



**Anti-Dumping and Anti-Subsidy on  
Saudi's Petrochemicals products**

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## **ABSTRACT**

In recent years, petrochemicals products from Saudi Arabia have been the subject of anti-dumping (AD) cases in several countries. This has raised questions about whether Saudi Arabia's domestic laws and regulations relating to AD and anti-subsidy are, (1) effective, and (2) compatible with Saudi Arabia's international legal obligations under the World Trade Organisation (WTO). This thesis examines the compatibility of Saudi Arabia's domestic laws concerning AD, with international trade law, under the WTO agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement (AD Agreement)). It critically analyses cases filed against Saudi Arabia's petrochemicals products in a number of countries; including India, China, and Turkey, and in the European Union.

It is observed that the high number of AD cases filed against Saudi Arabia's petrochemicals products around the world reflect a need to strengthen Saudi Arabia's domestic laws, and the regulations applicable to dumping. Arguably, some aspects of the WTO AD Agreement are in need of reconsideration by the contracting parties in view of the modern context of trade between contracting parties. Aspects to be re-examined include, for example, dispute resolution procedures. In this respect, this thesis argues that some parts of the WTO AD Agreement should be subject to further negotiations between the WTO contracting parties, with a view to making appropriate amendments.

Finally, this research will present recommendations for the Saudi Arabian economic system, suggest amendments relating to AD and anti-subsidy provisions under the WTO and finally offer recommendations for the dispute resolution mechanism under the DSU. This will help to improve and develop an effective AD legal regime under the WTO agreement, which would be applicable in the context of the changing circumstances of global international trade.

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<b>ACWL</b>	Advisory Centre on WTO Law
<b>AD</b>	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. (Anti-Dumping).
<b>ADR</b>	Alternative Dispute Resolution
<b>ARAMCO</b>	Saudi Aramco
<b>BTU</b>	British Thermal Unit
<b>CPME</b>	The Committee of (PET) Manufactures in Europe
<b>D-8</b>	Developing Eight Countries
<b>DRC</b>	Dispute Resolution Centre
<b>DRC</b>	Dispute Resolution Centre
<b>DSB</b>	Dispute Settlement Body
<b>DSU</b>	Dispute Settlement Understanding
<b>EU</b>	European Union Community
<b>FDI</b>	Foreign Direct Investment
<b>G-20</b>	The Group of Twenty
<b>GATT</b>	General Agreement on Trade and Tariffs
<b>GCC</b>	The Cooperation Council for Arab States of the Gulf
<b>GDF</b>	Gaz de France
<b>HRH</b>	His Royal Highness
<b>ICC</b>	The International Court of Arbitration of the International Chamber of Commerce
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>IMF</b>	International Monetary Fund
<b>IPO</b>	International Petrochemical Organization.
<b>ITC</b>	International Trade Court
<b>KACST</b>	King Abdul-Aziz City for Science and Technology



<b>LCIA</b>	London Court of International Arbitration
<b>MEG</b>	Mono Ethylene Glycol
<b>MODON</b>	The Saudi Industrial Property Authority
<b>NAFTA</b>	North American Free Trade Agreement
<b>NGO</b>	Non-Government Organisation
<b>OPEC</b>	Organization of the Petroleum Exporting Countries
<b>PET</b>	Polyethylene Terephthalate
<b>RCJY</b>	The Royal Commission for Jubail and Yanbu
<b>SABIC</b>	Saudi Arabian Basic Industries Corporation
<b>SAFCO</b>	Saudi Arabian Fertilizer Company
<b>SAGIA</b>	The Saudi General Investment Authority
<b>SAMBA</b>	Saudi American Bank in Saudi Arabia
<b>SCM</b>	Agreement on Subsidies and Countervailing Measures
<b>SEDA</b>	Saudi Export Development Authority
<b>SEDC</b>	Saudi Export Development Centre
<b>SEP</b>	Saudi Export Programme
<b>SG&amp;A</b>	Selling, General and Administration
<b>SOCAL</b>	Standard Oil of California
<b>UN</b>	United Nations
<b>UNIDO</b>	United National Industrial Development Organization
<b>WTO</b>	World Trade Organization
<b>WTO Agreement</b>	Marrakesh Agreement Establishing the World Trade Organisation.

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2008/40

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WT/DS46/AB/R

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WT/DS70/AB/R

WTO, *European Communities: Anti-Dumping Duties on Imports of Cotton-Type Bed  
Linen from India – Recourse to Article 21.5 of the DSU by India* (24 April 2003)  
WT/DS141/AB/RW

WTO, *Japan v China* (20 December 2012) WT/DS454/1

WTO, *Mexico: Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS)  
from the United States – Recourse to Article 21.5 of the DSU by the United States*  
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Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201

Agreement on Subsidies and Countervailing Measures (1994), Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 14

Chile and Canada, Free Trade Agreement, Ch M, 5 July 1997, 36 ILM 1079

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Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 401, 33 ILM 1226

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The Implementation of the Saudi Competition Law issued by a Royal Decree No M/1 date 10 April 2000

The Royal Commission for Jubal and Yanbu Act 1975

The Saudi Anti-Dumping law was adopted later from the GCC, by Royal Decree number 30/M date 14 June 2006

The Saudi Basic Law of Government issued by Royal Decree 90/A dated 2 March 1992

The Saudi Competition Law and its implementation, issued by Royal Decree 138 dated 22 June 2004

The Saudi Foreign Investment Law, issued by Royal Decree 1/M dated 10 April 2000

Turkish Law No 3577 (1989) on the Prevention of Unfair Competition in Imports, as amended by Law No 4412 (1999)

