

Nicolaj Kuplewatzky, *Defining Anti-Dumping Duties under European Union Law*
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DEFINING ANTI-DUMPING DUTIES UNDER EUROPEAN UNION LAW

NICOLAJ KUPLEWATZKY*

Anti-dumping duties are a payment levied by a State to counter injurious dumping. This levy is demanded when importing a product into the territory of the State. By default, one would count on that compound term to be self-explanatory. After all, an anti-dumping duty is a mandatory levy that appears to be incurred upon importation in the same way as customs, excise or other import duties. Under European Union law, their nature is different and disassociated from other types of State levies. As will be argued in this note, the currently employed definition of anti-dumping duties under European Union law may be simple but carries with it a multitude of considerations and implications. As such, and while deriving from a judgment of the year 2000, the definition remains valid until today and provides an example to other jurisdictions on how to categorise anti-dumping duties in the national system of laws.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. INDUSTRIE DES POUDRES SPHÉRIQUES AND “PROTECTIVE AND PREVENTIVE MEASURES”
- III. THE DISASSOCIATION FROM THE GROUP OF PENAL MEASURES AND SANCTIONS
- IV. ANTI-DUMPING DUTIES AS ‘PROTECTIVE’ MEASURES?
- V. ANTI-DUMPING DUTIES AS ‘PREVENTIVE’ MEASURES
- VI. A FURTHER CHARACTERISTIC: DISSOCIATING ANTI-DUMPING DUTIES FROM TAXES
- VII. CONCLUSION

* Member of the Legal Service of the European Commission. The author can be reached at: [nicolaj.kuplewatzky\[at\]ec.europa.eu](mailto:nicolaj.kuplewatzky[at]ec.europa.eu). The opinions expressed herein are exclusive to the author and do not reflect those of the European Commission. The author is grateful to Gustavo Luengo for his thoughts on a prior version of this article.

I. INTRODUCTION

Mr. Fox: “Why a fox? Why not a horse, or a beetle, or a bald eagle? I’m saying this more as, like, existentialism, you know? Who am I? And how can a fox ever be happy without, you’ll forgive the expression, a chicken in its teeth?”

Kylie: “I don’t know what you’re talking about, but it sounds illegal.”¹

Imposed as a payment levied by a State—to counter injurious dumping²—anti-dumping duties are demanded when importing a product into the territory of the State. But, they are different from other levies collected upon importation. As Michael J. Finger has noted, “[a]nti-dumping has about it the aura of a special measure to undo a special problem.”³ As such, it is not surprising that little has been written on the nature of anti-dumping duties under European Union law.⁴ After all, the European Union legislature never sought to attach a label to their nature ever since the introduction of the first European legislation on anti-dumping in 1968.⁵ Foreign publications do exist, but unsurprisingly, these deal with anti-dumping duties either from an international or domestic legal perspective. As such, the authors concerned often categorise anti-dumping duties in existing or—for European Union law—unhelpful drawers, be these “extra import duties”, “penalties”, or “extraordinary customs duties”.⁶

¹ FANTASTIC MR. FOX (American Empirical Pictures 2009).

² In the European Union, the determination of “dumping” is set out in Regulation 2016/1036, art. 2, 2016 O.J. (L 176) (EU) [hereinafter Regulation 2016/1036]. The determination of injury is set out in Article 3 thereof.

³ J. Michael Finger, *The Origins and Evolution of Antidumping Regulation 1* (Policy, Research, and External Affairs Working Papers, WPS 783, 1991).

⁴ See, for instance, Jessen, who argues that anti-dumping duties are “extra import duties” without elaborating what this would entail or why they should be considered such. Pernille Wegener Jessen, *Anti-dumping, in WTO LAW-FROM A EUROPEAN PERSPECTIVE* 379, 407 (Birgitte Egelund Olsen, Michael Steinicke & Karsten Engsig Sorensen eds., 1st ed., 2006).

⁵ The first anti-dumping legislation in the Union was Regulation 459/68, 1968 O.J. (L 93) 1 (EEC). This year, the Union celebrated fifty years of anti-dumping legislation with the entry-into-force of Regulation 2018/825, 2018 O.J. (L 143) (EU) amending Regulation (EU) 2016/1036, and Regulation 2016/1037, 2016 O.J. (L 143) (EU).

