Global Journal of Politics and Law Research

Vol.5, No.1, pp.26-45, February 2017

Published by European Centre for Research Training and Development UK (www.eajournals.org)

A CONCEPTUAL FRAMEWORK: 'DUMPING' AND 'ANTI-DUMPING' IN THE INTERNATIONAL AND REGIONAL LEGAL SYSTEMS

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ABSTRACT: *These papers cover the discussion about the concept of dumping and anti-dumping. It provides a clear framework of these concepts and their historical foundation. The paper views the economic and the legal definition of dumping and views the Shariah laws concerning this concept. Finally, the paper shed light on the Arab countries and their utilization of anti-dumping within the framework of the WTO*

KEYWORDS: **Arab Countries, Anti-Dumping, Dumping, *WTO***

INTRODUCTION

The Practice of dumping in the global market is clearly of concern to all trading States, whether importers or exporters. It is a form of price discrimination and unfair competition, affecting a broad range of competing interests, both national and foreign, and products in the captive market (Aggarwal, 2007). The paper will shed light on the important historical events that took place and led to the adoption of the WTO AD Agreement. It will be seen that there was recognition amongst many States of the necessity to regulate anti-dumping in a comprehensive and clear way. However, this chapter will argue that GATT Agreement tended to favour the industrially developed States at the expense of those with comparatively insignificant trade power (Bown, 2002). The advent of the WTO in 1995 brought with it more emphasis on the regulations of the trade dumping as a way of protecting developing member States. The WTO Anti-dumping Agreement allows the importing country to apply duties to offset the price advantage enjoyed by the exporter (Aggarwal, 2007).

The second part of the part will be dedicated to the meaning of the concept 'dumping'. It will be shown that the term "dumping" has different meanings depending on the perspective that it is seen through, e.g. economic, legal, or Islamic Sharia jurisprudence. Section three will focus on an important element in the dumping determination process; that is, the 'injury' element. It will be noted that dumped imports can materially threaten or injure domestic producers or lead to material retardation of the establishment of an industry.

Historical Development: Anti-Dumping, From GATT to the WTO

The trajectory of the international economy witnessed a turning point in the aftermath post-World War II. At this time, many international and national actors were working towards growing international economic relations, hoping that these relationships would contribute to the accomplishment of global peace and security. Indeed, specifically after the industrial revolution which was accompanied by a huge increase in the production of goods, it became clear that there was a need to regulate international trade, so that it could establish cooperative international relationships between States.

Therefore, many economic thinkers called for the adoption of a new international trade system to be based on open and fair competition, liberating trade exchange between countries, and introducing

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

new ways to facilitate the passage of goods and services through borders (Abdul-Hakim and Fuwzi, 1999). Those calls were raised when the world was witnessing the establishment of a new phenomenon called 'economic globalisation', which required lifting all obstacles and barriers facing international trade. In these economic circumstances, international negotiations began between many international parties to consider the barriers that were hampering the trade exchange, focusing their attention mostly on tariffs (Dabbah, 2003). Eventually, these negotiations led to the adoption of the General Agreement on Tariffs and Trade, known as 'GATT'.

The GATT agreement was essentially a post-war amalgam of 23 industrially developed countries, to facilitate recovery by the reduction of discrimination and tariffs on trade between states (Michalopoulos, 2000). The plan was to expand production and unify the bases of trade relationships in the pursuit of mutual interests; a principle of liberalisation of trade which largely favoured the powerful nations over those with markedly less influence or control over their own fates.

Davey describes the operation of the 'most favoured nation' (MFN) status amongst members, where economic well-being took effect in the form of eliminating price and product discrimination, primarily, by the removal of trade barriers between those who subscribed to the principle of free trade, and indeed, were in a position to take advantage of the opportunities (Davey, 2012) MFN status allows the merchant freedom to import their wares into the signatory, recipient nation, competing on terms of its choosing because they are free of tariff barriers which add to the cost, and therefore price; the recipient captive state is prohibited from increasing existing tariffs to deal with the competitor, who may, in fact, be dumping its cheap excess production in order to seek commercial advantage (Bossche, 2008).

Article VI of GATT 'condemns, but does not prohibit dumping', whilst authorising resistance to the practice by 'elaborate rules that specify the conditions under which antidumping duties may be imposed. The benefits are arguably outweighed by the damage to the recipient host, and tariffs are the main method by which states protect their domestic economy from dumping (Ciuriak,2005).

Bentley and Silbertson consider the principle motivation of GATT to be tariff reduction and liberalisation of international trade much more than providing mechanisms to ensure members are engaging in fair trade (Bentley and Silbertson, 2007). It was a major break with national attitudes of the past, where even America had a fledgling development status with the need for state intervention to protect its growing industrial base. The Wilson Tariff of 1894, for example, made it unlawful for foreign producers to combine or conspire to monopolise the U.S. market (Irwin, 2005), followed by an Antidumping Act in 1916 making it

'illegal to sell imported goods at prices substantially lower than the market value in the exporting country with the intent of destroying or injuring an industry in the United States, or of prevent the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States (Congressional Budget Office, 1994)

Since its inception, GATT has sought to achieve trade liberalisation, and by 1986 the average rate of tariff imposition between members had reduced from 40% in 1947 to less than 5% by 2000 (McCalla, 2003). A result of the evolution of GATT was the World Trade Organisation which, 'simply put … deals with the rules of trade between nations at a global or near-global level', providing a forum and legislative framework for international trade treaty negotiations and the

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

resolution of problems arising therefrom (WTO, 2016). Van den Bossche and Werner describe its ultimate objectives as (i) an increase of living standards, (ii) achieving full employment, (iii) growth of real income and effective demand, and (iv) expansion of, and trade in, goods and services, whilst preserving the environment and contributing to the growth of developing nations. This is to be achieved by the reduction of tariff and other barriers to trade, ending discriminatory treatment between nations and 'positive efforts' by members to promote the development of members (WTO, 2016).