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# CHAPTER 1: INTRODUCTION

## 1.1 Background

On 11 December 2005, Saudi Arabia became the 149<sup>th</sup> member of the World Trade Organisation (WTO),<sup>1</sup> having overcome a series of hurdles, navigated over a ten-year period.<sup>2</sup> The challenges Saudi Arabia overcame to fulfil membership requirements necessitated changes to its judicial and legislation system; however, membership led to a qualitative leap in Saudi Arabia's economic system. An example of the legal changes made included the formation of new anti-dumping (AD) and competition laws.<sup>3</sup> Although Saudi Arabia agreed to sign the Marrakesh Agreement of Establishing the World Trade Organization (WTO agreement)<sup>4</sup> following negotiation, it placed many reservations on the terms of its membership, as detailed below:<sup>5</sup>

- A ban on the import of alcohol, pork and all other products prohibited under Islamic law;
- A condition that a minimum of 75% of the labour capacity in both Saudi Arabian and foreign companies should be Saudi nationals;

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<sup>1</sup>World Trade Organisation, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) accessed 1 June 2014.

<sup>2</sup> Ministry of Commerce and Industry, available at <http://www.mci.gov.sa/>, accessed 1 June 2014.

<sup>3</sup> Competition Law issued by a Royal Decree number 138 date 22 June, 2004. The Anti-Dumping law was adopted later from the GCC, by Royal Decree number 30/M date 14 June, 2006. For more information about Saudi Regulations, see the website for the Bureau of Experts at the Council of Ministers available at <http://boe.gov.sa/> accessed 1 June 2014.

<sup>4</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

<sup>5</sup> Abdul-Aziz M Aljarallah, *Analysing the Impact of the World Trade Organisation (WTO) on the Sustainability of Competitiveness of the Petrochemical Industry in Saudi Arabia*, (PhD thesis, Durham University 2010) 52. Also, see the World Trade Organisation, available at [http://www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm), accessed on 1 June 2014.

- A condition that Saudi oil products<sup>6</sup> would not be covered by the WTO agreement;
- A condition that the government of Saudi Arabia would collect income tax from foreign companies and *Zakat* from Saudi companies;
- Bound tariffs were to be higher than the existing rates for similar products;
- Bound tariffs were to be phased in by 2008, 2010 or possibly 2015, depending on circumstances;
- 10 years of subsidies would be granted to the agriculture sector;
- Some domestic subsidies would continue, such as fuel and electricity;
- A condition that foreign investment must be approved by the Saudi General Investment Authority (SAGIA);<sup>7</sup> and
- A provision permitting only Saudi and Gulf Cooperation Council (GCC) citizens to invest directly in Saudi real estate and shares.<sup>8</sup>

Saudi Arabia possesses the largest oil reserves in the world, comprising 25% of the world's total oil reserves; currently this equates to a proven 265,405.0 billion barrels.<sup>9</sup> Consequently, Saudi Arabia is a founding and significant member of the Organisation of the Petroleum Exporting Countries (OPEC) founded in 1960.<sup>10</sup> In addition, Saudi Arabia's natural resources include 287,822 trillion cubic feet of natural gas, which constitute about 25% of the world's total gas reserves (based on

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<sup>6</sup> Oil products are different than petrochemicals products that under investigation. The oil products are an oil crude and petrochemicals products are chemicals obtain from oil and gas.

<sup>7</sup> The Saudi General Investment Authority (SAGIA) was established by Royal Decree number (2) date 10 April 2000, available at <<http://www.sagia.gov.sa/>> accessed 1 June 2014.

<sup>8</sup> The Gulf Cooperation Council (GCC) is a cooperative union between Saudi Arabia, Kuwait, Bahrain, Qatar, United Arab Emirates and Oman, available at <[www.gcc-sa.org](http://www.gcc-sa.org)> accessed 1 June 2014.

<sup>9</sup> The Saudi Ministry of Petroleum and Minerals. Available at <<http://www.mopm.gov.sa/>> accessed 1 June 2014.

<sup>10</sup> OPEC official website, available at (<http://www.opec.org/>), accessed 1 June 2014.



2011 statistics).<sup>11</sup> The Saudi government prohibits private company investment in oil products.<sup>12</sup> The government extracts the oil under the auspices of the nationally owned, Saudi Aramco, the largest oil company in the world.<sup>13</sup>

The establishment of oil as intrinsic to the Saudi economy was furthered by government investments in hydrocarbons, through the establishment of petrochemical industries. Royal Decree (Number M/66 date 6/9/1976) in 1976 established the ‘Saudi Arabian Basic Industries Corporation’ (SABIC),<sup>14</sup> which holds stocks on the Saudi stock exchange. The Saudi government owns 70% of the company’s capital, equating to a total value of 30 billion Saudi Riyals, with the remainder of its capital held by Saudi citizens and other GCC members.<sup>15</sup> Like SABIC, the majority of Saudi Arabian petrochemical companies have issued stocks on the stock exchange, and remain either fully or partly owned by the Saudi government. Impressively, SABIC is the second largest petrochemicals company in the world, and the largest non-oil company in the Middle East.<sup>16</sup>

As a result of its 70% share in SABIC holdings, the Saudi Arabian government has the authority to appoint members of the Board of Directors through issuance of a Royal Decree.<sup>17</sup> Thus, other private petrochemical industries do not have SABIC’s renowned capacity for production, and are unable to compete with it, whether in terms of the type of products or the quantity and quality of products. Petrochemicals industries in the Kingdom are classified into three categories:

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<sup>11</sup> The Saudi Ministry of Petroleum and Minerals. Available at <<http://www.mopm.gov.sa/>> accessed 1 June 2014.