⁶ See, e.g., DAVID P. TWOMEY, MARIANNE M. JENNINGS & STEPHANIE M. GREENE, *BUSINESS LAW: PRINCIPLES FOR TODAY’S COMMERCIAL ENVIRONMENT* 193 (5th ed. 2017). Viner, albeit many years earlier, appeared to suggest that they are penalties on the basis that they are intended to penalise sales prices below normal value. See JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 275 (1st ed. 1923). Duarte offers a third, more exotic understanding, characterising them as “penalties which are imposed through extraordinary customs duties”, of “primarily punitive” nature, which

To the European goose, these discussions on foreign gander are of little assistance: considerable implications flow from the tagging with a label of any subject matter. The arising considerations are then of a domestic nature rather than those deriving from international law. In fact, anti-dumping duties derive a considerable part of their unique characteristics from public international law, in particular Articles II(2)(b) and VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the World Trade Organization (WTO) Anti-Dumping Agreement.⁷ After all, in the words of the European Communities in DS136 *United States-Anti-Dumping Act of 1916*: “anti-dumping theory and legislation is based on the idea that the kind of price discrimination between different markets described in Article VI of the GATT 1994 and the WTO Anti-Dumping Agreement poses a problem which is different from, and requires a different set of remedies from, the problem of price discrimination within one and the same market.”⁸

While the characteristics flowing from international law are a part of the present discussion, the same has not been addressed within the scope of this note. What this note is concerned with, primarily, is an analytical discussion of the definition of anti-dumping duties under European Union law. This is relevant not only to academicians but also to the practitioner of trade defence law because the ultimate nature of anti-dumping duties naturally informs their practical application. It is against this backdrop that the following part will discuss the nature of anti-dumping duties and shine light on their own unique category of measures.

“are beyond the legal definition of taxes on the grounds that, unlike ordinary import duties, they are not an integral part of the autonomous body of laws of a country”. See Luiz Claudio Duarte, *Dumping and Anti-Dumping in International Trade Origins, Legal Nature, and Evolution Developments in Brazil and in the United States* (Jan. 1, 1997) (unpublished LL.M. thesis, University of Georgia School of Law), https://digitalcommons.lawuga.edu/stu_llm/194.

⁷ While outside the scope of the present note, this interaction has been discussed in detail by the Panel and the Appellate Body. See Panel Report, *United States — Anti-Dumping Act of 1916*, WTO Doc. WT/DS/136 (adopted Sep. 26, 2000) [hereinafter *Panel Report — Anti-Dumping*]; Appellate Body Report, *United States — Anti-Dumping Act of 1916*, WTO Doc. WT/DS136/AB/R (adopted Sep. 26, 2000).

⁸ On this basis, it differentiates itself from the approach to price discrimination taken by competition law considerations: “It is the understanding of the Panel that, under anti-trust law, transnational price discrimination of the type covered by the definition of ‘dumping’ in Article VI:1 of the GATT 1994 is not sufficient as such to form the basis for a claim of violation of anti-trust law, even in the presence of a price-based disruption on the export market. It is necessary to demonstrate other specific practices, such as monopoly, abuse of dominant position, price agreement or concerted practices, of which international price discrimination may at most constitute supporting evidence”. *Panel Report — Anti-Dumping, id.*, ¶ 3.105.

II. INDUSTRIE DES POUDRES SPHÉRIQUES AND “PROTECTIVE AND PREVENTIVE MEASURES”

Derived from the WTO regime’s premise of *private-enterprise economies*,⁹ the WTO Anti-Dumping Agreement generally assumes private-enterprise action when policing the condemned practice of injurious dumping.¹⁰ Dumping is, in essence, price competition. Such price competition is subject to sanction in the form of duties whether intentional or not. The *mens rea* of the manufacturer concerned does not play a role here.¹¹ What counts is an objective assessment of the pricing practice of the manufacturer concerned. Anti-dumping duties, therefore, seek to police the effect of certain selling practices as opposed to their underlying intent.

Indeed, dumping is a phenomenon by nature related to forms of distortion of competition otherwise only seen in competitive domestic markets. It is a form of cross-frontier private-enterprise price discrimination, outside the reach and application of domestic competition laws. Broken down to its most basic appearance, dumping is maybe best explained by Jacob Viner’s famous example of the unfair trading practices by English manufacturers, who “in the early years of American independence not only dumped in the United States but did so with the deliberate purpose of crushing, or, in the language of the time, ‘stifling’ or

⁹ Francis Snyder, *The Origins of the ‘Nonmarket Economy’: Ideas, Pluralism, and Power in the EC Anti-Dumping Law about China*, 7 *European L. J.* 369, 379 (2001).

¹⁰ The basic framework of WTO anti-dumping law is set out in Article VI of the GATT 1994 and the accompanying Ad Notes. The WTO Anti-Dumping Agreement implements and applies the relevant provisions of the GATT 1994; see, in this regard, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 1, title, Jan. 1, 1995, 1868 U.N.T.S. 279. The GATT 1994 and the WTO Anti-Dumping Agreement must be applied together. See Appellate Body Report, *US — Shrimp (Thailand)/US — Customs Bond Directive*, ¶ 223, WTO Doc. WT/DS345/AB/R (adopted Aug. 1, 2008). Bourgeois, Berrod and Fournier argue that comparatively little importance was attributed to anti-dumping during the Uruguay Round of Multilateral Trade Negotiations in general, as, according to them, anti-dumping was not generally perceived by governments to be a major problem in the GATT trading system in the early 1980s. Indeed, the operation of the Anti-Dumping Code was not among the key issues considered in the context of the GATT ministerial meeting in November 1982, nor did its profile really gain attention before the summer of 1989. See *THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS’ PERSPECTIVE* 153-55 (Jacques H.J. Bourgeois, Frederique Berrod & Eric Gippini Fournier eds., 1995).