Dumping, is a centuries-old tactic to gain and grow influence in the economies of other nations with an aim to enrich of the merchant nation. In the early 20th century, however, with the decline of world empires and ascendancy of individual nation states, that legislation was passed to counteract dumping tactics (Grimwade, 2009). In 1947, the entitlement of countries to take action against the practice that threatened or caused material injury to their domestic producers and economies was enshrined in Article VI of the General Agreement on Tariffs and Trade (GATT), subscribed to by 23 of the major trading nations of the time, members of the defunct International Trade Organisation. It has not proven to be a wholly successful enterprise in the regulation of trade, given the competing self-interest of members and this has arguably been a continuing problem since the inception of the World Trade Organisation in 1995. GATT continues as the primary global trade regulatory mechanism, but is appreciative of its imperfections in dealing with dumping;

'world trade had become far more complex and important than 40 years before: the globalization of the world economy was underway, trade in services - not covered by GATT rules - was of major interest to more and more countries, and international investment had expanded. The expansion of services trade was also closely tied to further increases in world merchandise trade … in agriculture, loopholes in the multilateral system were heavily exploited, and efforts at liberalising agricultural trade met with little success. In the textiles and clothing sector, an exception to GATT's normal disciplines was negotiated in the 1960s and early 1970s'.

The relationships of nations within the WTO have seen a growth of administrative and regulatory measures in the international market to curb the dumping of goods which is not unlawful in terms of the treaty principles, save where it threatens or causes material injury (Bossche, 2008) There is concern that allegations of dumping are used as part of a bargaining process, by obtaining a concession, whether political or economic, in inter-state negotiations (Mattar, 2014). Regulation on such a scale is complex, littered with different levels and strengths of self-interest, but unrestricted freedom of trade and tactics of commercial control by stronger nations pose considerable risks for developing economies, and indeed each other. In *Indian Anti-Dumping Authority, India v Saudi Arabia, Oman and Singapore*, for example, the Middle Eastern Nations of Omar, Saudi Arabia, and Singapore were involved in the export of a substantial volume of excess, state aided manufactured polypropylene into India; after complex investigation and analysis, it was found that India's own fledgling industry was profoundly compromised by the availability of cheap imports, and could not compete (Indian Anti-Dumping Authority, 2009).

The European Economic Community, on the other hand, appears to have considered the practice as effectively a price of membership in a tariff free single market, and anti-dumping measures were prohibited under its common policy of freedom of movement of goods under Article 9 (1) Treaty of Rome 1957 (Lloyd and Vautier, 2002) This prohibition does not, of course, apply to the wider global trading community, including Saudi Arabia. The European Commission regulates trade barriers with outside nations on behalf of its members, and will adjudicate on disputes between

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themselves. Saudi Arabia imports much of its machinery products from the European Union (EU), whilst exporting a substantial share of the Community's oil based requirements (EC Directorate-General for Trade, 2014). Whilst the economy of the Kingdom depends on a finite resource at present, development needs to be undertaken with regard to the sufficiency of its heavy manufacturing base. Foreign investment, expertise and products are essential to achieve this, but attention must be paid to the avoidance of dependence and compromise of domestic development.

It could be said that Article 6 of the GATT is the first legislation that had been adopted internationally, to combat dumping.[1] According to its first Paragraph, dumping occurs when the products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

This Article was considered vague and unclear. Therefore, discussions commenced at the international level to reconsider its provisions. Three rounds of negotiations were concluded; first, the Kennedy negations between 1964 -1967, then the Tokyo negotiations between 1972-1979, and finally the Uruguay negotiations between 1986-1993. This final round of negotiations is an important turning point in the history of the international trade as it led to the adoption of an agreement dedicated for antidumping measures. This agreement is called the 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade' and also referred to as 'the Anti-Dumping Agreement'. What distinguishes this agreement are its clarity, precision and transparency of its provisions. This perhaps could explain the acceptance of all States who participated in the Uruguay round to be obliged by it. The most important amendments that were introduced to the agreement could be summarised as follows:

- Detailed rules about how to calculate the amount of dumping.
- Detailed provisions that regulate the investigations in dumping cases.
- Rules to enforce the anti-dumping procedures and the period of the imposition of the dumping fees.
- Criteria that must be complied with by the arbitration committee in the conflicts that result from dumping cases.

The Concept of Dumping

An examination of dumping requires a comprehension of its various conceptualisations from different perspectives; whether it is economic, legal, or jurisprudential. A discussion of each perspective will be provided below. However, before engaging in a discussion of what is the meaning of dumping, a preliminary issue must be clarified. Dumping is not prohibited by the WTO Antidumping Agreement (Bossche, 2012). In fact, this Agreement does not even impose upon States any obligation to enact any legislation or system that counter dumping. Although it is not mandatory for member states to have protectionist measures in place, there is an obligation to inform the WTO if the State does have any legal system in place (Al-Najar, 1964).

[1] It should be noted that Havana Covenant allowed its member States to take anti-dumping measures if the dumping has injured a domestic product or has impacted a developing industry through imposing compensatory fees. Havana International Conference for Trade, held between 21 November 1974 until 24 March 1948 and had been signed by 53 States.

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The Economic Definition

Dumping policies are one of the issues that gained considerable attention from economic scholars. This is understandable, given the seriousness of the implications that the implementation of dumping policies have on the economies of the international and domestic markets. Economists differed in defining dumping; however, these definitions could be classified into three main categories, depending on the criteria adopted to explain dumping: defining dumping in accordance with *'the market price'* criterion; second, defining dumping in accordance with *'the value of the cost'* criterion; third, defining dumping in accordance with both criteria; i.e. *the market price and the value of the cost*'.