<sup>12</sup> *Petroleum exploration and Petroleum producing*. See Article 3 of the Saudi Foreign Investment Law.

<sup>13</sup> Saudi Aramco, available at <http://www.saudiaramco.com/>, accessed 1 June 2014.

<sup>14</sup> See the SABIC website, available at <<http://www.sabic.com/>> accessed 1 June 2014.

<sup>15</sup> See the SABIC website, available at <<http://www.sabic.com/>> accessed 1 June 2014.

<sup>16</sup> SABIC Annual Report 2012, available at <<http://www.sabic.com/>> accessed 1 June 2014.

<sup>17</sup> SABIC, available at <<http://www.sabic.com/>> accessed 1 June 2014. Also, see the World Trade Organisation’s report (Trade Policy Review, Report by the Secretariat about Saudi Arabia) number WT/TPR/S/256 date 21<sup>st</sup> of December, 2011.

- Small petrochemical companies;
- Petrochemicals companies that work in the development and marketing of the petrochemicals; and
- Large petrochemical companies, in which SABIC or Saudi Aramco have shareholdings.

The first of these categories, small petrochemical companies, have a very limited capability to produce petrochemicals products, and only manage to produce within a limited range. These companies are: the National Industrialisation Company,<sup>18</sup> the Nama Chemicals Company<sup>19</sup> and the Saudi International Petrochemical Company (Sipchem).<sup>20</sup> In combination with other national and international companies, these companies are private sector owned. However, their capacity cannot compare with that of SABIC to produce petrochemicals products.

The second category consists of those companies that specialise in developing, managing, operating and building petrochemical industries and companies. The Sahara Petrochemicals Company is such a company;<sup>21</sup> however, it does not have a role in the industrialisation of petrochemicals.

The third category is the most important, and includes the following five companies: Yanbu National Petroleum,<sup>22</sup> the Rabigh Refining and Petrochemical Company,<sup>23</sup> the Saudi Arabian Fertilizer Company (SAFCO),<sup>24</sup> Saudi Kayan,<sup>25</sup> and

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<sup>18</sup> The National Industrialization Company, available at <<http://www.tasnee.com/>> accessed 1 June 2014.

<sup>19</sup> The Nama Chemicals Company, available at <<http://www.nama.com.sa/>> accessed 1 June 2014.

<sup>20</sup> The Saudi International Petrochemical Company (Sipchem), available at <<http://www.sipchem.com/>> accessed 1 June 2014.

<sup>21</sup> The Sahara Petrochemicals Company, available at <<http://www.saharapcc.com/>> accessed 1 June 2014.

<sup>22</sup> Yanbu National Petroleum, available at <<http://www.yansab.com.sa/>> accessed 1 June 2014.

<sup>23</sup> The Rabigh Refining and Petrochemical Company (Petrorabigh), available at <<http://www.petrorabigh.com/>>, accessed 1 June 2014.

<sup>24</sup> The Saudi Arabian Fertilizer Company (SAFCO), available at <<http://www.safco.com.sa/en/>> accessed 1 June 2014.

<sup>25</sup> Saudi Kayan, available at <<http://www.saudikayan.com.sa/>> accessed 1 June 2014.

finally Sadara.<sup>26</sup> All these companies are owned by either ARAMCO or SABIC, thereby distinguishing their importance in the market. This limits the freedom of competition between them and other small petrochemical companies. Saudi petrochemicals products have been subject to negative export experiences, because of international AD and anti-subsidy laws; they are protected from these when operating domestically by lack of competition from within the sector.

SABIC has embarked internationally on partnerships with several major petrochemicals companies around the world. Currently it has part shares in, or owns outright, approximately 64 companies in the petrochemicals industry.<sup>27</sup> For example, SABIC owns Asia Pacific Pte Ltd in Asia, which occupies a significant position as an export company, distributing petrochemicals products throughout China, Singapore, Indonesia, Vietnam, Hong Kong, Taiwan, South Korea and Japan.<sup>28</sup> It also owns three petrochemicals companies in Europe: Geleen (the Netherlands), Teesside (the United Kingdom) and Gelsenkirchen (Germany).<sup>29</sup>

The above summary of ARAMCO, SABIC and the remainder of the petrochemicals sector demonstrate a direct relationship between access to large reserves of oil and natural gas and the ability to offer low prices on petrochemicals products. Thus, the fact that the Saudi Aramco Company for the extraction of oil and natural gas is wholly owned by the Saudi government (which also owns 70% of the remaining Saudi's petrochemical companies), confers unfair competitive advantage on Saudi products in the international markets. There is a strong argument in favour of mitigating this by applying AD duty to Saudi petrochemicals products, when its petrochemicals products are exported to the international market. Such arguments

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<sup>26</sup> Sadara, available at <<http://www.sadara.com/>> accessed 1 June 2014.

<sup>27</sup> SABIC, available at <<http://www.sabic.com/>> accessed 1 June 2014.

<sup>28</sup> SABIC, available at <<http://www.sabic.com/>> accessed 1 June 2014.

<sup>29</sup> SABIC, available at <<http://www.sabic.com/>> accessed 1 June 2014.

are based on the company's ability to sell petroleum raw materials at a lower price than the prevailing international market level, as will be shown later in this research.