¹¹ See Appellate Body Report, *United States — Anti-Dumping Act of 1916 (EC)*, ¶ 107, WTO Doc. WT/DS136/AB/R (adopted Sep. 26, 2000).

‘strangling’ the young American industries.”¹² As Advocate General, Verloren Van Themaat, has previously noted, this brings about an effect akin to that which the European Union’s rules on competition seek to counter.¹³

Accordingly, an anti-dumping duty is imposed as a measure through which the host State seeks to protect its industry from the injurious—or predatory—actions of private enterprises seeking to break open the host State’s market and drive out existing competition, be they national or foreign. This imposition is the first leg. The second leg involves keeping in place measures to ensure that, in the foreseeable future, no such private-enterprise actions recur when the duties, put in place to tackle those past actions, disappear. Hence, anti-dumping duties have a forward-looking element.¹⁴

The European Court of Justice has already had occasion to look at the nature of anti-dumping duties, albeit only once. In *Industrie des Poudres Sphériques*, the Court of Justice was faced with an appeal by an undertaking, specialising in the production of certain calcium metal, which argued that the European Commission could not continue an anti-dumping investigation on the basis of a different reference period than that used in a regulation which had partially been declared invalid.¹⁵ According to the applicant in that case, the Commission’s action had violated the principle of legal certainty as it would allow for the replacement of the annulled regulation with retroactive effect.¹⁶ The Court disagreed with this assessment. It noted that “[t]he adoption of anti-dumping duties is not a ‘penalty’ relating to earlier behaviour but is a ‘protective’ and ‘preventive’ measure against unfair competition resulting from dumping practices” (emphasis added).¹⁷ On this basis, the Court of Justice agreed with the finding of the General Court that the Commission was, indeed, permitted to continue a re-opened proceeding on the basis of a different reference period, and rejected the appeal.¹⁸

¹² Jacob Viner, *The Prevalence of Dumping in International Trade: I*, 30 J. Pol. Econ. 655, 656-57 (1922).

¹³ Opinion of Advocate General Verloren Van Themaat in Joined Cases C-239/82 & C-275/82, *Allied Corporation and Others v. Commission*, 1984 E.C.R. 1005, at 1038.

¹⁴ See, however, the disagreement by Advocate General Warner in Case C-113/77, *NTN Toyo Bearing v. Council*, 1979 E.C.R. 1185, at 1251: “I do not overlook the oft-repeated assertion of the Council that antidumping duties are measures of commercial policy and not penalties. The reality is, however, that for a manufacturer whose products are subjected to such a duty it has the effect of a penalty.”

¹⁵ Case C-458/98, P *Industrie des Poudres Sphériques v. Council*, 2000 E.C.R. I-8177, at 14 [hereinafter Case C-458/98].

¹⁶ Opinion of Advocate General Cosmas in Case C-458/98, *id.*, ¶ 77.

¹⁷ Case C-458/98, *supra* note 15, ¶ 91.

¹⁸ *Id.*, ¶ 96.

Until today, *Industrie des Poudres Sphériques* stands as the only judgment in which the Court of Justice has given specific directions as to the nature of anti-dumping duties. As set out above, this characterisation consists of one negative (“not a penalty”) and two positive (“a protective and preventive measure”) attributes. It is these attributes that the following parts will look at more closely.

III. THE DISASSOCIATION FROM THE GROUP OF PENAL MEASURES AND SANCTIONS

Anti-dumping duties are not penal measures or sanctions, whether of administrative or criminal nature, as that would entail the intended correction of—or punishment for—a past wrong in a similar way as the types of burdens traditionally found to constitute civil or criminal penalties.¹⁹ Anti-dumping duties do not set out to do so. They are not penalties for earlier behaviour. An earlier judgment of the General Court of the European Union had already noted that, due to their disconnection from criminal legal proceedings, the UNHR’s International Covenant on Civil and Political Rights does not apply to anti-dumping duties, meaning that there need not be an assessment of guilt, the consideration of the presumption of innocence, or the regard for the right for an interested party not to provide evidence.²⁰

In fact, the manufacturer, at the point in time at which he is later found to have committed injurious dumping, as opposed to mere dumping,²¹ is not going to have been aware of the impact of his sales—namely, injury to the Union industry and a causal link between the two.²² To borrow the wording of the European Court of Human Rights in *Kokkinakis*, because “an offence must be clearly defined in law . . . the individual [must be in a position] to know from the wording of the relevant

¹⁹ That being said, it should be noted that in 1921 the U.S., in adopting an amended anti-dumping act which closely resembled Canada’s anti-dumping law, used a civil statute to assess penalty duties to compensate for price differentials. See Aradhna Aggarwal, *Patterns and Determinants of Anti-Dumping: A Worldwide Perspective* 4 (Indian Council for Research on Int’l Econ. Relations, Working Paper No. 113, 2003).