In accordance with the first criterion, some economists define dumping as the selling the same product by two prices -- one, which is high in the exporting country and the second, is low in the foreign or international market (Al-Najar, 1964). Dumping, according to this view, is also conceivable when selling a product in a foreign market with a price that is lower than the price in the local market for reasons that do not relate to costs of the expenditure or production. Matsushita et al, for example, provides that dumping is a process of 'exporting a product at an unduly low price in order to drive out the competition in the importing country'(Matsushita et al., 2003). Aggarwal also focused on the price discrimination, noting that dumping leads to unfair competition in the international market (Aggarwal, 2007). Similarly, the definition provided by Bentley and Silberston focuses specifically only on the element of price and the selling operation (Bentley and Silberston,, 2007). Bossche and Zdouc also refer to dumping as 'a situation of international price discrimination involving the price and cost of product in the exporting country in relation to its price in the importing country' (Bossche and Zdouc, 2013). These definitions could be critiqued for their shortcomings, as they do not take into consideration other important factors such as the similarities between the products. However, they are workable and useful to refer to when examining this study. The second criterion that has been used to define dumping is the price of production. Dumping occurs *only* when the price of exporting the product is less than the price of its production, by selling the product in the foreign markets by a price that is lower than the price of its production. Therefore, according to this view, dumping does not exist if the product has been sold by a price that is lower than the local market, but higher than the value of its production. The loss is usually compensated by selling the product at a higher price in the local market. In other words, it should be a State policy that is based on price discrimination, by reducing its prices in the foreign markets from a level that is determined by the value of the product internally (at the same time, same production circumstances and with a due consideration to the transportation costs) (Abu-Sharara, 2007).

The third view defines dumping by using the both above-mentioned criteria; namely, 'the price of the market' and 'the value of the production'. Scholars conceptualise dumping as a process of selling a local product in a foreign market either at a lower price compared to its production or at a price that is lower than its price in the local market of the exporting country (Hashish and Shihab, 2003). It could be argued that this third view is more protective from dumping practices since it does not allow any kind of circumventing on the rules of free trading which by no means allow for injurious practices to domestic markets.

Along these lines, it is important to note that dumping has been classified into three different categories; (i) sporadic, or intermediate, (ii) intermittent or predatory, and (iii) persistent (Viner, 1923). Sporadic or intermediate dumping is adopted under exceptional or unforeseen circumstances when the domestic production of the commodity is more than the target or there are unsold stocks of the commodity even after sales. In such a situation, the producer sells the unsold stocks at a low

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price in the foreign market without reducing the domestic price. Sporadic dumping is possible if the foreign demand for the manufacture's commodity is elastic and the producer is a monopolist in the domestic market. The aim of the producer here is to put his commodity is a new market or to establish himself in a foreign market to drive away a competitor from a foreign market. In this type of dumping, the manufacturer sells his products in foreign country at a price which covers his variable costs and some current fixed costs in order to reduce his loss (Hall and Nelson, 2009).

Persistent dumping is possible when a monopolist consistently sells a portion of his product at unusually high price in the domestic market and the remaining output at a low price in the international market. This happens only if the domestic demand for that product is less elastic and the foreign demand is highly elastic. 'When costs fall continuously along with increasing production, the producer does not lower the price of the commodity more in the domestic market because the home demand is less elastic'. The merit of this kind of dumping is that the monopolist keeps a low price in the foreign market because the demand is highly elastic. Also domestic consumers are at advantage because the price they are required to pay is less compared to what they pay in the past.

Predatory dumping is an unfair method of competition through international price discrimination and it exists when a producer in order to get hold over the world markets throws away its rival and for this purpose the producer can deliberately sell his product cheaper, though for a shorter period. The producer assumes that when competitions disappear he earns abnormal profits by raising price level. Simply put, it is temporary price discrimination. The logic behind price discrimination is the fact that the monopolist believes that he would be able to maximise profits in the long run even if he is facing losses in the short run. The economic disadvantage of this kind of dumping is that it carries with it the risk of dragging on for a longer period of time than expected and it is only big organisations or firms can undertake this type of dumping because of huge resources involvement. This form of dumping is also called predatory pricing. Predatory pricing is the practice of selling goods and services at loss to drive away competitor from the market thereby increasing the market power of the predator company.

Every manufacturer aims to make a profit and, if possible, excessive profit to remain afloat in the face of harsh competition. A monopolist resorts to dumping in order to remain in business in the foreign market, especially when there is a perfect international market. He unusually lowers the price of his product in comparison to other competitors so that the demand for his product may continue to rise. This is why opinion is divided on whether dumping is harmful or unlawful or both. Arguably, it is said that dumping is harmful but not unlawful. For example, if there is excessive production of a monopolist product and he is not able to sell well at the domestic market, the monopolist would want to sell the surplus at unfairly low price at the foreign market. When this happens, export and import facilities would be affected. This situation leads to price discrimination and injury or threat to domestic market.

The Legal Definition

Article 6.1 of the GATT Agreement

Article 6.1 of the GATT Agreement defined dumping as a process
'by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

Clearly, the key to the determination of whether dumping exists or not is the element of 'normal price'. The same Paragraph elaborates on this matter by stipulating that

For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(*a*) Is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(*b*) In the absence of such domestic price, is less than either;

(i) The highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) The cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

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'. (GATT Agreement, 1947)

By analysing the provisions of this Paragraph, it could be said that the normal value of a product could be measured using two ways:

- Comparing the price of the product in the market of the importing country to that in the exporting country. In this scenario, the price of the product in the domestic market of the importing country must be less than its price in the exporting country. However, this method might not be efficient in proving the existence of dumping, specifically, if the products and goods are produced solely for exporting and are not sold domestically.
- Alternatively, the criteria that should be used are either

(i) 'The price of the like product in a third country'. In this scenario, the price of the product in the importing country must be less that the price of the like product in a market of a third country.

(ii) 'The cost of the production added to it the cost of the selling and the cost of the profit'. In this scenario, the price of the product must be less that the price if its production plus the cost of the selling and the profit, taking into consideration all factors that contributes to identify the existence of the product; such as the selling circumstances and the price differences.

Article 2.1. of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade

Article 2.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade provides that a product is considered to be dumped if it is

'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 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994).

