence, began to operate and decide cases. The legal basis for its operation is established in the following acts: Treaty on the Establishment of the EEC, the Stature of the EEC Court, and the Treaty on Judicial Recourse to the Court of the EEC for the Business Entities on the Disputes within the ECU and on Special Procedural Considerations.

One might deduce that the EEC Court is de facto the Court of ECU and SES and not EEC. Nowadays its scope is limited with the claims of ECU and SES. The interstate part was not

25 Article 8
formed: Kyrgyzstan failed to appoint judges and Tajikistan has not ratified the Statute of the EEC Court\textsuperscript{28}.

The court has a seat in Minsk, Belarus. The judges of the Court present all EEC states, i.e. all 5 states have two judge-representatives. The term of their office is limited to 6 years. The judges are appointed by the Interparliamentary Assembly upon the prior recommendation of the Supreme Eurasian Economic Council.

Jurisdiction of the Court can be divided into two types. The first jurisdiction is direct, i.e. it is traditional litigation and disputes resolution between EEC MS, and between MS and the EurasEc Commission\textsuperscript{29}. Moreover the Statute of the EEC Court allows further jurisdictional extension by virtue of provisions of other treaties within ECU and EEC.

The second type is indirect jurisdiction; its target is a judicial review on a compliance assessment with norms. The aim is to promote the unified application of the union legislation. The assessment is conducted on two grounds: preliminary and follow-up.

The preliminary control is only valid for the highest judicial instances of the MS (both ECU and EEC). The highest courts may apply for the preliminary ruling on the interpretation and application of the international treaty to the particular facts of case. They must suspend the proceedings until the EEC Court rules on the question. However, article 3 of the Treaty on Judicial Recourse to the Court of the EEC provides one more opportunity for business entities to apply for the ruling before the final instance renders the final decision. They may do it through the national courts of first and second instances as well. It is their right, as well as the right of inferior courts. Nevertheless for the highest courts and constitutional tribunals it is the obligation. The preliminary rulings have binding nature. Without it the decision of national court concerning the international treaties is impossible, for these reasons this assessment is called precursory.

The follow-up control has two different forms. The first form is an advisory opinion of the Court. This procedure is invoked by the inquiry of the MS, the EEC and the ECU institutions, or the highest judicial instances of MS (without a concrete case). The second form is a binding judicial decision, which contains analysis of the ECU and EEC legislation on the compliance issue with the international agreements of the ECU and the EEC. The follow-up control is possible either in the proceedings on the legal act annulment or under the request to interpretation.

These binding judicial decisions shall be the judicial mechanism invoked by exporters when they want to appeal on the Commission’s decisions levying AD duties. The legal basis for the annulment is a legal collision between acts of the administrative bodies and the supranational treaties and agreements. The Courts decides if the act is in compliance with the international


\textsuperscript{29} Article 14 of the Statute of the EEC Court
treaties. The collision may be due to the following reasons: lack of competence, violation of the procedure, abuse of supranational power, etc. When one of the reasons is revealed the Court may declare the act void\textsuperscript{30}.

There are two \textit{fundamental questions} that have no answer in the current regulation.\textsuperscript{31} Firstly, what is the moment when the act is void? Is it the moment after the court declares it or is it retroactive action, and it is void from the moment of its issuance? This is a very sensitive question for the business entities as the period for which damages might be recovered amounts to the final sum. In this situation, the Court shall find the golden middle between the private and public interests. This challenge is also applicable to ADM, because the invoking duties by the administrative act that result in controversy with international treaties might finally call for damages. But leaving this question on the discretion of judge is personally believed to be ineffective and even non-appropriate in countries where CPI is still very high\textsuperscript{32}. Thus this issue shall find its solution in the amendment of the current regulation.

The second challenge lies in the particularity of the EEC Court, i.e. its decisions shall contain the measures of the execution\textsuperscript{33}. This subsequently means that while announcing the act void, the Court must decide on its possible amendments. This situation clearly fails the separation of powers test. And at the same time needs alterations.

The judicial contention of the action or inaction of the institutions may also refer to the supervening assessment\textsuperscript{34}. These claims are accepted after pre-judicial contention in the EurasEc Commission. However the Commission’s frame acts do not contain any norms on it. What must the Court do when the complainant file the motion directly to Court without first trying to contest it in the administrative proceedings? According to the European Convention on the Protection of Human Rights and Fundamental Freedoms article 6 the access to justice must be guaranteed. Thus the Court will accept the claim. This problem might be settled through the adoption of one more norm to the EurasEc Commission Rules of Order.

To sum it up it seems that regulation of the procedural issues are developing by fits and starts in the ECU and mostly through the discretionary powers of judges as in the absence of norms they apply the analogy principle or rather interpret the law in an appropriate way. But this provides neither clarity nor certainty. The excessive interpretation, obviously, shall not become goal in and of itself.

\textsuperscript{30} Article 11 of the Statute of the EEC Court
\textsuperscript{31} Both challenges were pointed out by Neshatayeva, T.N. (2012), p.155
\textsuperscript{32} See CPI from 2012 on the official web page of Transparency International
http://cpi.transparency.org/cpi2012/results/
\textsuperscript{33} Article 25 of the Statute of the EEC Court
\textsuperscript{34} Article 2 of the Treaty on Judicial Recourse to the Court of the EEC, Article 13 of the Statute of the EEC Court
The Court’s decisions are final and may be appealed to the Appeal Chamber of the Court. Decisions are binding both on the supranational level and national one. The Commission has 60 days for the enforcement and the national authorities get the term according to the case-to-case basis. In the event of the delay in the enforcement the party may apply for the Court to ask the Supreme Eurasian Economic Council to rule on this question35.

3. WTO-Membership and ECU

Nobody will deny that WTO membership is not just one time political action but a long-time economic strategy within the corresponding legal regime, which in the end might produce viable economic achievements. Among three ECU MS only Russia represents the full WTO Member.

The significance and importance of this title is difficult to overestimate. Eighteen years of controversial negotiations and eight-year-long implementation period (till 2020) – should have passed to admit Russia’s WTO membership completely. EU Commission in its annual Trade and Investment Barriers Report 2013 identified this as a milestone in the improvement of trade relations between countries in the recent time: “Russia's WTO accession on 22 August 2012 has triggered a potential for solving many longstanding market access issues, although new barriers have been erected in the course of this process”36.

By entering into the process of meeting with her WTO international obligation Russia had to modernise not only her own trade laws and practices according to the WTO rules and international agreements, but to embed this new regime into ECU's flesh. It is more and more hearsay rule, that “the provisions of the WTO and the international customs regime (i.e. the Kyoto Convention) have become standard reference points in drafting agreements to improve the ECU regime”37.

At present, however, ECU and Russia in particularly still have practices in some trade regulation parts that are complete against WTO understanding of fair trade and violate commitments: the cars recycling fees for foreign suppliers on the imported cars38; higher than bound levels import tariffs on car parts; SPS measures without justification and proportionate rationale. Russia and ECU generally must get used to the WTO traditions of trade regulation, to the protection of their domestic producers only through prescribed mechanisms and make the trade transparent and predictable.

Obviously, for the ECU there are positive and negative consequences of different WTO status within its MS. The possible concerns were at the same time identified in the Report of Working

35 Article 20(2) of the Statute of the EEC Court, Article 12 of the Treaty on Judicial Recourse to the Court of the EEC
37 Dragneva R., Wolczuk K. (2012), p.8
Party, which raised the problem of possible conflict between ECU laws and WTO regime that Russia would bring with her\textsuperscript{39}.