²⁰ See Case T-48/96, *Acme Industry & Co. v. Council*, 1999 E.C.R. II-3089, ¶ 30 and, in similar vein, recalled in T-410/06 *Foshan City Nanhai Golden Step Indus. v. Council*, 2010 E.C.R. II-879, ¶ 133. See also, by way of analogy, Case C-374/87, *Orkem v. Comm’n*, 1989 E.C.R. 3343, ¶ 31. The U.S. courts have followed the same logic. See, in this regard, for instance, *C.J. Tower & Sons v. United States*, 71 F.2d 438 (C.C.P.A. 1934); *Imbert Imports Inc. v. United States*, 331 F. Supp. 1400 (Cust. Ct. 1971).

²¹ See, for an explanation of the difference between the two, the Opinion of Advocate General Sharpston in Case C-638/11 P, *Council v. Gul Ahmed Textile Mills*, 2013 EUR-Lex (Nov. 11, 2013), ¶¶ 48-50.

²² Valsamis Mitsilegas, *Art 49 – Principles of Legality and Proportionality*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 1351, 1355 (Steve Peers, Tamara K. Hervey, Jeff Kenner & Angela Ward eds., 2014).

provision . . . what acts and omission will make him liable.”²³ No such knowledge can ordinarily be presumed at the time of exportation, unless predatory pricing practices are involved.²⁴ Neither does retroactive effect flow from the adoption of anti-dumping duties, nor from their extension or review. Note, in this regard, that the classic concept of retroactivity also does not arise in the application of the ninety-day ‘backward’ collection of these duties pursuant to Article 10(3) of Regulation (EU) 2016/1036, as that, in turn, would violate the balance that must be struck between the protection of the operator’s rights and the Union’s interest in protecting its industry.²⁵

Most distinctively, however, the amount of penalty generally bears no relation to the cost of individual remediation of any harm caused by performance or failure of performance of an act.²⁶ Nothing in European Union law indicates that the amount of a penalty imposed pursuant to a violation of a law falling within the competence of the Union should, in any way, be related to the costs incurred by the person or industry affected by it.²⁷ Instead, anti-dumping duties, and in particular the so-called

²³ *Kokkinakis v. Greece*, 260 Eur. Ct. H.R (1993), ¶ 53. The European Court of Justice applies the same test; see Case C-72/15, *Rosneft Oil Comp. v. Her Majesty’s Treasury*, Mar. 28, 2017, ¶ 162: “[T]he principle of *nulla poena sine lege certa* . . . which falls within the scope of Article 49 of the Charter . . . implies, inter alia, that legislation must clearly define offences and the penalties which they attract. That condition is met where the individual concerned is in a position, on the basis of the wording of the relevant provision and, if necessary, with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable.”

²⁴ That situation is notably different where the Commission has published a regulation registering imports under Article 14(5) of Regulation (EU) 2016/1036 after a complaint by the Union industry that a further substantial rise in imports of the injuriously-dumped product has occurred. See Commission Regulation 2016/1329, 2016 O.J. (L 210), at 27. In the latter case, the importer and its manufacturer are made aware that their continued dumping will cause further injury and the definitive duties to be undermined.

²⁵ See, e.g., Case 63/83, *Regina v. Kent Kirk*, 1984 E.C.R. 2689, ¶ 22: “The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.” See also Mitsilegas, *supra* note 22, ¶ 49.12.

²⁶ See, by analogy, *Huaiyin Foreign Trade Corp. v. U.S. Dep’t of Commerce*, 26 C.I.T. 494 (Ct. Int’l Trade 2002) 24 and the case-law cited.

²⁷ Although, needless to say, the principle of proportionality still circumscribes any punishment arising from such a violation as well as any limitation of a right ensured by European Union law. See, e.g., Case C-601/15PPU, *J.N. v. Staatssecretaris voor Veiligheids Justitie*, Feb. 15, 2016, ¶ 54. See also Charter of Fundamental Rights of the European Union, arts. 49, 52, Dec. 18, 2000, 2000 O.J. (C 364) 1.

'lesser duty' rule,²⁸ are specifically geared towards the remediation of the harm caused to Union industry as a whole, so long as that remediation complies with the general EU law principle of proportionality.²⁹ This is important, in that the level of duties is generally seen to capture the amount necessary to remove the harm or the dumping arising from the subjected imports. Nothing in the level of duties is meant to discourage future dumping behaviour, or otherwise seeks to have a deterring aspect.