Over the last ten years, Saudi Arabia has been examining how best to diversify its sources of national revenue to decrease its dependency on the oil industry. There are two main reasons for this:<sup>30</sup>

- 1- Oil is a product that will eventually run out, being a non-renewable resource; and
- 2- Fluctuations in oil price and speculation in the financial stock markets have affected the stability of oil prices.

Thus, Saudi Arabia has issued a plan for the industrial sector that includes the petrochemicals industry: "*Towards a competitive industry and an economy based on knowledge*" (this is Saudi Royal Decree No. 35, dated 3<sup>rd</sup> of February, 2009 and is a National Industrial Strategy detailing objectives for 2020).<sup>31</sup> The main aim of this strategic plan was to raise the industry's contribution to national revenue by 20% by 2020 (currently it is 11.1%),<sup>32</sup> and to attain a privileged position on the global industrial map.

Moreover, part of this plan included a package of industrial legislative changes including a review of all legislation related to the industrial sector and trade, which must be completed in a short period of time (during the first five-year plan for the implementation of the strategy).<sup>33</sup> This transformation will involve the evaluation

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<sup>30</sup> Eid Al-Juhani, *The Kingdom of Saudi Arabia after one hundred years*, (Dara King Abdul-Aziz, 1999) v 14, 257.

<sup>31</sup> The National Industrial Strategic for Industry 2020 Saudi Industrial Development Funds, available at <<http://www.sidf.gov.sa/>> accessed 1 June 2014.

<sup>32</sup> The National Industrial Strategic for Industry 2020 Saudi Industrial Development Funds, available at <<http://www.sidf.gov.sa/>> accessed 1 June 2014.

<sup>33</sup> The National Industrial Strategic for Industry 2020 Saudi Industrial Development Funds, available at <<http://www.sidf.gov.sa/>> accessed 1 June 2014.

and proposal of new laws, such as company law, tax incentive laws, anti-monopoly laws, and laws to protect domestic technology, as well as a foreign investment law.<sup>34</sup> Crucially, the strategy also highlights the importance and necessity of reviewing AD law in Saudi Arabia.

## 1.2 Statement of problem

In recent years, SABIC has faced a number of legal allegations related to AD laws, and following export of its products abroad. These allegations have also affected other Saudi petrochemicals companies. Legal cases have been brought against SABIC in China, India, Turkey, and the USA, as well as elsewhere in the Middle East, in developing countries, and in the European Union.<sup>35</sup> These AD laws provide opportunities for unfair competition in the petrochemicals market.

For example, in the case of India, at the beginning of 2009, the Indian government applied AD duty to Saudi petrochemicals products.<sup>36</sup> This duty required exporters to pay an additional \$440 per tonne of product, over a period of six months. This period began 15 June 2009 and ran until 29 January 2010.<sup>37</sup> However, following negotiations between the Saudi Arabian government and India, India terminated the case and cancelled the AD duty.<sup>38</sup> In addition, the European Union and Turkey also terminated AD cases raised against Saudi Arabian petrochemicals products.<sup>39</sup>

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<sup>34</sup> The National Industrial Strategic for Industry 2020 Saudi Industrial Development Funds, available at <<http://www.sidf.gov.sa/>> accessed 1 June 2014.

<sup>35</sup> The World Bank Global Anti-dumping Database, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014

<sup>36</sup> See the case number 14/5/2009-DGAD under the Indian anti-dumping authority, available at <[http://commerce.nic.in/traderemedies/ad\\_casesinindia.asp?id=2](http://commerce.nic.in/traderemedies/ad_casesinindia.asp?id=2)> accessed 1 June 2014

<sup>37</sup> See the case number 14/5/2009-DGAD under the Indian anti-dumping authority, available at <[http://commerce.nic.in/traderemedies/ad\\_casesinindia.asp?id=2](http://commerce.nic.in/traderemedies/ad_casesinindia.asp?id=2)> accessed 1 June 2014

<sup>38</sup> See the case number 14/5/2009-DGAD under the Indian anti-dumping authority, available at <[http://commerce.nic.in/traderemedies/ad\\_casesinindia.asp?id=2](http://commerce.nic.in/traderemedies/ad_casesinindia.asp?id=2)> accessed 1 June 2014

<sup>39</sup> The Indian case number 14/5/2009-DGAD under the Indian anti-dumping authority, available at <[http://commerce.nic.in/traderemedies/ad\\_casesinindia.asp?id=2](http://commerce.nic.in/traderemedies/ad_casesinindia.asp?id=2)> accessed 1 June 2014. The EU case

Despite their dissolution, these cases suggest there is a risk of similar cases arising in the near future. This prompts the question: why are those products produced by the Saudi petrochemicals industries repeatedly the subject of AD related legal actions?

This situation also affects Saudi industrial strategy, as the Saudi government has advanced a 10-year plan to expand the petrochemicals' sector in particular and the entire industrial sector in general.<sup>40</sup> This plan aims to increase employment opportunities, and to diversify Saudi Arabia's sources of national income.<sup>41</sup> However, those cases brought against Saudi petrochemicals products have the potential to impede the saleability of these products abroad, thereby negatively affecting implementation of the plan. In addition, limits on Saudi petrochemicals exports could affect the Saudi economy, both directly and indirectly.