Subsequently, the Treaty on the Functioning of the Customs Union in the Multilateral System 2011 addresses the convergence of the two regimes. Firstly, it avouches that the provisions of the WTO agreement as vested in the Accession Protocol of a Customs Union state become an integral part of the legal framework of the Customs Union as of the date of the accession of that member state\textsuperscript{40}. Moreover, MS have obligations to guarantee that all ECU international agreements and decisions comply with the WTO regime notwithstanding the time of their enactment. The same obligations are applicable to non-WTO members of ECU as well.

Obviously the ECU applies the concept of the WTO law supremacy, in the event of any discrepancies WTO will prevail over contradicting ECU provisions. This supremacy provision essentially makes ECU different from any previous ex-USSR integration arrangements. International arena meets such decision with fascination mostly due to the beneficial effects of fostering transparency and ensuring predictability of policy-making in ECU.\textsuperscript{41}

Another challenges or even fears are reflected in the tariffs reductions, Russia was claimed to adopt after WTO accession\textsuperscript{42}. There is a common public concern from non-WTO Members about potential fiscal losses and domestic producers’ unfavourable position from such concessions.\textsuperscript{43} It remains remarkable that while negotiating its accession, Kazakhstan is going to meet obligation on tariff reduction even more than those Russia has already made.

On the other hand, there a potential positive outcomes. The so called “WTO seal of approval” make ECU more attractive in the sense of its reliability and bona fide in the commercial sense. Moreover it may boost the path of WTO accession of other ECU members. Nobody denies that through further graduate tariff reductions, and through compliance with international obligations and development of trade and customs regulation, the desired level of trade facilitation may be reached in the mid-term without further political meetings and not-related concessions.

According to the opinion of Director-General Pascal Lamy “the objective is not just blanket liberalization of trade, but rather to avoid discrimination and distortions in international trade and


\textsuperscript{40} Dragneva R., Wolczuk K. (2012), p.8


\textsuperscript{42} The average “bound” tariff rate of Russia will be 8.6%, after implementation of all commitments tariffs will fall to 7.9% (11.5%) on an un-weighted average basis and to 5.8% (13%) on a weighted basis. Available on http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm

make it more open, more transparent and more predictable”. This shall be the motto of ECU officials in the future process of meeting their international obligations not only by putting the signatures in papers rather enacting legal acts that will work on progress.

The WTO accession is not the final destination; it is the crossroads on which the state must choose the preferred direction. Would it be the main road, on which spirit and letter of law meet each other, or would it be the subsidiary road, where international obligations are left in paper? This is the short-term choice with long-term consequences for the whole economy.

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CHAPTER II - THE LEGAL NOTION AND CONCEPT OF “DUMPING”

It is not only for theoretical importance to answer the question how to define “dumping”. As Matsushita, Schoenbaum, Mavroidis point out in their work: “AD law are seriously flawed”. The lobbying, protectionist interests, inconsistency has all amounted to a negative trend in AD execution. The EU recent attempts to reform the AD regime can only prove the idea that the modern AD policy is a challenge for countries, or even a test for fairness, which requires the art of execution, fair politics practices, well-established barriers for execution infringements, and hurdles for arbitrary application.

The notions of “dumping” and “anti-dumping” have a long standing history and can be found in the commercial treaties and national statutes since 1800s. The pioneer of introducing dumping terms in a modern trade context in 1904 deemed to be a Canadian government, who has increased import duties, aiming by this to protect their domestic farmers and producers and therefore gain their electoral support.

As Mavroidis, Messerlin and Wauters point out that “during the 50 years following the end of the I World War, AD as a trade instrument remained largely a sleeping beauty, mostly because the bulk of protection was ensured through tariffs, quantitative restrictions, subsidies, or a mix of all these instruments”. Despite the introduction of GATT 1947 the practice of invoking AD measures witnessed the low rate. It was only after 1970-s when the AD became one of the most efficient mechanisms in protecting domestic manufactures from unfair price discriminations.

The term “dumping” has not only one meaning. Firstly, it is used to refer to exporting goods at unduly low price to distort competition in the importing country. Secondly, it may mean “exporting the product from a country where wages are extremely low (and therefore, where the export price is low)” The latter kind of exporting practices is named “social dumping”. The connotation is deemed to be negative. However, sometimes this term used in the meaning of just legitimate price competition. This paper examines “dumping” as the sale of goods on foreign market at a lower price than their normal value, which is usually the price paid for the same goods when sold on the domestic market, causing material injury to the local producers of the same goods, a remedy in the form of an anti-dumping duty may be applied.

The welfare effects following dumping are mixed. The producers of the importing country are the main victims of dumping practices. However her consumers may be better off while paying less. Consumers of the exporting county may also suffer from this price imbalance. The third-country-

45 Id. p.401
46 More on this topic please see Viner Jacob (1923) [reprint 1966], Dumping: A Problem in International Trade, New York: A.M.Kelley.
exporters suffer at the same time from the unfair price competition. These harmful actions may have both macro- and microeconomic consequences with different extent of damage and interests involved.

Some economists at the end of XX century tended to argue that the understanding of dumping is false, “as there is no economic justification for these measures according to free trade principles, and that they merely amount to instruments of protectionism”\(^{49}\). According to them, the adopted anti-trust laws and tough tariff reduction discipline have rendered AD regulation almost unnecessarily. However the past and recent financial crisis showed how it is vital to have non-tariff mechanisms when regulating the normal and fair flow of goods. Moreover one might consider that competition law has different objectives in its regulation and is not applicable when speaking about the initial steps of integration, i.e. customs union. It is personally believed, that AD laws will not lose their actuality and effectiveness in relief; however they will seek for more efficiency and wiser application.

The AD regulation seems to be mostly unified within WTO members. However some countries prefer to go beyond it and add new facets in the AD regime. EU represents one of these countries.

1. **WTO Understanding of Dumping**

It is the legal reality that the domestic legislation is formed under the prevailing influence of WTO regime. In this way the polarisation of diverse state interests is preserved and smooth application of law is established. Domestic legislation may go above WTO provisions, i.e. set a bar higher for applying measures than those developed at WTO level.

AD regulation represents the significant example of international and domestic systems interaction. Firstly, the WTO requirement to make the domestic legislation in compliance with WTO law guarantees that all WTO-members implement this provision. Secondly, countries that are willing to access to WTO shall make their legislation in accordance with WTO provisions. It may lead to the complete annulment of act or of concrete norms. WTO members have at the same time obligation to notify WTO on the state of their AD legislation.

WTO’s AD tradition has a long standing history, reflecting in several negotiation rounds and different amendments to the existing legal instruments. But it was always in line with the non-written reciprocity principles, i.e. “the provisions were almost never essentially altered, however refined and elaborated”\(^{50}\).

Lowenfeld also notices that, “AD measures (as well as anti-subsidy measures) consistent with Article VI GATT are among the few instances in the GATT/WTO system where departure from most-favoured-nation treatment is permitted - indeed required and where duties bound under


Article II [Schedules of Concessions] may be pro tanto unbound”. There is no liability for states where the dumped products are originated from. However, in the event of improperly imposed AD duties, the WTO dispute settlement mechanism will be triggered against the imposing state. Without going through thrilling historical development of AD measures, the overview of dumping and its elements will be considered in this section.

1.1. WTO Legal Framework

There are two major multilateral legal sources in the WTO regime of dumping. The first one is Article VI of the GATT 1994. This article has been transferred from GATT 1947 without any substantial changes. It finds the further development in the Agreement on Implementation of Article VI of the GATT 1994, or it is also referred to as an Antidumping Code, which is the part of Annex 1A of the WTO Agreement. In this section the general overview of the multilateral AD regime will be discussed in a nutshell, providing theoretical background for the ECU future legal framework.