Indeed, because the European Commission's goal in the imposition of anti-dumping duties is specifically to equalise competitive conditions between foreign manufacturers and the Union industry (because there is nothing forbidding the sale of the product concerned at Price X), it is not punishing past practice. Instead, it intends to ensure that the continued sale of the product concerned at a certain price (here, Price X) will not lead to injury to the domestic industry (or is geared to remove the dumping margin concerned). It is in light of this that Advocate General Sharpston has described anti-dumping duties as follows:

"[A]n anti-dumping duty is not a sanction designed to punish a dumping exporter for his behaviour. It is rather (clumsy though it may be) a mechanism designed to redress, as nearly as possible, an imbalance considered unfair to the domestic industry."³⁰

So, it is clear that rather than punitive, anti-dumping duties are supposed to be corrective in their nature. As such, should the value of the imported product, when released for free circulation, fall within the range of dumping prices, then the anti-dumping duty is intended to correct that price logically upward.³¹

²⁸ Second sub ¶ of Regulation 2016/1036, art. 9(2), 2016 O.J. (L 176) (EU), the idea being that the level of anti-dumping duties will be at the level of dumping or injury, whichever is the lower of the two.

²⁹ Indeed, as the General Court in *Canadian Solar Emea v. Council* noted, the lesser duty balances the interests of the manufacturers, importers, industry, and consumers of the European Union and expresses, in respect of EU trade defence measures, the general principle of proportionality. See Case T-162/14, *Canadian Solar Emea v. Council*, Feb. 28, 2017, ¶ 190. So, as there is a choice between two levels of penalties, that is to say between the injury margin and the dumping margin, the lesser duty rule ensures that recourse is had to the least onerous so that the disadvantages caused are not disproportionate to the aims pursued. See by analogy, for instance, Joined Cases C-497/15 & C-498/15, *Euro-Team v. Budapest Rendőrfőkapitánya*, Mar. 22, 2107, ¶¶ 40, 42-43. See also Regulation 2016/1036, arts. 10(4)(d), 13(1), 13(2)(c), 2016 O.J. (L 176)(EU), which specifically refers to the 'remedial effects' of anti-dumping duties.

³⁰ Opinion of Advocate General Sharpston, *supra* note 21, ¶ 60.

³¹ BRIAN HINDLEY, *Trade Policy of the European Community*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 374, 382 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993).

IV. ANTI-DUMPING DUTIES AS ‘PROTECTIVE’ MEASURES?

This leads the discussion to the second attribute that derives from the judgment in *Industrie des Poudres Sphériques*: anti-dumping duties are ‘protective’. Readers of *An Inquiry in the Nature and Causes of the Wealth of Nations* will have jumped at the use of the term ‘protective’ in relation to a measure that merely seeks to equalize competitive conditions. A ‘protective’ measure in the hands of the legislature, Adam Smith argued, would lead, on the side of merchants and manufacturers, the desire to “secure themselves the monopoly of the home market”.³²

Here, a curiosity of the European Union legal order gains in importance. The European Union legal order is characterised by the unique fact that all official languages of the Union are accorded equal weight so that no single language version carries determinative value over another. Similarly, the collective of many interpretations does not automatically outweigh the interpretation of that of a single language version or that of a minority of language versions. As the Court of Justice has previously opined, “[w]here there is divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.”³³

This principle of legal interpretation informs any analysis of European Union case-law and will be of particular use in analysing the judgment in *Industrie des Poudres Sphériques*. Indeed, a simple comparison of the different language versions of the judgment reveals divergence in translation and therefore, divergence in understanding of the measures at issue. Note, in this regard, that while the English language version speaks of a ‘protective’ measure, the French (*unemesure de défense*), Spanish (*unamedida de defensa*), Italian (*unamisura di difesa*), Dutch (*een beschermende maatregel*), and Portuguese (*umamedida de defesa*) language versions of the judgment all point towards the understanding of anti-dumping duties as ‘defence’ measures, rather than ‘protective’ measures. The former notably implies defending a State’s industry against injuriously dumped imports, whereas the latter, at least in the economic sense of the term, more clearly yields towards shielding the said industry from any foreign competition.

³² ADAM SMITH, AN INQUIRY IN THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 245 (Cosimo Classics 4th ed., 1786).

³³ See, e.g., Case C-451/08, *Helmut Müller v. Bundesanstalt*, 2010 E.C.R. I-2673, ¶ 38; Case C-372/88 *Cricket St Thomas*, 1990 ECR I-1345, ¶¶ 18-9; Case C-149/97 *Institute of the Motor Industry*, 1998 ECR I-7053, ¶ 16; and Case C-239/07 *Sabatauskas and Others*, 2008 ECR I-7523, ¶¶ 38-9.