The first observation that could be made about this definition is that it does not include the element of 'injury', which is essential in the determination of dumping. According to this definition, one of the key elements in the determination of whether dumping exists or not is the element of 'normal value'. Normal value is defined in the second part of this text as 'the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'.

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Given that price differential is a major part of the dumping investigation proves, it is worthy to consider its bases of calculation and the particular aspects of the dumping transaction anticipated by the antidumping legislation of the WTO. The calculation and comparison of price accounts for manufacturing and administrative cost, transport and selling expenses, other general costs, and for profit, which must be based on actual data pertaining to production and sales in the ordinary course of trade in the like product by the exporter or producer under investigation (WTO: Dispute Settlement Reports, 2003). It is a complex process of calculation and analysis, but the requirements of the investigatory process go further in seeking to determine what exactly is to be valued. Article 2(4) states the price for the 'like product' recognises that when there are no sales of the like product, in the ordinary course of trade in the domestic market of the exporting country, or when, because of the particular market situation, sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to a third country (Raju, 2008). Essentially, where the exporter does not market the dumped product domestically, there appears to be nothing in the captive market to compare it to; in those circumstances, the calculation is undertaken using a comparative third party nation to establish what it would sell for in the merchant market, were it to be sold there.

The 'normal value' would be calculated taking account of the aforementioned factors and compared to the export price, following adjustments to promote fairness and transparency; those may include domestic taxation in the recipient market, duties and tariffs, storage and transportation costs (Bossche , 2009). Thereafter, determination of the dumping margin may be calculated on an apparently straightforward subtraction calculation, but each aspect of the calculation is open to political, economic and market conditions challenge. Taking account of broad influencing factors requires the mathematically complex task of 'weighting' the normal and export price figures in the sense of emphasising the importance of different sums in the dumping practice, and thereafter conducting the comparison to help ascertain the level of harm. It is beyond the scope of this study to demonstrate the operation of the 'weighting' process, and an indication of its application is given by the WTO as follows:

'To ensure that prices are comparable, the Agreement requires that adjustments be made to either the normal value, or the export price, or both, to account for differences in the product, or in the circumstances of sale, in the importing and exporting markets. These allowances must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other differences demonstrated to affect price comparability. The weighted average calculation has to include enough sample pricing to reflect on nationwide pricing in the respective markets to ensure that the comparison is fair' (Anti-Dumping: Technical Information on anti-dumping, WTO)

The investigation may simply require price comparison between merchant and captive markets, or indeed a third party where there is no market in the exporting state for the product. Otherwise the complex exercise of weighting may be required, particularly where there is a marked difference in development of the respective markets and a suspicion of 'targeted dumping' by the merchant.
Anderson asserts that the investigation and considered reaction to dumping is a complex and time consuming exercise, involving the collection and analysis of comparative data between nations, and assessment of harm to the recipient's economic market (Andersen , 2009). It may be simple to allege, and therefore be used to justify tariff restrictions on imports, but complex to prove should the merchant state complain. Simple comparison of prices in different markets is insufficient, for development, economic conditions and market considerations differ. It is generally necessary to undertake a series of analytical steps in order to better understand and determine the appropriate

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

price in the market of exporting country and that of the recipient state. The activity may not be easily recognised, until the damage is irreparably done and dependence on the foreign exporter is achieved by the merchant. It is therefore argued that anti-dumping is at the heart of EU trade policy with those nations not affiliated to the Union in pursuit of the protection of its members from the harmful effects of those which do not subscribe to its concept of 'fair' trade (Davis, 2009). It has also been noted that the anti-dumping policy of a state has the potential to be utilised as an industrial tactic to promote domestic production by the imposition of punitive levels of tax on imports, rather than restricting unfair imports (Blonigen, and Prusa , 2003). This perhaps provides the need for analytical proof and tariff justification of a complaint before the European Court or the WTO Panel. Something that the GCC and Saudi Arabia could do to combat dumping within its borders is create a better system by which to monitor pricing. Government departments in Saudi Arabia are already required to keep a strong set of data concerning similar product pricing, but they could also gather additional information on market circumstances and costs from production inside importing countries (Mattar, 2014). While price monitoring is done, it is focused primarily on food products (such as the Turkish eggs) and there is no firm emphasis on some of the major Saudi industries such as petrochemicals. More information about the element of 'price' would help avoid litigation on anti-dumping in the future. In order to create a good system to monitor prices in Saudi Arabia, the government should avoid interfering in the actual pricing of products themselves, which means the creation of a separate legal framework and ability to collect information from different industries without actually interfering.

To conclude, it could be said that the details provided within Article 2 of the Anti-dumping Agreement reflect the drafters' intention to avoid any possible controversies or conflicts between member States in relation to the determination of whether dumping exists. It could be also argued that the provisions of Article 2 reflect an assertion of the provisions of Article 6 of the GATT Agreement. However, in the case where there is any conflict between a provision within the GATT Agreement and the Anti-Dumping Agreement, the later applies. The Article could be critiqued for its narrow scope since it limits its provisions to the dumping of goods and products without any mention to financial dumping, social dumping or even services dumping..

Dumping in Islamic Sharia

In general, Islamic Sharia' allows any trade transaction (Quran 4:29, 2:282, 17:66, 24:37, 35:28, 62:11) (Verse 4:29 of the Quran reads). However, Saudi Arabia can only implement laws within its domestic legal system which are compatible with Islamic law, as stated in its Basic Law of Governance: "Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and Sunnah of his Messenger, both which govern this law and all the laws of the state." (Saudi Law, 1992). There are two constraints for these trading activities; first, Islam prohibits trading in certain goods such as alcohol, swine, dead bodies and human organs (Ayub, 2007). Second, trading transactions are allowed as long as there is no injury to the seller, the buyer and the community as a whole. Injuries in this context can be defined as any injustice in the trade transaction; for example, cheating, deceiving, and monopolistic behaviour.