Article VI in the relevant part states:

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

There are three criteria set up for identifying the unfair trade practice as a dumping. Firstly, the export price of a good must be lower than the price or normal value of that good in the exporting country’s market. A second criterion is the material injury to a domestic industry, even a threat to cause such an injury is deemed to be sufficient. To the second requirement is also applicable the material retardation of the establishment of a domestic industry. Thirdly, there must be the causality link between the first and second conditions. However there is no automatic check-test, as the following provisions of Article VI make the analysis broader and deeper. It states: “Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.”

Through several rounds of negotiations, i.e. Kennedy, Tokyo and Uruguay Rounds, ADA with its eighteen articles and two annexes was adopted as a tool for further clarification of principles and notions, which were previously set forth in Article VI GATT. The objective was to provide the guidance for both authorities who on a regular basis invoke AD norms and for businesses of exporting countries that can be the subject of AD duties.

51 GATT Art.VI:1
52 GATT Art.VI:1
ADA is a multilateral international agreement under WTO legal order, which constrains the domestic legislators’ freedom in creating AD rules without due consideration of ADA norms. The compliance with ADA’s provisions is of the high importance and all MS must provide information on their AD legislation development.

The definition of “dumping” in Article II “Determination if Dumping” ADA is narrower than the same one in Article VI GATT, ADA defines “dumping” through a dumped product without taking an injury and a causality as the elements of the definition. Article II 2.1 is read as follows:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

The title of Article II ADA doesn’t match with its content. A dumped product is only the one element of dumping. It is not enough to have a dumped product to initiate AD procedures. Fortunately Article VI GATT has always been the ultimate element of the WTO AD regime. However this little inconsistency in WTO legal terminology gives some room for improvement.

Among other novelties of ADA the institutional one has to be mentioned in particularly. ADA establishes a special Committee on AD Practices, composed of representatives of all WTO Members. The Committee shall be promptly notified on any AD initiations of a MS. The main objectives of its activity are to serve as a forum for consultations and to gather and moderate data on AD.

As one of the main drawback of ADA, identified by Matsushita, Schoenbaum, Mavroidis, is the Article 15 ADA, which addresses the interests of the developing countries. As the authors pointed, “the provision is vague and somewhat ambiguous”\textsuperscript{53}. The essence of this article is to consider their interests when applying AD measures under ADA. It is an outstanding obligation for the importing country to explore the possibilities for constructive remedies before applying AD measures, when a developing country is a target of an AD measure.\textsuperscript{54}

1.2. Elements of Dumping

a) Dumped product

The most critical task in determination of existence of dumped product is to get accurate and fair comparisons of price and value. The crucial task is to determine the dumping span, i.e. difference between the export price and the normal value of the imported good. Depending on

\textsuperscript{53} Matsushita M., Schoenbaum T., Mavroidis P. p.403

\textsuperscript{54} More on this see Panel report, EC - Bed Linen and United States – anti-Dumping and Countervailing Measures on Steel Plate from India 29.07.2002 WT/DS206/R
the difference the consequences can be differ. The 2% difference and less gives no authority to invoke AD duties.

Article 2.1 ADA states, that the EP is the price at which the product is exported, i.e. it is a transaction price at which the good is sold by an exporter to an importer in an importing country. The clues on this price may be found in the export documentation. Essentially it is this price that is dumped and for it the comparison of normal value shall be considered to determine the fact of dumping.

Different prices and values may be deemed to be NV. The adjustments depend on the situation. First situation is when there are domestic sales of a like product and these sales are made in the ordinary course of commerce. This under article 2.1 ADA is called a domestic price. However there situations when there is no domestic sales then article 2.2. ADA applies the third country export price, i.e. a comparable and representative price of the good that is exported to a third country. If such a price is not representative then the price can be constructed from the costs of manufacturing and SG&A costs and profit (constructed normal value).

b) Material Injury

Article 3.1 provides that the injury determination “shall be based on the positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products”. These are objective economic criteria deemed to give the real understanding of the scope of damage.

c) Causality

The causality shall be based on the examination of all relevant facts and evidence, including others than the dumped import. The attribution of non-dumped factors shall be excluded from injury calculations. Article 3.5 contains a non-exhaustive list of related factors depending on the case particularities.

After the investigation is over and dumping is established the authorities impose ADM. There is opportunity for exporters to revise the prices or terminate the import of the concerned product; this initiative is called price undertakings. This offer from exporter may be accepted by authorities and is possible under article 8 ADA.

2. EU Approach towards AD Regulation

The EU level of AD regualtion is of the high interest to the ECU. Russia, the biggest MS of the ECU, represents one of the strategic partner of EU in trade and investments.55 The EU experience in regulation and understanding of the main concepts of AD may bring two partners

in mutual beneficial relationship without triggering political and diplomatic channels, but through the same level of fair trade and market access understanding.

The model patterns of AD regulation for the ECU may be found in the EU level because of the following reasons. Firstly, EU has always taken active role in creating and developing AD regime under WTO. Secondly, the EU is one of the leading WTO members in the number of initiated disputes.

According to WTO Statistics on AD from 1995 to 2012, the EU initiated 451 AD investigations and now is on the third place\(^{56}\). Moreover, the EU used to have the same challenges as ECU facing currently, when it successfully managed to adopt its AD regulation to all divergent interests of national industries presented in the Union. Finally, EU is a strategic partner for Russia namely and for other ECU’s MS, thus this partnership indirectly calls for the harmonisation and simplification through the well operated legal system.

Under article 216 TFEU, agreements concluded by the Union are binding upon the institutions of the Union and on its MS. Müller, Khan and Scharf in their handbook state, that “the Court [Cour of Justice], when examing the legality of EC [EU] trade defence action, does not give any direct effect to the relevant WTO Agreement. However, it interprets EC [EU] law in the light of the Community’s [Union’s] international obligations”\(^{57}\).

As a member of WTO, the EU is bound by the provisions for of AD in WTO legal instruments. Article VI GATT and ADA. One may deduce, that “in order to comply with the WTO provisions and to ensure their proper application the EU rules for dumping are largely based on these WTO provisions and mirror to a great extent their content without being identical”\(^{58}\). The substantive law differences will be highlighted in this subsection.

2.1. Overview of regulation. Striking differences from WTO approach.

Council Regulation No 1225/2009 “On protection against dumped imports from countries not members of the European Community” \(^{59}\) (hereinafter “Regulation 1225/2009”) regulates the procedure for the imposition of anti-dumping duties. The structure of the Regulation is very similar to that of the ADA. The Regulation is in the full compliance with WTO legal order, however it is sometimes noticed that EU “do not faithfully transpose WTO rules on a number of questions”\(^{60}\).

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\(^{56}\) Left behind by India with 677 investigations and USA - 469. Data is taken from WTO Statistics http://wto.org/english/tratop_e/adp_e/adp_e.htm


\(^{59}\) OJ L 343, 22.12.2009, p.51

The Regulation 1225/2009 permits imposition of ADM when the four prerequisites are met: a dumped product existence, material injury, treat or retardation of the establishment, causal link between them, and the imposition of ADM in the interest of the Union.

“Once anti-dumping duties are imposed, they normally remain valid for a period of five years. The Regulation provides for several types of review of the level and of the period of validity of the anti-dumping measures”61.

The AD complaint shall be submitted by the EU industry and be supported by a significant part of relevant producers to the EU Commission. Collectively they shall represent at least 25% of the total output of the dumped product. European Commission then investigates and assesses all justifications. The Commission however may only impose provisional AD duties while the Council following the recommendations of the Commission must impose definitive AD duties. The juridical mechanism for challenging the levied duties is vested in the General Court and WTO DSB.

Among particularities of EU AD policy the following are of the increasing interests. There are provisions that not all WTO MS applied in their regulation. With these provisions the application of ADM in the EU deemed to be more balanced.