It is clear that the latter sense of the term would not bode well with the nature of anti-dumping duties. After all, as Advocate General Tesouro has noted in *Epicheiriseon Metalleftikon*, the utilisation of commercial policy measures, such as anti-dumping duties, should not result in an unjustified hindrance to international trade.³⁴ A right to protection under European Union trade defence law does not exist.³⁵ All that the Union legislator provides for is a legitimate interest on the part of the Union industry in the adoption of measures if—and only so long as—the conditions for their imposition, which are dumping, injury, causation, and Union interest, are satisfied.³⁶ Indeed, and while the Court of Justice has never explicitly recognised the right to trade internationally,³⁷ the argument could be made that the references in Article 3 of the Treaty on European Union to *free and fair trade* and Article 206 of the Treaty on the Functioning of the European Union to a contribution “in the common interest, to the harmonious development of world trade [and] the progressive abolition of restrictions on international trade” instil also within the Union’s external trade policy the idea of the same type of liberalising market order that initiated the European project *ab initio*. Contrast this, by analogy, with the view of the U.S. Supreme Court which, already in 1904, has said that there exists no vested right under the Constitution to trade internationally.³⁸ As such, defining anti-dumping duties as ‘protective’ as opposed to ‘defensive’ of the domestic industry instils an incorrect assumption that the Union’s founding treaties were meant to limit the right

³⁴ Opinion of Advocate General Tesouro in Case C-121/86, *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon v. Council*, 1989 E.C.R. 3921, at 3930.

³⁵ *Id.*, ¶ 26.

³⁶ Case C-191/82, *FEDIOL v. Comm’n*, 1983 E.C.R. 2913, ¶ 25.

³⁷ Like Petersmann observes, the Court of Justice (and, before it, the Court of Justice of the European Communities) has only so far recognized the freedom of trade in relation to professional and trading activities within the European Economic Community (and now the Union). E.U. Petersmann, *National Constitutions and International Economic Law*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 22–24 (Meinhard Hilf & Ernst-Ulrich Petersmann eds. 1993). Peers has argued that no right to trade deserves to be recognized by the Court of Justice. See S. Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 129 ((Grainne De Burca & Joanne Scott ed., 2001).

³⁸ “[N]o individual has a vested right to trade with foreign nations which is broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.”, U.S. Supreme Court decision in *Buttfield v. Stranahan*, 192 US 470, 493 (1904); See also *Arjay Assoc., Inc. v. Bush*, 891 F.2d 894 (Fed. Cir. 1989): “When the people granted Congress the power ‘to regulate Commerce with foreign Nations’ ... they thereupon relinquished at least whatever right they, as individuals, may have had to insist upon the importation of any product”, cited in F. L. Morrison & R. E. Hudec, *Judicial Protection of Individual Rights Under the Foreign Trade Laws of the United States*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 91 (Meinhard Hilf & Ernst-Ulrich Petersmann eds. 1993).

to trade internationally. This understanding would be closer to the American interpretation of the right to trade, rather than, say, the German legal interpretation that the constitutional guarantee of liberty protects also the freedom to trade and undertake commerce with foreign economic areas.³⁹ To the author, the American interpretation would be a misleading understanding of the European Union's position in, or approach to, the international trading order, particularly in light of the clear Treaty reference to *free and fair trade*.⁴⁰

Interestingly, only the German (*eine Schutzmaßnahme*) and Danish (*foranstaltning til forsvar*) translations portray the idea of a 'protective' measure, whereas the Swedish translation (*ensäkerhets- . . . åtgärd*) rather conveys the picture of a 'security' measure, which points towards today's understanding of a safeguard measure⁴¹. Seen against the fact that the judgment in *Industrie des Poudres Sphériques* was originally drafted in French and interpreted against the purpose and general scheme of the Union's anti-dumping legislation, it would, accordingly, be wrong to follow the somewhat mistranslated concept of a 'protective' measure as opposed to a measure in the defence of free and fair trade. So, there is a careful need for that separate categorisation to be maintained as otherwise, this note could not pay tribute to the unique status of anti-dumping duties under European Union law.

V. ANTI-DUMPING DUTIES AS 'PREVENTIVE' MEASURES

The third and final attribute that the Court of Justice attached to anti-dumping duties is that of a 'preventive' measure: a tool that is intended to keep something undesirable from occurring.

This can be understood in one of two ways. First, with regard to the classic remediation-of-existing-injury scenario, where the purpose of an anti-dumping duty is to prevent foreign manufacturers from aggravating further the (existing) injury to domestic industry in the Union by continuing their less than 'fair value' sales in the Union market. In this scenario, the 'preventive' aspect of the duty is reflected in the prospective reduction (if set against the dumping margin) or elimination (if set against the injury margin)—for a certain period of time—of the asymmetry between the price level in the Union and that of the home market of the product concerned. Here, the remedial and corrective nature of the duties has the effect of preventing further injury from occurring while competition is maintained in the Union market.

³⁹ Petersmann, *supra* note 37.

⁴⁰ Which, in turn, could imply that there exists a right to 'fair trade'.

⁴¹ The rules on which are implemented into EU law through Regulation 2015/478, 2015 O.J. (L 83) (EU) and Regulation 2015/755, 2015 O.J. (L 123).