In the early stage of Islam, during the rule of Omar bin Alkhatab, in the early 6th century, an incident was recorded which can be classified as dumping. A seller was offering raisins at price lower than the market price. Omar bin Alkhatab ordered him to sell at the market price or to leave the market. The aim was to protect other sellers in the market from the sudden reduction of the product price.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

Since the time of Prophet Mohammed there have been many classifications for the trade transactions. Islamic scholars and researchers have identified certain conditions that must exist to consider the trade transaction as authentic. They are seven conditions:

- Both parties should accept the transaction: it is not allowed for one of the parties (seller or buyer) to have influence on the second party to force him to commit the transaction.
- The seller and the buyer must be sane to be able to judge the product and the selling conditions. Accordingly, it is prohibited for children or insane people to conduct trading activities.
- The seller should be the owner of the goods or authorised to sell the goods from the owner. It is prohibited for any person to sell anything that does not belong to him.
- The good should be deliverable. It is required that the seller is able to deliver the sold goods or services to the buyer.
- The goods are allowed in Islam and there is a benefit from them. There is a set of products that are prohibited to sell or buy in Islam; which include alcohol and swine.
- The product must be known to the buyer, which means that the buyer should have enough knowledge about that specific product.
- The price must be known and identified. The price should be known and identified by both the seller and the buyer. This includes the amount, the timing, and how the price is going to be paid.

Of course, Islamic regulations of trading transactions are designed to achieve the benefits that the seller is looking for (i.e. profit) while maintaining the interest of the buyer and the community as a whole. In dumping, the consumer and the community do not know that the company or industry conducting dumping is deceiving them until the goal of that company is achieved. The company that is practicing dumping will control the price of the product in the market when all other companies or industries that are selling the same product will not be able to compete with it and therefore, it might find itself out of the market.

Islam strikes a balance between individual rights and interests versus society, with the result that economics under Islam is entirely different from that of a capitalist or socialist system.[2] There are basic rules of good faith and fair play in trade, forbidding any form of fraud or deception, with Mohammed stating "A man is not to undersell his brother, nor is he to try to out haggle his brother."[3] Mohammed further warned that "whoever interferes with the prices among the Muslims to cause those prices to increase, Allah has the right to seat him in a sever fire on the Day of Judgment."[4] Therefore, at least concerning other Muslims, Islam appears to have a fairly clear provision warning against dumping and price manipulation.

The question is, however, whether the laws concerning anti-dumping currently in place both globally and domestically are compatible with the tenets of Islam. The most important aspect of Islam is to promote a free market, without government or state intervention.[5] From an Islamic perspective, dumping is prohibited because it harms the consumers, domestic industry, and the community as a whole. The consumer is deceived that the product should be at a lower price that

[2] Mattar, *Anti-Dumping and Anti-Subsidy*, 52. (note 62).

[3] Sunan Ibn Majah, Vol. 3, Book 12, Hadith 2172.

[4] Musnad Ahmad, Mustadrak al-Hakim [2/12-13].

[5] Mattar, *Anti-Dumping and Anti-Subsidy*, 61. (note 62).

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the current market price. This will lead to an unfair competition for the domestic industry. The community will be also negatively affected, as these harmful practices leads to higher unemployment, price fluctuations, and of course the monopoly of the market by one firm. According to Islamic regulations, three different antidumping measures can be utilised. First, the company that performs dumping can be forced to sell at the normal price of the market. Second, tariffs could be imposed upon the company the practices dumping to force it to sell at the price of market. Third, prevent the company from accessing the market. In the early stage of Islam, and as it is known, there was no borders between countries, therefore, the effective antidumping measures that could be conceived are the first and the third measures mentioned above.

Dumping under article VI of the GATT defines dumping similarly to that of Islamic law, Saudi Arabian domestic law and the WTO agreement, stating that it is a product which has been "introduced into the commerce of another country at less than the normal value of the products (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994). As noted above, in Islam, a proverb mentions that a product should be removed from the market if not similarly priced between like products. While the duty to prevent AD might be more complex and comprehensively discussed under the WTO, and even Saudi domestic law, they are both compatible in that each paradigm agrees upon the need to have fair competition in the marketplace between products.[6] The WTO trade agreements were designed to liberalize the existing trading regimes in the world (Alavi, 2002). Generally speaking, these provisions concerning anti-dumping and predatory pricing have turned into a protectionist attitude with local governments and industries protecting their own markets. Therefore, most of the anti-dumping cases are brought against developing countries, very many of which are Muslim countries. Anti-dumping litigation can be an expensive and lengthy process, which is on the whole harmful to developing, Muslim countries. This paper, however, focuses on Saudi Arabia, a wealthy country in comparison, and therefore does not experience the same kinds of harms in practice stemming from the WTO.

Arab Countries and their use of AD within and without the WTO

The WTO is demonstrably compatible with most tenets of Islam. However, most Muslim countries fail to participate in the WTO dispute settlement process. Some of this can be attributed to their lack of expertise on the WTO rules, which have been applied to increasingly complex commercial disputes. A WTO dispute is a lengthy process, which requires a lot of preparation, expertise, and money. Indeed, when developing countries do initiate disputes within the WTO, they are less likely to prevail than other, more developed countries (Shahin, 2006). The GCC system appears to work well for the Arab nations, perhaps because of its simplicity, and adoption of the local and religious culture of the area. But, how does this work for Muslim countries outside the paradigm of the GCC system?. As of 2012, a total of 130 cases has been decided through the WTO dispute settlement mechanism (Malkawi, 2012). Of these cases, no Arab country has ever initiated a case as a complainant, and Egypt has been the only Arab party in a case as a respondent (other GCC countries have been involved merely as third parties). This is a vicious cycle – underrepresentation of Arab countries can affect the legitimacy of the WTO, scaring off Arab countries; but without Arab countries becoming more assertive in their participation, the problem will simply be exacerbated. Single Arab countries will also have to bear the majority of the cost, whereas if a group of Arab countries join forces, they will be able to split the cost of litigation across the board (Malkawi, 2012). WTO cases can take years, and is estimated to cost up to $500,000 USD if taken up through

[6] Mattar, *Anti-Dumping and Anti-Subsidy*, 61. (note 62).