The lesser duty rule in the essence presents the lower rate of duty than the dumping margin, which is enough to eliminate the injury. “The desirability of having lower duty levels rests on the premise that they lead to fewer distortions to market competition. However, lesser duty rules may have hidden effects. In fact, one of the peculiar features of AD policies is that their mere filing can affect firms’ behaviour since the result of the investigation depends on market outcomes”62. Despite desirability of lower duty levels, it will be preferable that such a mechanism is not open to manipulation by firms.

Community interests test is the unique and binding tool of EU investigation. In principle, this means that not only the interests of import-competing producers are considered, but the welfare of other parties should also be taken into account. The effect on downstream industries, consumers, households is considered and their interests and opinions are welcomed to determine the fair balance. The wise rationale behind it lies in the logic that ADM may distort the market levers and in the end may bring more damages than dumped product. But in practice the clause application is extremely limited. Notably, the Global Antidumping database (World

Bank) reports only six EU cases in which rejection was due to Community interest\textsuperscript{63}. This raises question on the extent of this provision power and practical significance.

Another peculiarity of the EU AD law is the division of foreign economies into market and non-market. ADA doesn’t have such a provision; however the footnote to article VI GATT mentions this issue\textsuperscript{64}.

The rationale behind it lies in the difficulties in NV determination when the import originates from state-controlled markets. There the supply and demand levers do not work independently, thus the data and prices do not mirror the reality. Thus export prices will be compared with prices or costs in the surrogate/analogue country determined for these purposes. The first choice is always “for a market economy whose producers are subject to the same investigation, otherwise another country in which the product under investigation (or a similar one) is being manufactured”\textsuperscript{65}. When occasionally the domestic price of the surrogate country is not representative, then the third-country sales or constructed value will be applied. It is noteworthy, that till 1998 Russia had a status of non-market economy. Thus 2002 initiative, following EU-Russia Summit, to remove Russia from this list and subsequent EU back up in her WTO accession have established long-term cooperative basis for both states.

\textbf{2.2. EU Proposals on the Amendments of AD Regulation}

On 10 April 2013 The EU Commission announced its plans about the amendments of anti-dumping and anti-subsidy regulation. These legislative proposals shall be approved by the Council and the European Parliament, and might then become effective from 2014. This is the first review effort since the adoption of both acts. These proposals aim to adjust the AD to better protection of the domestic producers, especially from any risk of retaliation. The Directorate General for Trade is working on Guidelines on four complex areas: expiry reviews, the EU interest test, calculation of the injury margin and the choice of an analogue country in investigations against non-market economies.

The legislative proposals include the following main innovations:

- “Businesses will be informed about any provisional anti-dumping two weeks before the duties are imposed. Similarly, if it is decided not to impose provisional measures but to instead continue the investigation, interested parties will be informed of this two weeks in advance. Interested parties will have the opportunity to comment on the calculation of the dumping and injury margins. The purpose of this change is to improve predictability.

\textsuperscript{63} See Bown, Chad P. (2012) "Global Antidumping Database." Available at http://econ.worldbank.org/ttbd/gad/

\textsuperscript{64} “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[...], 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 country may not always be appropriate”, footnote to Art VI GATT

\textsuperscript{65} Lowenfeld, Andreas F. (2008) Id. p.281
• Importers will be able to obtain a reimbursement of duties collected during an expiry review if the Commission concludes, as a result of that review, that there is no need to maintain the relevant trade defence measures.

• The “special circumstances” under which the Commission may initiate investigations itself (ex officio) will be enlarged to include cases where there is a likely threat of retaliation by the exporters or exporting countries. This proposal would also impose obligations on EU producers to provide the necessary information in order for the ex officio investigation to proceed.

• It is proposed not to apply the “lesser duty” rule in cases of circumvention of duties, or in cases where the exporting country uses unfair subsidies or creates structured distortions in its raw material markets.

• A number of practices resulting from European Court of Justice judgments or World Trade Organisation rulings will be codified.\(^{66}\)

It is noticed, that lots of the proposals have already been applied by the Commission in practice, e.g. registration of imports in case of a circumvention investigation. Essentially through some changes the Commission’s powers in AD investigation will be strengthened. Other changes, such as the non-application of the lesser duty rule are clearly a new development in an attempt to put pressure on third countries which provide subsidies and raw material price controls (China and Russia namely). “This new approach by the Commission is highly worrisome. It appears that in line with WTO law there is neither a mandatory obligation to apply the lesser duty rule, nor is there a rule that if applied, it has to be applied uniformly “across the board”. However, there is scope for opposite conclusions.”\(^{67}\)


CHAPTER III - ECU's ANTI-DUMPING POLICY AND REGULATION

The legal creation of the ECU has brought legal challenges for domestic legal systems not only in the respect of customs law but for complete regulation of common trade and commerce. The on-going transformation of the customs and trade legal order has in particularly effect on the diverse legitimate trade defence instruments, in which AD ones play their special role.

Just one year after enacting of the ECU’s Customs Code the World Bank finished its research on the content of the ECU customs legislation and came to a conclusion that it is in the line with the international standards.68 However the process of its further improvement is still onwards. One of the main drawbacks is the plenty of reference norms in domestic customs legislation. It is like a labyrinth of norms with ambiguous language and technical character of its norms. Taking the case of Russia, where the main federal statute “On Customs Regulation in the Russian Federation” consists of more than 200 references to the secondary acts with 87 references to the acts of Government and 97 to the acts of the Federal Customs Service, the clarity and predictability of the customs regulation just on the example of one country is in ambiguous. The ancient maxim *leges intellegi ab omnibus debent*69 shall never be defied as opposed to the fiscal flourishing interests of the states.

The current level of the AD regulation within the ECU calls for more improvements70. The further unification of customs regulation and AD regulation in particularly will amount to the sustainable mechanism of domestic industries’ interests protection and will make the ECU an attractive place for investments in the long-term.

The statistical information, which is available in WTO data and publications on the AD filings and initiations, presents the ECU’s record (the same is true to the initiations of each member state alone) trade defence experience. The short look at the figures proves that the current record leaves much to be desired and the amount of AD measures has currently no tendency to grow. There are only two initiated AD investigations in ECU, both of them are reopened. The first one is from 12 September 2012 and is against Chinese producers of rolling contact bearings (except nail)71. The second investigation from 16 April 2013 deals with the Ukrainian importers of some types of steel pipes.72 There are already 10 AD measures that are in force in

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69 Acts of law should be clear and comprehensible to all
70. The current Prime Minister Mr Medvedev has invited representatives of Russian business to consider the changes critical points and will proceed with the initiative of the amendments. Interview with Prime Minister Medvedev from 31 May 2013, retrieved from http://www.rg.ru/2013/05/31/medvedev-anons.html
ECU\textsuperscript{73}. Obviously, such leading AD-initiators like USA, EU, India, and Brazil are far ahead in the efficiency and effectiveness of their AD legislation.

It seems, that at the first stage of the functioning of the ECU it is easier for authorities to change the respected tariffs for the chosen product without triggered the AD mechanism, which ultimately requires additional time, costs, professionals and well-functioning regulation\textsuperscript{74}. However WTO regime strictly approves only prescribed trade defence instruments, and in the exhaustive list there is no place for tariffs. AD duties are the instruments that must be concerned in the event of unfair price competition. AD mechanism cannot be applied ex parte, on contrary it calls for the judicial or sometimes administrative process where evidences are presented and balance of interest are concerned. The possible challenges and existing drawbacks in applying the well operated AD system for the ECU will be discussed in this chapter.

1. **ECU Legal Framework**

The AD legal framework of the ECU has multilevel characteristics and consists of legal acts with different legal nature. Officials or politicians sometimes neglect the importance of categorisation in the cognitive in practical senses which led them to diverse non-connected or overlapping provisions. In this subchapter the possible classifications are suggested for the future development of ECU AD regulation.