The grounds for the AD cases brought against Saudi Arabian petrochemicals products<sup>42</sup> were unfair competition, based on the relatively lower prices of Saudi Arabian products compared to normal international market prices. The low prices arise from the fact that the Saudi government subsidises fuel, gas and electricity.<sup>43</sup> In addition, the petrochemicals sector has access to cheap raw materials from the government owned Saudi Aramco. These raw materials costs are not similar to standard international prices. Moreover, there is no effective competitive mechanism

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number 2011/c 49/10, see Official Journal of the European Union law, available at <<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2011:049:SOM:EN:HTML>> accessed 1 June 2014. The Turkish case number 2008/40, see The Turkish Ministry of Economic, available at <<http://www.economy.gov.tr/>> accessed 1 June 2014.

<sup>40</sup> The National Industrial Strategic for Industry 2020 Saudi Industrial Development Funds, available at <<http://www.sidf.gov.sa/>> accessed 1 June 2014

<sup>41</sup> The National Industrial Strategic for Industry 2020 Saudi Industrial Development Funds, available at <<http://www.sidf.gov.sa/>> accessed 1 June 2014

<sup>42</sup> The World Bank Global Anti-dumping Database, available at <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>, accessed 1 June 2014

<sup>43</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, vii . Also, see the report by Reuters Arabic news, available at <<http://ara.reuters.com/article/businessNews/idARACAE9B2FFP20131110>> accessed 1 June 2014

inside Saudi Arabia's domestic market, as all petrochemicals products are either produced by SABIC or by companies partly owned by SABIC.

This research shows that a high number of cases have involved petrochemicals products, and that these have increased to over 20% of all AD cases around the world.<sup>44</sup> This increase represents a concern, and is the motivation for this study, as it has many legal causes. The absence of a legal guarantee between conflicting parties in disputes relating to AD and anti-subsidy laws at the national level is a notable problem. Additionally, there is a legal gap concerning the application of AD law to limit exported products; applying AD duty to exported products can trigger price increases among similar domestic industries. Moreover, AD and anti-subsidy laws have been used as a weapon to keep exported products out of the market, rather than using AD and anti-subsidy laws to protect domestic products from unfair competition. In addition, conflicting parties citing AD and anti-subsidy under the WTO agreement have refused to apply different approaches to resolve legal matters such as mediation and arbitration. Conflicting parties rarely use the alternative dispute resolution methods available, although these could be the best way to reduce the huge number of AD cases worldwide; especially those brought against petrochemicals products. Good faith must be apparent in the relationship between the WTO contracting parties, in order to reduce conflict regarding agreements between parties.

This research will only refer to three cases brought against Saudi Petrochemicals products; these are the cases filed by India, Turkey and the EU.<sup>45</sup> It

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<sup>44</sup> The World Bank Global Anti-dumping Database, available at <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>, accessed 1 June 2014

<sup>45</sup> Indian case number 14/5/2009-DGAD under the Indian anti-dumping authority, available at <[http://commerce.nic.in/traderemedies/ad\\_casesinindia.asp?id=2](http://commerce.nic.in/traderemedies/ad_casesinindia.asp?id=2)> accessed 1 June 2014. The EU case number 2011/c 49/10, see Official Journal of the European Union law, available at <[9](http://eur-</a></p></div><div data-bbox=)

was a challenge for the researcher to identify the most relevant and useful cases for analysis, from the 33 cases that have been brought against Saudi Arabia.<sup>46</sup> The researcher established the following inclusion criteria to narrow the options:

1. The cases should offer a representative sample of all AD cases brought against Saudi Arabian petrochemicals products.
2. The cases should have been raised against Saudi petrochemicals products at the national level.
3. The cases should have been well covered in the Saudi media, and the offending companies should have received good governmental support.
4. The cases should have terminated in a unique way; in some cases after application of AD duty.
5. Some of the cases should include the issue of subsidies.

However, these three cases fulfil all criteria for doing the examination properly under this research in order to get the right result and point out the legal problem. This will be seen in chapter three of this research.

### **1.3 Objectives of study**

Petrochemicals products are important to the Saudi Arabian economic system, as recognised in the Saudi Arabian government's plans for improvement. The AD cases brought abroad represent potential obstacles to the realisation of this plan. Consequently, this research sets out to fulfil a number of economic and legal objectives as follows:

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[lex.europa.eu/JOHtml.do?uri=OJ:C:2011:049:SOM:EN:HTML](http://lex.europa.eu/JOHtml.do?uri=OJ:C:2011:049:SOM:EN:HTML)> accessed 1 June 2014. The Turkish case number 2008/40, see The Turkish Ministry of Economics, available at <<http://www.economy.gov.tr/>> accessed 1 June 2014.

<sup>46</sup> The Global Anti-dumping Database held by the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.



- 1- To avoid AD and anti-subsidy cases being brought against Saudi Arabian petrochemicals products in the future;
- 2- To establish legal solutions to address current cases;
- 3- To improve the competition between petrochemicals products inside the Saudi Arabian domestic market, by applying legal processes, such as limiting the Saudi Arabian government's interference in the sector;
- 4- To reform Saudi Arabian subsidy programmes, so they become compatible with anti-subsidy law under the WTO agreement;
- 5- To improve the AD process to achieve guarantees of fairness for all parties;
- 6- To protect the petrochemicals sector worldwide by establishing a new treaty under the WTO agreement or beyond the WTO framework;
- 7- To encourage and advance alternative dispute resolutions as a primary step in any AD and anti-subsidy's legal process; and
- 8- To propose a Disputes Resolution Centre (DRC), as well as an International Trade Court (ITC).