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the Appellate process. Of course, this is a bare minimum – the figure can explode if private law firms are utilized.

Egypt has been a member of both GATT and WTO, and therefore, by default, they have more cases than other Arab countries. Egypt is the only active country active at the WTO, with a large Geneva-based delegation, and is the only Arab country usually invited to the ministerial meetings of the WTO (Malkawi, 2012). Additionally, some of the lower to middle income countries are unable to keep a full-time administrative staff at the WTO and UN offices in Geneva – one of the most expensive cities in the world. This all comes down to lack of representation and lack of expertise that negatively affects Arab nations (Malkawi, 2012). The WTO should also take steps to address these inequities, as the ultimate goal is to achieve free trade and global economic development (Malkawi, 2012). If Arab countries feel left out and underrepresented, these goals cannot be achieved.

There is also a question of attitude concerning globalization in Arab countries. Despite globalization being sanctioned by Islam, there is evidence that many Muslim countries actively resist free trade and economic globalization, demonstrated by establishment of the Arab forum (Malkawi, 2012). The objectives of this forum are to coordinate information and represent a unified Arab position, to the exclusion of other cultures. There are also basic polls that show evidence of anti-globalization feelings – the majority of Jordanians have less confidence in globalizing the economy than populations in India, Mali and Argentina. Litigation is also fairly antithetical in Arabic cultures – adversarial procedures are largely disfavoured. (Malkawi, 2012). The Arabic tradition has utilized *sulh*, which prefers settlement, negotiation and reconciliation over traditional litigation and even arbitration. This mind set can make it difficult to persuade Arabic countries to engage in litigation processes of the WTO. With these obstacles, it is not surprising to find that Muslim countries prefer to avoid using the WTO do settle dispute, especially countries that benefit from the GCC and its own paradigm of dispute resolution.

Another factor that could contribute to Arab nations' lack of participation is the modest levels of investment and trade across the world by Arab countries, as well as foreign investment into these countries. Since 1980, Arab countries have seen a 75 percent drop in its shares of global exports, and they contribute to only about one percent of exports for manufactured goods (Malkawi, 2012). However, raw materials such as fuel and mining exports are huge – up to 20 percent of world exports. Arab countries, in particular Saudi Arabia, export huge amounts of oil, which is a product rarely addressed by the WTO. Thus, the WTO is less attractive, less experienced with, and less accessible to, Arab traders.

The WTO is drive by governments, which typically represent domestic industries and their domestic economies. However, in most Arabic countries, there is little cooperation or consultation between the government and the private sector. The private sector is thus poorly represented both in Arabic governments, and as an extension, the WTO. Due to the lack of litigation with Arab countries in the WTO, it is incumbent to select cases from developing countries similarly situated to illustrate the realities of these difficulties. In the EC-GSP case between the EC and India, the EC had granted tariff concessions to developing countries, but excluded India. After a panel to hear a dispute and the proceedings were underway, TEXTROCIL, representing the clothing sector, independently submitted a memo to the Indian government to address problems and burdens placed on the clothing sector. TEXTROCIL was unaware that the Indian government had already made an effort to relieve the clothing sector of various burden. TEXTROCIL, a private association,

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requested government help months after a formal WTO complaint had been lodged, illustrating the breadth of disconnect between government and private-sector interests in WTO matters within developing nations. The private sector in GCC countries also remains highly undeveloped, with the state owning most sectors from hydrocarbons to real estate, banking and air transit.

Finally, Arab countries face the same challenge as other developing countries – the problems with enforcing compliance from the result of the WTO challenge. The WTO itself has very little enforcement power itself; rather, it typically allows the complainant to retaliate against the offender until compliance with the ruling occurs. This leaves developing countries at a distinct disadvantage, as retaliatory measures against highly developed countries such as the United States or those within the EU will likely have an impact on these economies, whereas the retaliation might actually harm the economy of the enforcing or complaining country. One case illustrates this effect. In the European Communities-Regime for the Importation, Sale and Distribution of Bananas, the EU trade measures with Ecuador violated certain WTO obligations. Ecuador imposed retaliatory measures, which were easily absorbed by the EU – it took 45 months (or nearly 4 years) for the EU to comply with the ruling from the dispute settlement body.

It is thus no surprise that many Arab and Muslim countries have opted to utilize a more Arab-centric and Arab-focused entity. For all intents and purposes, the GCC and WTO requirements are similar. The GCC allows trade remedy instruments such as AD measures, under the WTO only if GCC statutory requirements are satisfied (Kazzi, 2014). The GCC rules strongly mirror the WTO texts, particularly the determination of whether an injury to an industry occurred, the procedure of investigations and the type of remedies available. The efficacy of such a regional system has yet to be fully studied, given its recent implementation. However, the hope is that it will fill in the gaps and encourage more open trade between GCC states, who can feel confident in accessing enforceable remedies in the event of dumping.

Anti- Dumping

The use of antidumping measure is strongly supported by WTO as an instrument to re-establish fair trade in international trade. Therefore, countries that have suffered dumping usually apply anti-dumping action to remedy the injury or threat to their domestic market. Anti-dumping measure therefore becomes necessary where it is established that dumping has taken place or where dumping causes injury or threat to domestic market. This will lead to anti-dumping investigations by the country importing the dumped products. The purpose of the investigation is primarily to find out whether dumping is taking place or causing injury to the domestic industry of the country importing the alleged dumped commodity (Judith, et al, 2003). In other words, the process concentrates on basic issues like;

‘establishing a normal value of the product when sold in the domestic market of the exporting country; establishing the export price of the product; comparing the export price with normal price established; determining whether the domestic industry of the importing country is suffering injury as result of the dumped imports’.