Firstly, the three layers may be identified: international, supranational and domestic\textsuperscript{75}. The international layer is presented with the WTO instruments, which are binding on the whole ECU and supreme towards all other acts. This mechanism was established by the Treaty on the Functioning of ECU in the Course of Multilateral Trade System\textsuperscript{76}. The next layer in the hierarchy is the supranational agreements, acts, decisions within ECU framework. This layer is subordinated to WTO provisions. The last group of relevant instruments finds its place in domestic acts. The prevailing tendency in the latter case is to reduce the number of these legal acts as the designated body for AD investigation, the Committee of the Internal Markets Protection, applies only ECU acts in its activity.

As revealed by this research the layers and levels of AD regulation are not the same. Troshkina, with her latest article on ADM, suggests identifying three main AD sources: the special Agreement № 37 on the Imposition of safeguards, anti-dumping and countervailing measures towards the third countries, then Customs Code of the ECU and finally Decisions of the EurasEc

\textsuperscript{73} Official statistics is retrieved from official web page of EurasEc Commission http://www.eurasiancommission.org/ru/act/trade/podm/mery/Pages/zaschita.aspx

\textsuperscript{74} Troshkina T.N. (2012). The creation of the Customs Union and the legal problems of anti-dumping duties regulation. The legal questions about the Eurasian Customs Union. Moscow: Infotropic. p.246-247


\textsuperscript{76} Signed on 19.05.2011, in force from 22.08.2012, the date of Russia’s accession to WTO. Retrieved from http://www.eurasiancommission.org/_layouts/Lanit.EEC.Desicions/Download.aspx?lsDlg=0&print=1&ID=4203
Commission. However, it is seemed more adequate to provide five levels of AD norms allocation, keeping in mind the layers discussed above.

First Level – WTO Multilateral Agreements on ADM. Article VI of WTO Agreement and Anti-dumping Code are the main of them. It is also must be mentioned, that the schedules of concessions can be treated as a source of AD legal norms as well.

Second Level – ECU General Multilateral Agreements. The legal instrument, which among other basic principles initially presupposed the harmonised non-tariff measures, is a Treaty on a Customs Union and Common Economic Space, signed in 1999. Article 12 provides for the unified approach towards regulation of international trade and for the synchronised activities in its development and amending, namely in the sphere of non-tariff regulation towards third countries Subsequently, Article 14 calls for the uniform application of these measures guided by the multilateral agreements adopted specially for these purpose. However, the declarative character of this Treaty envisages no detailed provisions and can be treated as a general act of mutual understanding.

It is notably, that according to the EEC Court interpretation, WTO agreements and ECU treaties are on the same level in the hierarchy of legal acts, i.e. there is no subordination between them. However when there is contradiction between them or when the legal system of the ECU as a whole is not in line with WTO regime, then WTO acts step in and overrule the ECU legislation. Moreover the Court points to the international treaties theory according to which both WTO and ECU treaties are international thus the general principles lex specialis derogat lex generali and lex posterior derogat legi priori shall be applied. The Court came to a conclusion that ECU treaties are special acts in relation to WTO acts. This interpretation, according to the Court’s conclusion, does not contradict the WTO obligations, because all WTO provisions have been finally transferred into the ECU regulation.

The official interpretation of the EEC Court might be treated as worrisome in some aspects. It is a very broad and general interpretation; it seems to be more adequate to decide the applicable level of law on the case to case basis, especially in the beginning of establishing the common juridical interpretation. Thus it is believed, that WTO norms shall be always on mind of the judges and officials when they apply the ECU law in the early stages of its formation.

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77 Troshkina T.N. Id p.251
79 Article 1(1) Treaty on the functioning of the ECU
80 See EEC Court Decision 24.06.2013 on the Case No 1-7/2-2013. The discussed position can be found in “Applicable law” section. Available on http://sudevrazes.org/main.aspx?guid=20941
Third Level – ECU Specific Multilateral Agreements on ADM. The “Agreement on the Imposition of safeguards, anti-dumping and countervailing measures towards the third countries”\(^{61}\) (hereinafter “the Agreement on TDM”), adopted in 2008 and in force from 1.07.2010, provides the legal essentials for the trade defence measures applicable only to trade with goods. The scope of this Agreement doesn’t cover the relationships relating to the rendering of services, performance of work, IP- rights, foreign investments and currency control. The adoption of this Agreement has controversial results. On the one hand, this was the first framework union act that laid down the foundations of the common AD regulation. But on the other hand, this act at the same time created the first institutional and operational challenges, which ECU members are currently facing. This Agreement would be directly applicable in the territory of the MS after the expiration of the transitional arrangement that was set-out in the Agreement on the transitional period, which is discussed below.

The difficulties in bringing MS to the unified understanding of procedures and concepts were deemed to be solved in the Agreement on the Imposition of safeguards, anti-dumping and countervailing measures towards the third countries during the transitional period” (hereinafter “Transitional Agreement”) from 19.11.2010. The objective of this Agreement was to decide procedural questions of the domestic review mechanisms and to address concerns on the future of the revised TDM. When the national authorities during revision find that TDM affects more than 25% of the national producers from the whole ECU output, then the Commission will extend the scope of this TDM on the territory of the ECU. When not, then the TDM’s effect will be limited to the national territory of the MS till the expiration of the imposed measure. “The investigations on-going on the date of the entry into force of the Agreement on TDM were to be continued in accordance with the new rules and the national regulations to the extent those regulations did not contradict that Agreement”\(^{62}\). Upon the expiration of the transitional period, national regulations would be abolished.

The Agreement on TDM has undergone changes, which were introduced in 18 October 2011 by the “Protocol introducing amendments into Agreement on the Imposition of safeguards, anti-dumping and countervailing measures towards the third countries”. The amended draft is presented by the applicable on the temporary basis “Working draft of the Department of the internal markets protection”\(^{63}\). The final effectiveness of the introduced changes depends on the “interstate procedures of the MS necessary for effectuating the provisions of this Protocol” (Art. 3). It is unclear what is meant under “necessary interstate procedures”. Does it mean bringing

\(^{61}\) In force from 1 July 2010 adopted by the Interstate Council on 21 May 2010. Retrieved from official web page of EurasEc Commission

http://www.eurasiancommission.org/ru/act/trade/podm/Documents/%D0%A1%D0%9E%D0%93%D0%9B%D0%90%D0%A8%D0%95%D0%9D%D0%98%D0%95.pdf


\(^{63}\) Available on the EurasEc Commission’s web page

the domestic legislation of the MS into compliance with the Protocol's provisions? If it is so, then it is appeared ineffective that Protocol provides for no deadline in implementing the provisions. Thus after almost two-year period the changes are still not in force. Or is it the ratification of the Protocols by parliaments of the MS? If the answer is positive, then the same remarks on due deadline and non-delaying mechanism are true.

The working draft, however lays down more detailed and concrete regulation basis, in some parts adopting the logic of the EU and WTO acts on AD, and deemed to be more consecutive in almost all aspects, e.g. authorities of the designated bogy and procedural arrangements, the order payment and fiscal transfer, the establishment of the concept “legal framework on TDM”, confidentiality guarantees etc.

Through this research the actual date of the enforcement of this Protocol was finally revealed. This unfortunately was not found on the official web page of the EurasEc Commission, where by contrast the Protocol has still the temporary basis for the application. Still it is in force from 6.05.2013 and having direct effect on the old provisions of the Agreement on TDM. The information was found on the official state portal of legal data.

*Fourth Level – ECU Supranational Codified Acts. The Customs Code of the Customs Union* cannot but be mentioned as a pick of the ECU’s legislative work in the qualitative sense. It is an every-day working legal act, replacing the domestic customs codes of the MS. There are set of norms relating to the AD regulation as well.