This thesis aims to explore the lack of compatibility between the export policies in Saudi Arabia and the WTO agreement rules.<sup>47</sup> Firstly, there are export policies related to the Saudi Arabian government, which actively subsidises the domestic petrochemicals sector, conferring an advantage and having a direct effect on product pricing. This has an impact, both inside and outside Saudi Arabia. Secondly, the domestic competition policies in Saudi Arabia require examination, due to the huge debate regarding the effectiveness of competition laws, which relate to the petrochemicals sector.<sup>48</sup> Finally, the Saudi government reports interference in

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<sup>47</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994).

<sup>48</sup> Competition Law issued by a Royal Decree 138 dated 22 June 2004.

this sector, challenging the development of SABIC into the largest petrochemicals company in the world.

This work also aims to consider how countries including India, Turkey and the European Union follow WTO import regulations in reference to domestic AD and anti-subsidy laws. The effect of this will be examined by investigating a number of cases brought against Saudi petrochemicals products. Furthermore, the impact on Saudi Arabian petrochemicals products following these cases will be analysed.<sup>49</sup> The scope of this examination will be in reference to WTO AD and anti-subsidy regulations,<sup>50</sup> to clarify the extent to which these countries observe the agreement. Alternative disputes mechanisms will also be considered as a means to reduce the number of AD cases brought against Saudi Arabian petrochemicals products, as well as those that have a positive effect on AD cases around the world in general.

## **1.4 Research questions**

Based on the problem statement and research aims, the researcher has formulated six research questions:

- 1- Are Saudi Arabia's existing policies and regulations for exporting petrochemicals products compatible with the WTO rules that are applicable to dumping and subsidies?
- 2- Did the AD cases brought by Turkey, India and the EU countries against Saudi petrochemicals products have an impact on these products?

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<sup>49</sup> Indian, Turkish and European Union Anti-Dumping cases against the Saudi Petrochemicals products, supra 32 & 33.

<sup>50</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 231 (1999), 1869 UNTS 14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201.

- 3- What are legal weaknesses in the AD and anti-subsidy laws under the WTO agreement?
- 4- Can the petrochemicals industries be protected either under the WTO agreement or beyond the WTO framework, and if so how?
- 5- What measures should Saudi Arabia implement in order to prevent imposition of AD duty on its petrochemicals products in future?
- 6- Is there an effective mechanism for the resolution of disputes on AD and Anti-Subsidy under the WTO?

## **1.5 Methodology**

This research studies the legal processes relating to all the export procedures applied to Saudi petrochemicals products in the international markets pertaining to AD and anti-subsidy actions. The research will combine investigation and analysis of recent AD cases against the Saudi Arabian petrochemicals products, with an examination of Saudi Arabian domestic competition law and legal processes.

Consequently, the methodology in this research involves a textual legal analysis involving case law study. It will begin with an analysis of AD and Anti-Subsidy regulation under the WTO agreement and Islamic law, which is applicable to Saudi Arabia. The analysis of AD and anti-subsidy under the WTO agreement will be performed in reference to selective cases from the Dispute Settlement. It will then reveal all the relevant provisions regarding these two matters. After which, cases against Saudi Arabia brought by India, Turkey and EU member states will be analysed. This will help to explain the legal matters pertaining to the export of Saudi Arabian petrochemicals products. Finally, alternative dispute resolution procedures available under the WTO agreement will be discussed, with some suggestions for

further development. This research will conclude by offering appropriate recommendations to protect Saudi Arabia's petrochemicals products from international AD and anti-subsidy legal action. This conclusion will include proposals to resolve legal issues inside Saudi Arabia, in order to ensure export of these products without encountering AD and anti-subsidy legal issues. Carefully selected primary and secondary sources related to AD and anti-subsidy laws will be drawn on to support this research.

## **1.6 Literature Review**

To attain in depth knowledge and understanding of previous studies and research concerning AD and anti-subsidy laws as related to petrochemicals products, a comprehensive literature review is required. This research employed a novel and unique approach to AD and anti-subsidy. All previous studies and researches regarding these two topics usually present one side. This can mean studying the internal market with the aim of protecting it and domestic industry by finding weaknesses in the domestic legal system and trying to resolve them. Alternatively, conducting theoretical and analytical studies to determine how to improve and develop regulations at the international level to improve on any defects or malfunctions.

Despite the different angle considered in this research, some aspects of it share similar aims to previous work. The study aim is to identify ways to protect Saudi petrochemicals products in the international marketplace from AD and anti-subsidy in all parts of the export process by analysing all possible processes and legal actions. This will uncover any legal weaknesses and defects in the Saudi Arabian legal system related to the export of these productions abroad, and introduce

practical solutions to apply to counter legal action being taken by importing countries against Saudi products.

To date, there are a reasonable number of useful studies published concerning AD and anti-subsidy. One such study was that by Wenre Qian in reference to China, which provided: “An analysis of the legal problems and issues arising from the European Union’s current AD legislation with regard to the People’s Republic of China”.<sup>51</sup> It analysed the implementation of policy, and explores legal problems and issues from both a theoretical and practical perspective. It began by examining the origins of EU AD legislation - the General Agreement on Tariffs and Trade (GATT) AD rules. After which it provides an in depth justification of the legal problems associated with EU AD practice in the context of China's economic reforms, starting from 1979. To suggest solutions to resolve the problems and offer a justification, the author considered comparable research revealing alternative strategies from the US AD legislation, and that in Australia, New Zealand and Japan, where applicable to China. China's accession to the World Trade Organisation on 2<sup>nd</sup> of December 2001, new issues and disputes have arisen with regard to AD practice. Therefore, this study attempted to find a solution that would be acceptable to EU and China, focusing on the regulation itself, theoretically rather than practically. However, this kind of research is not helpful to Saudi Arabia as it focused on two different jurisdictions: the EU and China.