Second, with regard to the much less common ‘threat of injury’ type of situation, where the purpose of the duty is to prevent injury from actually occurring in the first place (or from returning). Here, the ‘preventive’ aspect of the duty is reflected in the prospective remedial effect the duty casts over the market situation for the product concerned so that a competitive market price is retained even once imports below normal value start pouring in. Picture in this regard, for instance, the U.S. Congress’ concern in 1921 that Germany’s chemical giants would prevent the establishment of an American chemical industry if no action against sales at less than fair value was taken.⁴² A duty cast under the second type of scenario would, in this case, defend the American chemical industry, which at the time was in its infancy, from future injury arising from German chemical imports.

For both scenarios the remaining existence of fair, non-injurious-priced imports is vital because, much like an umbrella on a rainy day, the duty is not meant to immobilise or shield the industry from competition with fair-priced imports. In fact, business must continue as usual during the period where the competitive conditions between the two products are equalised and a fair ‘apples-to-apples’ comparison is permitted, as otherwise, the consumer would not be the rightful and ultimate arbiter of the success of the product (and manufacturer) concerned.

An analysis of the various language versions of the judgment does not, however, necessarily underline the above analysis. It appears, in fact, that none of the translations of the judgment in *Industrie des Poudres Sphériques* barring the English language version address this aspect.⁴³ While all language versions note that anti-dumping duties are no sanction against past behaviour, it is only the English language version that then appears to go on to establish that future undesirable effects of the dumped imports are also intended to be tackled. This is an unfortunate oversight. For ‘preventive’, the prospective nature of anti-dumping duties is one of the most important aspects of what sets these duties apart most clearly from other measures under European Union law. What other types of measures assess the payment to be effectuated prospectively on the basis of a fixed period in the past and whether or not a certain event takes place? The author can think of no equivalent in the national legal systems he is acquainted with.

Thus, and whether or not by way of lucky coincidence, the English language version of the judgment in *Industrie des Poudres Sphériques* most closely encapsulates also the remedial aspect of anti-dumping duties. When seen against the object and purpose of anti-dumping legislation with respect to international and domestic law, this

⁴² N. David Palmeter, *Material Retardation in the Establishment of an Industry Standard in Antidumping Cases*, 21(6) J. WORLD TRADE 1 (1987).

⁴³ The author does not speak or read Greek or Finnish and so had to rely on the less-than-certain results of a certain machine translation tool when formulating his analysis.

additional characteristic must be read into the other language versions too, for otherwise the nature of anti-dumping duties would not be properly encapsulated.

VI. A FURTHER CHARACTERISTIC: DISSOCIATING ANTI-DUMPING DUTIES FROM TAXES

The introduction to this note highlights that anti-dumping duties are imposed as a payment levied by a State. One would, accordingly, be prone to assume that they are taxes. Indeed, at least one U.S. judgment has previously held that they are.⁴⁴ But are they taxes? To the author, the answer should be *no*.

Anti-dumping duties arise from a binding set of rules set out at the international law plain, incorporated into national law. They apply only to the good that is dumped into the host market and not to the manufacturer in the home market *per se*. That is to say, the manufacturer as such will not be taxed for the importation of goods not subject to the investigation, even though his internal data may be used when determining the individual duty rate.

In fact, the taxation powers of States pose no obstacle to dumping.⁴⁵ Recall, in this regard, that ‘taxes’ on importation, are strictly circumscribed by the GATT.⁴⁶ Anti-dumping duties do not fall within the group of revenue duties charged upon importation, because they are not a result of the politics of ‘tariff making’ and cannot be revised through multilateral negotiations at the WTO (and so are not customs duties).⁴⁷

⁴⁴ Compare at this point U.S. jurisprudence, which has held anti-dumping duties to be taxes. See *Tung Mung Development Co. Ltd. v. United States*, 219 F. Supp. 2d 1333 (Ct. Int’l Trade 2002), at 1339.

⁴⁵ Jacob Viner, *Ordinary Protective Tariffs as Safeguards Against Dumping*, in *THE WTO AND ANTI-DUMPING*, 74 (Douglas R. Nelson & Hylke Vandenbussche eds. 2005).

⁴⁶ General Agreement on Tariffs and Trade arts. 2, 3, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

⁴⁷ See Regulation 952/2013, art. 56(2)(c), 2013 O.J. (L 269)1(EU), which sets out the elements comprising the Common Customs Tariff. The Combined Nomenclature is the Union’s goods nomenclature based on the Harmonised System of the World Customs Organization. In the US, the Customs Court, the Court of International Trade’s predecessor originally referred to ‘regular duties’ as those duties ‘levied under the various schedule of the Tariff Act of 1930 as assessable on all importations of a particular class of merchandise’ to distinguish it from ‘special duties’, which were those duties ‘levied against any particular importations, such as marking duties, or additional duties for undervaluation, or countervailing duties’. See *Dynacraft Indus. v. United States*, 118 F. Supp. 2d 1286 (Ct. Int’l Trade 2000), at 13-14 and the case-law cited.