Thus Article 6 stipulates that levying of AD duties, control of accuracy payment and promptitude of payments, and measures for the enforced recovery - are the competence of the customs authorities. Article 70 contains a provision, according to which “AD duties are asserted according to the international agreements of the MS and/or legislation of the MS and are levied in a manner as set forth for the tariffs in this Code”. The usage of “and/or” has a fatal importance in particular cases as in some respects internal legislation of the MS do not meet the ECU’s level of regulation.

The legal techniques of drafting the laws are of the high importance, as a basis for all future disputes settlements and interpretations and further rights assertions. This article can be a Pandora box once the great discrepancy among two levels of regulation appears. It requires for amendments by providing special occasions when it is possible to invoke domestic law and under what circumstances only ECU law is applicable.

Another concern is that the Department of the Internal Markets Protection doesn't identify in the list of AD legal framework the Customs Code. This also might be seen as a possible omission in the structured approach towards the unified regulation.

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Fifth level – Decisions of the Eurasian Economic Commission and the Court of EEC. These acts are discussed in the institutional part of this paper.

The possible sixth level, which is in pace for the transitional period, is presented by the domestic acts, in Russia – federal statutes on TDM.

1.1. ECU Legal Framework’s Challenges

After the insight to the ECU AD framework the following challenges come on the surface.

1.1.1. ADM as a Non-Tariff Measures

The first hurdle to the successful AD regulation is the declarative and general character of the majority norms of the Agreement on TDM. Some scholars state that due to its early adoption in 2008, when there was no idea about the jurisdiction of the main body of the ECU (EurasEc Commission), the founders decided to put as much authority on this body as possible.\(^{85}\) Thus the absence of the concept of the future institutional mechanism among the founders of the ECU has led to the low effectiveness of the application of the AD law. Fortunately the draft will solve these shortcomings after its full effectiveness.

The second problem has found its place in the conceptual gap between the diverse understandings of non-tariff protective measures. The inconsistency and lack of cohesion from the beginning led to adoption on the same day the duplicative act – “Agreement on the common non-tariff measures towards third countries”\(^{86}\). The latter Agreement contains essential provisions on all modern non-tariff measures in ECU, putting aside the safeguards and anti-dumping duties. This Agreement provides the legal definition of “the non-tariff measures”. Accordingly, its Article 1 in the respected part reads as follows:

Non-tariff measures- a system of measures, which regulates the external trade of goods, and available after imposition of quantitative and other types of prohibitions and limitations of economic character.

The above Agreement has an exhaustive list of non-tariff measures, where AD measures and safeguards are excluded.

Alternatively the Agreement on TDM treats AD measures, safeguards and countervailing duties as measures with non-tariff legal nature. Moreover the internal Russian federal statute “On safeguards, anti-dumping and countervailing duties on the imported goods”\(^{87}\) has its own definition of non-tariff measures. Under its provisions the non-tariff measures are all what

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\(^{85}\) Troshkina T.N. (2012). p.249


cannot refer to tariff measures, i.e. tariffs, customs duties. Clearly, the logical outcome is that AD measures are the special kind of non-tariff measures under the second understanding. Domestic legislation of Belarus and Kazakhstan in the respected part mirrors this approach.

Such conceptual discrepancies are believed to give rise to numerous collisions, clashes of norms, difficulties in application of respected provisions, and in the outcome will cause the unsatisfactory level of ECU’s legislative effectiveness and efficiency. Being almost the last resort under WTO restrictive attitude towards any kind of protection, the discussed situation shall be the subject of further improvement in the nearest future.

1.1.2. Clash of legal sources: Agreement on TDM vs. Customs Code

Recently amended the draft version of the Agreement on TDM is seen as a next level of the more harmonised and adequate regulation of trade defence measures. Going to the substantive part, the interesting novelty represents Article 1-1 “The ECU legal framework on safeguards, anti-dumping and countervailing measures”. This article sets forth a two-tier system of sources. The first one is made up from the Agreement and other ECU international agreements applicable to safeguards, anti-dumping and countervailing measures that do not contradict the Agreement on TDM. Evidently, written supremacy of the Agreement on TDM is established. The second tier, presented by the decisions of the designated authorities, when their application provided by the Agreement, and/or ECU agreements and treaties.

As can be deducted, there is no reference to the Customs Code in this list of sources. Whereas the question arises how this two acts shall be correlated. The challenge may lie in already mentioned Article 70, which requires the application of Customs Code provisions on customs duties when applying them to ADM, safeguards, countervailing duties administration. What legislatures understood under “administration” is not clear, the Code doesn’t define this term nor do any of the ECU’s acts. It can be predicted, that it will get its interpretation when disputes will arise on the question what is applicable - Agreement or Code. What is more lex specialis? According to the content and objectives of regulation of Agreement on TDM, it is deemed to be it. But on the other hand the procedural questions (as administration is referred to this part) are specially regulated by the Customs Code. However to prevent such cause of actions, it seems rationale to amend the provisions of Customs Code by laying down the definition of “administration” or at the same time to set forth the article in Customs Code on administration of non-tariff measures.

2. Case Study on Levied AD Duties by the EurasEc Commission on Imports of Light-Commercial Vehicles Originated from Germany, Italy, Poland and Turkey to the ECU.

The current practice of the EurasEc Commission in AD investigations can either prove that AD policy in the ECU may be regarded as very precautious but effective or just not well-operated. The World Bank Report and the Report of the Working Party have both agreed on the ECU AD
regulation’s compliance with the international standards. The model patterns of AD WTO and EU were presented hereinbefore, in this chapter the practical exercise will reveal the conceptual legal basis of AD in the ECU.

Through the presented case study two main objectives will be reached: to see how in practice EurasEc applies the AD law and to explore which further challenges it has. The analysis of this case concentrates on its substantive part, as the main target of this research paper, thus some procedural aspects had to be omitted.

2.1. Facts and Issue

The foreign producers of light commercial vehicles (hereinafter “LCV”) from Germany (Mercedes Benz and Volkswagen), Poland (Volkswagen), Italy (Peugeot Citroen, Iveco), and Turkey (Ford) have imported their cars into the customs territory of the ECU.

In 2011 the Russian car producer LLC “Sollers-Elabuga” initiated the AD investigation against above mentioned exporters, claiming that the imported LCV were dumped thus causing material injury to the company. The EurasEc Commission through the investigation found that there was dumping from the exporters (except Poland) and levied AD duties on them with a sunset clause of 5 years from 16 June 2013 onwards\(^88\). The AD duties will be added to the current rate of 10%.

- Turkey - Ford Otosan and other Turkish producers -11.1%
- Italy - Peugeot Citroen Automobiles SA and Iveco S.p.A. – 23%
- Germany - Mercedes-Benz & Volkswagen – 29.6%

The issue in this case was the existence of dumping from the foreign importers of LCV and its satisfactory proof by evidence under the ECU legislation.

2.2. Applicable Law

The investigation, conducted by the Department on the Internal Markets Protection (hereinafter “the Department”), was based on the provisions of the Agreement on TDM, the Transitional Agreement, The Decision of the Interstate Council of the EEC on effectuating the Agreement on TDM\(^89\), the Decision of the EurasEc Commission on the application of TDM in the customs


\(^89\) Decision № 37 of the EEC Interstate Council on the effectuating the Agreement on the Imposition of safeguards, anti-dumping and countervailing measures towards the third countries, 21.05.2010. Available at www.eurasiancommission.org
union\textsuperscript{90}, and of the Collegium Decision on some questions in the course of application of TDM in the ECU\textsuperscript{91}.