In other PhD research, conducted by Alfonso Mendieta-Pacheco regarding the “Anticompetitive Effects of Antidumping Policy in Mexico”,<sup>52</sup> the researcher focused on the internal regulations inside Mexico as a “Developing Country”, to help

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<sup>51</sup> Wenre Qian, *An analysis of the legal problems and issues arising from the European Union’s current anti-dumping legislation with regard to the People’s Republic of China* (PhD thesis, University of Glasgow 2003).

<sup>52</sup> Alfonso Mendieta-Pacheco, *Anticompetitive Effects of Antidumping Policy in Mexico* (PhD thesis, University of East Anglia 2009).

reduce the increasing number of AD cases brought by developing countries. The researcher proposed implementing a confirmed domestic market structure inside Mexico. The main hypothesis introduced in this research was that price distortions generated by the introduction of AD policies serve as a departure point for the achievement of collusive agreements. The researcher was trying to test a theoretical model: “Duopoly Compete Infinitely”. Although this research examined antidumping it did not cover all the aspects covered by the current research; however, the theoretical model provided a practical foundation upon which to base conclusions.

Gabriele Suder’s PhD study introduced “Anti-Dumping Measures and the Politics of EU-Japan Trade Relations in the European Consumer Electronics Sector”.<sup>53</sup> This research focused on the role of price cuts in dumping measures in order to determine what aspects dominate the market or increase market share between competitors creating similar products. The researcher analysed the relationship between EU-Japanese trade policy and examined the competitiveness of European consumer electronic industry. This research differs from the current research in two respects. First, it focused on electronic industrial products, whereas this study concerns the petrochemicals industry; however, both products are subject to AD problems and therefore attract the interest of researchers. Second, this research emphasised the relationship between EC and Japan in particular, whereas the focus of this study is Saudi Arabia. Although this research also applies a different methodology, the analysis of antidumping legal difficulties provided by Suder is of value in some aspects.

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<sup>53</sup> Gabriele Suder, *Anti-Dumping Measures and the Politics of EU-Japan Trade Relations in the European Consumer Electronics Sector* (PhD thesis, University of Bath 1993).

Other researchers have presented comparative studies between just two jurisdictions. For example, research by Cheong-Chi Chun: “A Comparative Study on Anti-Dumping Laws in the EU and Korea in the Context of International Rules”,<sup>54</sup> which concentrates on Korean electronic products as a target of EC AD regulations. The researcher tried to find a solution to limit the barriers encountered by Korean electronic products using a comparative methodology. This involved comparing the two AD regulatory systems as they apply to the EC and Korea as non-members of the EC community to locate lack of provisions in Korean AD law to protect Korean products. However, the research principally focused on protecting Korean electronic products in relation to the EC market, and was not applicable to different jurisdictions. This research, however, will seek solutions to protect Saudi petrochemicals products globally, and not within a single jurisdiction. This means applying multiple models and new ideas to find solution to these issues internally. However, there is an option to introduce new models to reduce the increasing number of AD cases between contracting parties, save time and make the trade between contracting parties smoother.

The research study, “Analysing the Impact of the World Trade Organisation (WTO) on the Sustainability of Competitiveness of the Petrochemicals Industry in Saudi Arabia” by Abdulaziz Aljarallah,<sup>55</sup> was found to be the closest to this research. The researcher was trying to ascertain the impact of AD measures on Saudi Arabian petrochemicals products, but from an economic perspective only. The research focused on the strengths, weaknesses, opportunities and threats to the petrochemicals industry in Saudi Arabia after joining the WTO. Hence, this research does not cover

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<sup>54</sup> Cheong-Chi Chun, *A Comparative Study on Anti-Dumping Laws in the EU and Korea in the Context of International Rules* (PhD Thesis, University of Hull 1996).

<sup>55</sup> Abdul-Aziz M Aljarallah, *Analysing the Impact of the World Trade Organisation (WTO) on the Sustainability of Competitiveness of the Petrochemical Industry in Saudi Arabia*, (PhD thesis, Durham University 2010).

all the objectives introduced here. The study aims and outcomes also differed, although some of the statistics and guidelines were of use to this research. However, the study was limited by its aim to protect the sector internationally from other competitors, rather than protecting the products during the exporting abroad process.

The differences between this research and other research reveal the gap that this study intended to fill. This study reports unique and specific research to uncover strategies to protect Saudi petrochemicals products from AD measures when exporting them to other countries, including the application of legal protection to some products internally in Saudi Arabia. Meanwhile, it will also help to identify models to reduce AD cases worldwide between contracting parties after the huge increase in these types of cases, particularly in developing countries “new users”.

### **1.7 Saudi Arabia and Petrochemicals Products**

In 1976, Royal Decree Number M/66 date 6/9/1976 established the "Saudi Arabian Basic Industries Corporation (SABIC)", which held stocks on the Saudi stock exchange. The Saudi government owns 70% of the company's capital, with a total value of 30 billion Saudi riyals; the citizens of Saudi Arabia and the GCC own the remainder of the capital.<sup>56</sup> Shares in SABIC are listed on the Saudi stock exchange, and it is one of the most important companies directly affecting the performance of the Saudi stock exchange market, both positively and negatively. Furthermore, the financial health of the company reflects that of Saudi Arabia's economy.

The objective of establishing the company was to invest in the country's hydrocarbon resources, by providing petrochemical's materials of high value (e.g.