This process must be carried in line with due process mechanisms. Anti-dumping investigations must be transparent, objective and done in an equitable way with all interested parties given adequate opportunity to defend their interest. Unfortunately, this area is difficult to determine because the WTO is not doing enough to ensure that member countries receive equitable treatment when cases of dumping takes place. This was briefly discussed in the ability of many Muslim

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countries to participate adequately in the WTO anti-dumping scheme. The anti-dumping agreement further discussed and enhancements and revisions performed in the Tokyo and Uruguay rounds - see table 1. The discussions in the Tokyo round were concerned about the non-tariff measures that can be used to protect the local markets; as between Kennedy and Tokyo rounds it had identified that cases of subsides and countervailing occurred.

Before the Uruguay round, there had been further discussions about the non-tariff measures and the defects in the dispute settlements process. This area and the dynamics of Anti-dumping investigations and the legal analysis of AD will be extensively discussed in another chapter.

Table 1: AD progress in GATT and WTO

Round	Date	Subject covered	AD actions
Kennedy	1964-1967	AD	AD code
Tokyo	1973-1979	Non-tariff measures	Regulating the AD
Uruguay	1986-1994	Non-tariff measures and dispute settlement	AD code more precise
Doha	2001-	Non-tariff measures	AD measures and tools

Source: Peter van den Bossche, p408 - 415.

The WTO Anti-Dumping Agreement contains 18 articles. Each article defines or explains one or more of the terms related to anti-dumping, including definition of dumping, normal value, export value, domestic industry, and provisional measures. As part of the dumping investigation it is required to determine the normal value and export price of the product being dumped; as detailed in article 2 of the AD agreement. In article 2 of the agreement, there are definitions and detailed discussion of the different terms involved in the dumping identification; like normal value, product, export price, and factors used for price adjustment. Following is a brief discussion of these terms. The normal value is the value of the product and is determined based on four factors namely, *the price 'in the ordinary course of trade, the price is for the 'like product, destined market, the price comparable system.*

The term price in the ordinary course of trade refers to a test investigating authority is permitted to apply to profit in constructing normal value under the chapeau of Article 2.2.2. The term also states that the amount for administrative, selling and general cost and for profit shall be based on actual data pertaining to production and sales in the ordinary course of trade in the like product by the exporter or producer under investigation.

The price for the 'like product, is found in the Article 2 (4) of WTO on determination of dumping in relation to anti-dumping investigation. The *price for the like product* recognises that when there are no sale of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to a third country (Raju, 2008). The principle of *product destined market* indicates that product must be manufactured for consumption in the exporting country. Otherwise, different factors can affect the pricing of this product if found in other markets; like quantities, quality and transportation costs. The *price comparable system* is where the normal value can be structured and the factors responsible for determining the normal value identified. Such factors to determine the overall price is the cost of production, storage facilities, transportation,

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profit margin, commission, taxes, transportation etc. For example, in the UK there is a VAT of 20% while there is no such tax in Saudi Arabia.

Anti-Dumping in Practice

Antidumping is an effective instrument to obtain temporary protection, and it has been used by many developed and developing countries. Among the developing countries, Turkey has become one of the heaviest AD users and filed the highest number of AD petitions in Eastern Europe and Middle East since 1990. Antidumping deals with cases where it is believed that a foreign firm is selling goods in the home market, or importing, at either a lower price than in its own market, or if there is no foreign prices to observe, then at less than its average costs of production (Lee et al., 2013). Supporters of antidumping measures say that these steps protect domestic industries that are being bombarded with products that are traded unfairly.

Antidumping laws are not only designed to protect domestic industry but they also allow national government to impose special duties on unfairly traded imports (Lindsey and D. J. Ikenson , 2003). Before duties are imposed on unfairly traded imports, the authorities that administer the law must first ensure that imported goods are being dumped or sold at prices less than normal value and second that the dumped imports are causing or threatening material injury to the domestic import-competing industry. For example, under the US system, it is usually the Department of Commerce (DOC) that determines whether dumping is occurring, while the International Trade Commission (ITC) examines whether dumped imports are injuring the domestic industry. When both the DOC and the ITC make affirmative findings, the goods under investigation are subject to duties equal to the margin of dumping i.e. the difference between the U.S. prices of the imports and their "normal value". This is the way it ought to be, but unfortunately national government imposes duties at their own discretion, rather than duties equal to the margin of dumping. This problem has raised a lot of questions on the use of antidumping measures by states.

Experience has shown that there is a yawning gap between theory and practice. The fact is that antidumping actions, contrary to the claims of their supporters, do not actually ensure a level playing ground. Instead, they punish foreign producers for engaging in commercial practices that are perfectly legal and unexceptionable when engaged in by domestic companies. It is this kind of discrimination that creates an unlevel playing field for importers and to foreign producers respectively. In effect, it would be proper to say that antidumping laws discriminate against imports, and that is the essence of protectionism. This is why it has become difficult for the supporters of antidumping laws to reconcile this contradiction with liberalization and free trade. Considering these recurring problems associated with antidumping measures and other trade defence mechanisms, antidumping has been deemed a villain, not a hero. Antidumping protection allows considerable discretion over when and how to implement this policy and base on this it has given rise to a more complex and less transparent tool than traditional tariff protection, creating trade effects that are difficult to overcome.

Free trade agreements (FTAs) which have proliferated since the 1990s have provoked heated discussion on whether they have contributed to facilitating more trade or aggravating discriminatory trade diversion (Dukgeun and S.Wonkyu, 2011). The general observation is that although FTAs may have significant trade effects on certain trading partners, the overall impact to the global trading system appears to be insignificant or less impressive than expected. Apart from this macro-level question on the relationship between global trade and FTAs, there are not many studies on the micro-level question of how FTA parties behave against each other, in particular whether FTA

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parties use antidumping (AD) measures more or less frequently against the other parties. Considering the fact that antidumping law is still one of the major trade barriers in the world trading system, the effect of FTAs on antidumping uses can provide an important implication to FTA policies or trade policy implementation in general (Dukgeun and S.Wonkyu, 2011). In other words, the FTA is to bring favourable trade and to avoid trade diversionary effects to FTA partners. The antidumping agreement was also established to bring trade liberalization and to avoid undue competition. Unfortunately, antidumping actions have failed to achieve the objectives it was purposely established. It causes serious barriers and challenges to states that do not use it, and benefits state partners.