2.3. Analysis

It is essentially the practical issue how to get information for comparison and for the fatal calculations. In this case the questionnaires were transmitted to all parties, with the option to make the information confidential. The exporters failed to answer complete questions and therefore the calculations were adjusted according to available statistical or official information\textsuperscript{92}.

The investigation period is set from 1.07.2010 till 30.06.2011. Under the Agreement on TDM the investigation period is set 12 months before the filing the complaint and in any case cannot be less than 6 months\textsuperscript{93}. The analysed period includes time frames from 1.01.2008 till 31.12.2011. Accordingly, the legal provisions lay down the norm that prescribed the three-year-long period before the investigation to find the evidences of the material injury and other related information.

According to the applicable law\textsuperscript{94}, ADM shall be levied on the product, subject to the dumped import, when the official investigation will prove that such import causes the material injury to the industry of the MS of the ECU, or it causes the threat of injury or substantial retardation of the establishment of such an industry. The import deemed to be dumped when the export price is less than the normal value of this product.

Three criteria – dumped product, material injury, and causation – are sufficient to declare AD duties. The possible union interest test doesn’t apply in ECU.

The latter raised the objection from exporters as there was no LCV industry and thus no interest from the ECU producers to invoke ADM on foreign importers. The Department however had letters with proof of interest from the Gaz Group, from Sollers and from non-commercial partnership of automobile producers of Russia, where they expressed their interest in the ongoing investigation and proved the existence of LCV production in the ECU. The regulation has no provisions of interest check, thus the Department might have left this allegation without consideration. It is obvious that here was the confusion between two concepts – the existence of injured industry that produces the like product and interests involved. The Department in application of law should have been more precise and didn’t cause ambiguities.

\textsuperscript{90} Decision №339 of the Customs Union Commission on the Application of safeguards, anti-dumping and countervailing measures within the single customs territory of the Customs Union of EEC, 17.08.2010. Available at www.eurasiancommission.org

\textsuperscript{91} Decision №1 of the Collegium of the Eurasian Economic Commission on Some questions regarding the application of safeguards, anti-dumping and countervailing measures within the single customs territory of the Customs Union, 7.03.2010. Available at www.eurasiancommission.org

\textsuperscript{92} Article 10 (10), Agreement on TDM

\textsuperscript{93} Article 9 (3), Agreement on TDM

\textsuperscript{94} Article 9 (1), Agreement on TDM
The doubts in existence of industry of MS however gave rise to further arguments.

*The Sollers-Elabuga is not a producer of LCV.* The Department however said that for the sake of this investigation it is deemed to be the producer, Moreover it was operating the whole cycle of the production during the investigation period. This short-term production was also evidenced by the state agreement with the federal ministries on trade and economy of Russia, thus according to the Department's view, proves the status of the manufacturer. This Argument is worrisome; the Department use the fiction of the industry's existence that cannot be found in the law.

*The Sollers-Elabuga had no legal grounds for production and realisation of Fiat LCVs.* However Department pointed out, that the reporting company conducted the industrial assembly of Fiat LCV under the licensing contract with Fiat Group Automobiles S.p.A., which was terminated on 31.12.2011. The Sollers-Elabuga was entitled to assembly the supplied car parts in 2012 and realise them through the chain of authorised dealers. Therefore it was the producer of LCV of the ECU.

It is deduced through the investigation report that Department failed to determine the industry of the MS. Report contains only replies to counterarguments but no consistent analysis. According to the Agreement, the industry of MS is all producers of the like products in the MSs, or those whose share in total production of the States Parties, respectively, of the like product constitutes a significant part, but not less than 25 %. No determination of “Sollers-Elabuga”'s share was conducted which is not in line with legal requirements.

2.3.1. *Dumped product*

Firstly the product itself shall be determined. In the present case the LCV with a gross vehicle weight between 2.8 and 3.5 tons with a diesel engine capacity not exceeding 3000 cc. were deemed to be the dumped product. The reporting company was assembling Fiat Ducato. The Department in the investigation asked the question if these products can be like. The legal term of like products is as following -“the complete identical product, or when there is no such a product the like products with similar characteristics” shall be the subject of the investigation. For the determination the Department took the following considerations into account. Firstly, the technology of the assembling or production was deduced to be analogue. Then, the technical standards of imported LCV and these produced in ECU were inferred to be identical. Finally, they both meet the same needs of the consumers, i.e. they present a means of combined transportation of people and goods. They have the like technical characteristics. And they have the similar scheme for realisation.

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95 Article 2, Agreement on TDM  
96 Article 2, Agreement on TDM
The exporters presented the counterarguments and claimed that imported LCV and domestic LCV are in different price segments. But Department treated their allegations without consideration, as they didn’t present sufficient evidence to prove it. On contrary the questionnaires presented different situation. Then exporters claimed differences in packages due to various vehicle systems and variants. The Department replied that it didn’t influence the comparability, as the latter doesn’t require the identity in qualitative characteristics. Thus all counterarguments didn’t succeed, mostly because they were thrown without evidential back up.

The calculation of the individual dumping margin was not possible due to the fact that questionnaires sent to importers were left half filled in, thus disabling the accurate calculations. The DM to Poland was calculated at 1% and therefore was excluded from the investigation as being negligible, as set forth in Article 31 (1) Agreement on TDM, which let to disregard DM less than 2%.

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DM = \left( \frac{(NV_{EXW} - EP_{EXW})}{EP_{CIF}} \times 100\% \right)
\]

is the formula that was applicable to calculate the DM of each importer.\(^{97}\) The NV is the price of the comparable product under its sale in its domestic market under normal course of commerce in the competition environment during the investigation period\(^{98}\). The EP the price is a price at which the product is sold to the non-affiliated under its import to the ECU.

2.3.2. Material injury – “is a positive evidence of deterioration of the industry of the MS, which is expressed in particular decrease in the volume of production and sales of the like product in the States Parties, reducing the profitability of production of such product, as well as a negative effect on inventories, employment, wages in the sector of the economy of the MS and the level of investment in this sector of the economy.”\(^{99}\)

Article 13 (6) provides the possibility to identify the joint impact on the injury when the DM of each exporter is more than 2%, the volume of import sufficient and there are no revealed findings during investigation about the differences in the competition among imported goods and between imported goods and comparable ECU product. After all calculations and considerations, these factors were established and it was possible to speak about the joint influence on the ECU’s industry.

The ECU as the EU applies the three-factors-analysis in determination the material injury – Volume of import, Effect on prices within the ECU, Impact on ECU’s producers\(^{100}\). It was

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97 Article 10 (2), Agreement on TDM. **Dumping margin** is determined by the Department on the basis of comparison: 1) the weighted ANV with weighted AEP of the product; 2) the NV of the product of individual transactions with the EP of the product of individual transactions; 3) the weighted ANV of the product with the EP of the product of individual transactions subject to significant differences in the price of the product according to the consumers, regions or time of delivery of a product.

98 Article 11 (1), Agreement on TDM

99 Article 2, Agreement on TDM

100 Article 13 (1), Agreement on TDM
deduced, that LCV imports from exporters increased by 23.2% (total imports of light commercial vehicles in the ECU is 29.1%) and the weighted average of the price of these vehicles in 2011 had decreased compared to 2008 by 9, 5%. According to the Department, as a result of the price dumping the industry profits in the ECU were reduced by 17% in 2010 and by 2011 the industry went into a loss.

2.3.3. Causation

The legal provisions provide for the determination of the causal link which shall be revealed under consideration of all related facts, e.g. import prices from other third countries, economic situation, competition, technological modernisation, trade indexes of the industry\footnote{Article 13 (8,9), Agreement on TDM}. The damage from these factors shall not be included in the calculation of dumping damage but must me considered to determine the real economic situation.

By the negative analysis the Department came to conclusion that other possible factors, which might led to the injury could be omitted due to their insignificance, thus the negative financial situation of the reporting company is deemed to be caused solely by the imported product.