Indeed, the beauty of their special nature is that they fall outside the traditional notions of discrimination which ordinarily circumscribe the application of ‘targeted taxes’ or the violation of the EU law principle of equal treatment vis-à-vis importers from other countries exporting the same product to the Union,⁴⁸ unless those countries formed part of the investigation.⁴⁹ For that reason, anti-dumping measures allow, theoretically, for an almost infinite degree of discrimination at the level of duty-setting because, in principle, a good could be taxed differently according to every plant of the same firm, including plants located in the importing country.⁵⁰

VII. CONCLUSION

The above discussion may be limited to aspects of European Union law, but the concepts employed easily resonate outside the remit of application of the EU Treaties. By making use of both a negative and a positive characterisation approach, the Court of Justice in *Industrie des Poudres Sphériques* appropriately encapsulated the

⁴⁸ The principle of equal treatment under European Union law requires that, for the Union’s institutions to be accused of discrimination, the accused must show that the former treated like cases differently thereby placing some traders at a disadvantage in comparison to others without such differentiation being justified by the existence of substantial objective differences. See Case T-255/01, *Changzhou Hailong Elec. & Light Fixtures & Zhejiang Sunlight Grp. v. Council*, 2003 E.C.R. II-4744, at ¶ 60. In any case, the Court has already held that the principle of equal treatment does not apply in all respects when the European Union discriminates between third countries in its external relations. See Case C-272/15, *Swiss Int’l Air Lines v. Sec’y of State for Energy & Climate Change*, Dec. 21, 2016, at ¶ 14. See also where the Court of Justice noted that the difference in treatment between independent and related importers for the purposes of treating anti-dumping duties as a cost for related importers but not for unrelated importer, because the former “are associated with the exporter [and] are thereby placed on the other side of the ‘dumping fence’, in the sense that they participate in the practices which constitute dumping and, in any event, are in a position to have full knowledge of the circumstances underlying it.” See T-162/94, *NMBFr. SARL v. Comm’n*, 1996 E.C.R. II-430, at ¶ 118.

⁴⁹ Regulation 2016/1036, *supra* note 2, art. 13(5). See also Opinion of Advocate General Darmon in Case C-49/88, *Al-Jubail Fertilizer Co. & Saudi Arabian Fertilizer Co. v. Council*, 1987 E.C.R. I-3187, ¶¶ 18-24, 24 thereof, the following explanation: “[E]ven if discrimination between imports from Libya and imports from Saudi Arabia were established, such discrimination could at most call in question the anti-dumping duty on Libyan imports, to the extent that they had enjoyed an unjustified preference, but could not lead to the annulment of Regulation No 3339/87 to the extent that it applies to Saudi Arabian imports, in as far as it was adopted on the basis of findings correctly made and in accordance with the basic regulation.” See also Opinion of Advocate General Verloren Van Themaat in Case C-53/83, *Allied Corp. v. Council*, 1985 E.C.R. I-1621, at 1637.

⁵⁰ Patrick A. Messerlin & Geoffrey Reed, *Antidumping Policies in the United States and the European Community*, 105 *ECON. J.* 1565, 1572 (1995).

nature of anti-dumping duties and provided, until today, the most complete definition of anti-dumping duties themselves.

The disassociation from the group of penal measures or sanctions provides probably the most important aspect practically. The converse, that is, a definition that would include anti-dumping duties within this group of measures, would bring about a range of practical implications not wholly reconcilable with the nature of anti-dumping duties as required pursuant to their international law origin. The same goes for the positive characterisation of their 'preventive' nature: a definition not paying due respect to the unique prospective approach the duties concerned take to 'protecting' (within the meaning of 'remedying' price asymmetry) the home market would not give credence to their full nature.

In their abstract, the attributes discussed above would, indeed, likely be employable also by other legal systems to define the nature of anti-dumping duties: they are always 'defensive' or 'protective' of domestic industry, because they seek to counter unfair trading practices; they are always 'preventive' and remedial of future injuriously-priced imports; and they are never 'penalties', because they do not seek to discourage future dumping behaviour or punish past misdeeds.⁵¹ And so, it becomes clear why anti-dumping duties are what they are: not a fox and not a bald eagle, but a special type of measure in their own right. They are different and there is something kind of fantastic about that.⁵²

⁵¹ Because, it is to be remembered, dumping, *as such*, is not actionable practice if there is no injury.

⁵² Mrs Fox: [to her son, Ash] "*Ash, I know what it's like to feel*" [gesticulates] "*different*" . . . "*We're all different.*" [Indicates Mr. Fox] "*Especially him. But there's something kind of fantastic about that, isn't there?*" FANTASTIC MR. FOX, *supra* note 1.