Where dumping is found to be occurring, it is supposed to uncover distortions in the foreign producers' market that allow the foreign producers to sell products at low prices abroad. Antidumping measures are then used to create a "level playing field" against the foreign producers (Lindsey and Dan Ikenson, 2001). Unfortunately, in practical terms, antidumping laws do not create a level playing grounds for member countries to WTO AD agreement. This practice has called into question the merit of antidumping measures.

The WTO AD agreement was supposed to regulate the imposition of high tariffs and discriminatory market prices but it is difficult to determine if the antidumping agreement is actually in the best interest of domestic industries or in the interest of trade partners. The imposition of tariffs and trade measures used by states appears not to be in consonance with the WTO AD agreement. It is the case that antidumping actions by states is detrimental to trade partners and affects the entire idea of free trade and liberalization. This situation paints antidumping laws in a bad light and defeats the essence of establishing antidumping trade measures against dumping in the global market system. This supports the argument that antidumping laws pose serious barriers and challenges to many member countries of the WTO and other trade partners. These everyday occurrences, however, can often raise eyebrows and create quid pro quo responses. For example, when the United States recently announced that it was placing tariffs on Chinese automobile tires under the WTO's safeguard provision (Whoriskey and A. Kornblut, 2009), China announced only two days later that it would be initiating an anti-dumping investigation into whether exporters in the United States were dumping automobile and chicken products into China (China Probes 'Dumping' of US. Auto , 2009). The timing of the announcement was no accident. The anti-dumping investigation was clearly intended to counter the tariffs placed on Chinese products (Mankiw and Swagel, 2005). Its initiation indicated the type of retaliatory intent and protectionist sentiment that is precisely what the WTO was formed to prevent.

These types of events highlight the barrier antidumping misapplication causes to world trade embodied in Article VI. First, the incidents of dumping investigations and duties are extremely high because the elements of dumping are both easily alleged and quickly proven by domestic agencies. Second, anti-dumping investigations and duties (more than any other aspect of the WTO) can become weapons vis-à-vis other members because there are few checks on their use. Third, anti-dumping duties harm consumers and politically powerless groups in the context of anti-dumping decisions by maintaining higher prices for these goods on behalf of domestic producers (Budget Office xi, 2001). Given the fact that anti-dumping investigations are initiated, and duties are assessed, so often, the Dispute Settlement Body (DSB) has been called upon to adjudicate numerous antidumping disputes. What this signifies is that in these disputes, the dispute settlement mechanism has invariably found the duties inconsistent with WTO obligations (Chakraborty et al., 2007).

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Global trade should not be seen as an opportunity to undermine free trade and trade liberalization and member countries of WTO should not leverage the global trading system to indiscriminately export products to another country or sale those products at unusually low prices compared to the value of the product in their domestic market. If this practice continues unchecked, dumping effects could be more devastating to international trade and attempt to establish free and favourable trade would be a charade. This practice has become rampant in Asia, Europe, and African countries and has invariably made dumping an issue in international trade.. The WTO report on 27th November 2005 revealed that China was at that time most frequent subject of antidumping inquiries in Asia accounting for 36.7% of the anti-dumping investigations (White paper, Cm458, 2006). China has also been accused of dumping textiles in South Africa. It is alleged that this practice had a significantly negative effect on South Africa's textile industry. Statistics showed that in 2005 antidumping cases stood at 21.9% and grew in 2006 with 37.7%.

China has not been the only perpetuator of dumping cases in the global market. The European Community has equally been accused of dumping. In 1991 for instance, EC dumped 54,000 tons of beef into West Africa countries, resulting in local cattle business losing market share and consequently going bankrupt (Madeley and C. Robinson, 1999). The EU countries have produced more beef that could be eaten in the EU or exported on normal commercial terms. So the beef was dumped and sold below the cost of production and was sold first in the West Africa countries and South Africa, thereby causing Beef companies to go bankrupt. The dumped EU beef competed on unfair terms with locally produced beef and severely damaged farmer output and incomes, and thus the economic development of an important sector for the recipient countries. Asian manufacturers have also been accused of dumping electrical goods and textiles in Africa. In 2005, China was alleged of dumping detonating fuse and delay detonators in Southern African Union market (SACU) thereby causing material injury or threat of material injury to the Industry concerned (Engineering News, 2005). The complaint was launched by the African Explosives Limited to International Trade Administrative Commission (ITAC).

It is, therefore, worrisome, that African countries, Saudi Arabia and other developing countries bear the brunt of dumping while WTO and other international organisations vested with the responsibility of supervising and policing dumping in the international market have remained helpless. No doubt the proliferation of dumping has greatly occurred in African market, the effect of this has not only affected African economies but also has cast the WTO in a bad light to not have done enough to mitigate the problem of dumping in the international trade.

CONCLUSION

The aim of this paper was to provide an examination of the conceptual framework of this study. In the historical development, it had been seen that before the GATT Agreement and during the first two decades of the GATT, tariffs were applied by the governments to protect their domestic markets from dumping practices. Thereafter, Article VI the GATT Agreement 1947 became the main article that regulated anti-dumping.

The paper examined the meaning of dumping from three perspectives; the economic, legal, and Islamic Sharia's perspectives. There are three criteria used to define dumping. The first is the market price, the second is the cost of the product, and the third adopts a dual approach by using both 'the market price and the cost of the product'. The latter is the favourable approach, since it guarantees more protection to the markets, and does not allow any circumvention of the rules of free trading,

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which intend to disallow injurious practices against domestic markets. The paper also analyzed the legal definitions of the concept of dumping. The provisions of Article 2.1. of the Agreement on Implementation of Article VI of the GATT provides detailed provisions about the way that dumping should be determined. However, it was critiqued for its shortcoming in limiting the scope of the dumping provisions to the dumping of products, leaving out the dumping of services and other forms of dumping, such as financial and social dumping.

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Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)