The exporters’ argued about the magnitude of the 2009 economic crisis, the competition from other domestic producers and the termination of the licensing contract. But the Department decided that these facts didn’t relate to the causation. Exporters pointed also to the lack of trade indexes analysis of industry, Department on contrary said that the presented table with all indexes is sufficient for analysis.

In the end the Department found all three criteria to declare the fact of dumping and levy the AD duties.

2.4. Conclusion

The business application after this case can be seen in reduction of the import. To preserve their positions on the ECU market, foreign car manufacturers will have to locate their production of LCV in the ECU by through joint-ventures with ECU producers or establish the new business entity In ECU.

Throughout these case findings the ECU protectionism edge can be easily observed. Trying to protect the domestic automobile industry the Department analysed the facts under the predestined interpretation. Fortunately, exporters have the right to appeal against the decision at the WTO DSБ or the Court of the EEC. Moreover, in a year, they may refer to the EEC with a request to carry out a duplicative investigation. This case proves again the concerns of foreign partners about the arbitrary and inconsistent application of law by ECU authorities in spite of de rigore juris. Fortunately the future appeals on such decisions will build up the case law on fair
interpretation of legal concepts and procedure. WTO DSB and the Court of EEC shall play the active role in the development of AD policy in ECU through their judicial mechanisms.
CONCLUSION

The current economic and political situation is witnessing the rise of the protectionist trends. Businesses that in particular operate globally have concerns about these and cannot afford to disregard this reality. On the other hand states or even interstate formations are facing several constraints in developing sustainable AD regulation. This is the art for legislatures to employ the effective legal mechanisms which will not establish undue market access restrictions and will not interfere with the normal and fair business activities.

However the problems do not end with the adoption of the act. “The Commission has monopolised all factual information thus inviting “leaks and abuse””¹⁰² – as it was once true to the European Community AD practice now it might be true to the ECU one. The legislation of the ECU on AD is in compliance with all standards but the execution or application is far from the ideal, thus resulting in protection-concerned decisions. The appeals mechanisms and transparent legal system have always been the part of protection from unlawful practices.

Throughout this paper the objective was to identify challenges and develop the plan of possible actions for improvement. The following steps or arrangement may be presented for the legislatures for the further reformation of AD regime and bringing the practice of institutes into compliance.

1) The classification and categorisation of the legal instruments must be done according to the advised five-level structure. The establishment of subordinated system of legal instruments will amount to more transparent regulation and application of ADM, and to avoidance of inter-contradiction among them. Subject-matter duplicative acts must be revised.

2) The unified notion of non-tariff measures and ADM relation to them¹⁰³. Definition of ADM as a trade remedy or contingent one is preferable, as it aims to counteract particular adverse effects of imports from unfair foreign trade practices.

3) The appeals mechanisms within the EurasEc Commission and the Court of the EEC must be ensured. The administrative appeal on the Decisions of the EurasEc Commission on ADM shall be provided. The independency of judges must be guaranteed.

4) The moment of declaring the act void or unlawful must be decided in the law. To apply the balanced solution the moment from the legal decisions becoming effective might be advisable, as it at the same time meets MS’ domestic law requirements.

5) The practices of the Department of the Internal Markets Protection must be reviewed on the question of its arbitrary approach, when the interest of the exporter-companies are ignored and their allegations are left without due consideration.


¹⁰³ UNCTAD classifies ADM, countervailing and safeguards as a non-tariff measures and namely contingent. UNCTAD Classification of non-tariff measures, February 2012, Available at http://ntb.unctad.org/docs/Classification%20of%20NTMs.pdf
These measures are the prerequisite measures for the normal operation of trade remedies and the system as a whole. The officials of the ECU have put many ambitions into the plan of EEU-2015 however they still think with old concepts and thus apply the law in the customised manner. One may argue that it is a young formation with no long standing practices. That is half-way true, but another half way requires the urgent alterations. This paper presents the short-term initiatives with long-term beneficial consequences not solely for AD but at the same time to all ECU mechanism.
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Annex I - Integration stages in Eurasian Region

STAGE VI
Eurasian Union

STAGE V
Eurasian Economic Union (effective from 2015)

STAGE IV
Single Economic Space (effective from July 2012)
Member-Countries: Belarus, Kazakhstan, Russia

STAGE III
Eurasian Customs Union (effective from 2010)
Member-Countries: Belarus, Kazakhstan, Russia
Observers: Ukraine

STAGE II
Eurasian Economic Community (effective from 2001)
Member-Countries: Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan
Observers: Armenia, Armenia, Ukraine
Uzbekistan has terminated her membership

STAGE I
Free Trade Area of CIS (CISFTA) (effective from 2012)
Member-Countries: Armenia, Belarus, Kazakhstan, Moldova, Russia, Ukraine, Uzbekistan
Under ratification process: Kyrgyzstan, Tajikistan
Under negotiation process to join: Azerbaijan, Turkmenistan
Annex II – Institutional Overview of the ECU

Supreme Eurasian Economic Council
Heads of MS or Prime Ministers

The Court of the Eurasian Economic Community
8 Judges (2 from each MS)

Eurasian Economic Commission

Council
3 members of the Council, one Deputy PM representing each MS

Collegium
Chairman of the Collegium

Departments

Trade

Department on the Internal Markets Protection

Development of Integration and Microeconomics

Technical Regulation

Customs Cooperation

Industry and Agro-Industrial Complex

Energy and Infrastructure

Economy and Financial Policies

Competition and Anti-Trust Regulation
Annex III – ADM in force in the ECU

<table>
<thead>
<tr>
<th>Product</th>
<th>Origin</th>
<th>AD Duty Rate</th>
<th>Expiring Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Light Commercial Vehicles</td>
<td>Germany</td>
<td>29,6%</td>
<td>14.05.2018</td>
</tr>
<tr>
<td></td>
<td>Italy</td>
<td>23%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Turkey</td>
<td>11,1%</td>
<td></td>
</tr>
<tr>
<td>2. Seamless Cold-Finished Stainless Tubes</td>
<td>China</td>
<td>19,15%</td>
<td>14.05.2018</td>
</tr>
<tr>
<td>3. Graphite Electrode</td>
<td>India</td>
<td>32,83% or 16,04%</td>
<td>25.01.2018</td>
</tr>
<tr>
<td>4. Enamelled Cast-Iron Baths</td>
<td>China</td>
<td>51,87%</td>
<td>25.01.2018</td>
</tr>
<tr>
<td>5. Polymer-Coated Rolled Steel</td>
<td>China</td>
<td>8,1% 11,4% 12,9% 22,6%</td>
<td>30.06.2017</td>
</tr>
<tr>
<td>6. Forged Steel Rolls for Rolling Mills</td>
<td>Ukraine</td>
<td>26%</td>
<td>26.06.2014</td>
</tr>
<tr>
<td>7. Rolling Element Bearings</td>
<td>China</td>
<td>31,3% 41,5%</td>
<td>17.09.2013</td>
</tr>
<tr>
<td>8. Some Types of Steel Pipes</td>
<td>Ukraine</td>
<td>18,9% 19,9%</td>
<td>18.11.2015</td>
</tr>
<tr>
<td>9. Industrial Nylon Threads</td>
<td>Ukraine</td>
<td>11,6%</td>
<td>24.09.2013</td>
</tr>
<tr>
<td>10. Nickel-Containing Flat-Rolled Products from Rust-Resisting Steel</td>
<td>Brazil</td>
<td>21,1% 29,9% 39,1%</td>
<td>25.12.2013</td>
</tr>
<tr>
<td></td>
<td>China</td>
<td>4,8% 62,8%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>South Korea</td>
<td>33,3%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>South Africa</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>