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<sup>56</sup> (<http://www.sabic.com/corporate/en/ourcompany/default.aspx>). Accessed 5 January 2015.



chemicals, polymers and fertilizers) and quality for export and to develop industrial manufacturing within Saudi Arabia, to increase the percentage contribution of non-oil sectors to the national income.

The company's total production capacity reached 6.3 million metric tons in 1985, rising to 55 million metric tons by the end of 2007. In 2009, the company attained a capacity of 59 million metric tons by the end of 2009, although it had planned to reach 73 million metric tons.<sup>57</sup> SABIC was not able to reach its target for 2009 for a number of reasons, one of which concerned legal problems associated with dumping.

SABIC's plan is to reach 130 million metric tons by the end of 2020,<sup>58</sup> to become one of the best petrochemical industries in the world. The total profits of the company in 2008 were 22 billion Saudi riyals, the total sales revenue was 151 billion SR, and total assets were 272 billion Saudi Riyals.<sup>59</sup> In 2009, total profits were 9 billion Saudi Riyals, total sales were 103 billion Saudi Riyals and total assets were 297 billion Saudi Riyals<sup>60</sup>.

The difference in the figures above, in relation to 2008 and 2009 total profits and sales, reflect an effect from AD duty and process. At present, SABIC is one of the ten largest petrochemical companies in the world, and the largest non-oil producing company in the Middle East.<sup>61</sup> SABIC products are a very important component of thousands of industries worldwide, as detailed subsequently in this thesis.

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<sup>57</sup> SABIC annual report for 2008, 2009.

<sup>58</sup> SABIC website, (<http://www.sabic.com/corporate/en/ourcompany/factsandfigures/production.aspx>), accessed 5 January 2015.

<sup>59</sup> SABIC, *the annual report 2008*, 2008, p 3. Also see SABIC website ( <http://www.sabic.com/> ).

<sup>60</sup> SABIC, *the annual report 2009*.

<sup>61</sup> <http://www.sabic.com/corporate/en/ourcompany/default.aspx>, accessed 9 January 2015.

SABIC has entered into partnerships with several major petrochemicals companies around the world and at the time of writing owns an estimated 64 companies in the petrochemical industry, whether as full or partial owner. For example, it owns Asia Pacific Pte Ltd in Asia, which occupies a good position in the sales of petrochemical products to China, Singapore, Indonesia, Vietnam and Hong Kong, Taiwan and South Korea and Japan.<sup>62</sup> It also owns three petrochemical companies in Europe: Geleen in the Netherlands, Teesside in the United Kingdom and Gelsenkirchen in Germany.<sup>63</sup>

Petrochemicals are products produced from oil and natural gas in a complicated industrial process. There are many different types of petrochemicals products, obtained in different ways; according to a business dictionary, a petrochemical is a

Chemical obtained either directly from cracking (pyrolysis), or indirectly from chemical processing of petroleum oil or natural gas. Major petrochemicals are acetylene, benzene, ethane, ethylene, methane, propane and hydrogen, from which hundreds of other chemicals are derived. These derivatives are used as elastomers fibres, plasticisers and solvents and as feedstock for production of thousands of other products.<sup>64</sup>

The petrochemicals products made by SABIC can be divided into six sections under specific divisions, as follows:<sup>65</sup>

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<sup>62</sup> SABIC website (<http://www.sabic.com/corporate/en/ourcompany/sabicworldwide/default.aspx>, accessed 9 January 2015).

<sup>63</sup> <http://www.sabic.com/corporate/en/ourcompany/default.aspx>, accessed 9 January 2015.

<sup>64</sup> Business Dictionary website, <http://www.businessdictionary.com/definition/petrochemical.html>, accessed on 7 February 2015.

<sup>65</sup> SABIC, *the annual report 2009*, 34 to 46.

- 1- Chemicals products, which are very important elements in thousands of goods necessary for our modern lives. These products are divided into Olefins, Aromatics and Oxygenates.
- 2- Intermediates, which are very important products in manufacturing transfer, i.e. for producing textiles and soap. These products are divided into Fibre Intermediates, Industrial Gases, Chemical Intermediate and Linear alpha Olefins.
- 3- Polymers. SABIC is the fourth largest petrochemicals company in world producing polymers.
- 4- Fertilizer, which is important to achieve global food security.
- 5- Metals. SABIC is the fifth largest company in the world, and the first in the Middle East, to produce iron and steel by direct reduction.
- 6- Plastics, SABIC produce a very high quality resin.

This list is important as it explains briefly, the different kinds of Saudi petrochemical products and their importance to various industries. It also assists to establish similarity when analysing cases.

## **1.8 Summary of chapters**

This research comprises seven chapters, starting with this introduction, which forms Chapter 1. This chapter has provided some brief the background to this research, offered a statement of the problem and the research questions. It has also included the objectives of the study, the methods used in this research and finally, a summary of the chapters.

In Chapter 2, the concept of international trade agreements under Islamic law, as the law applicable to Saudi Arabia will be considered. The chapter will

examine selective AD cases according to AD laws to provide a clear understanding of anti-subsidy law. It will discuss the compatibility between AD and anti-subsidy laws under the WTO agreement and Islamic law, as well as GCC country regulations related to AD and anti-subsidy.

Chapter 3 covers several AD cases raised against Saudi Arabia at both the national and international level, as well as detailing the reasons why the Saudi Arabia government did not strive to resolve these cases. After this, some of these cases will be analysed in detail in order to examine those elements relating to dumping. Finally, the chapter discusses the legal, economic and political impact of these cases on the Saudi petrochemicals sector.

In Chapter 4, some weaknesses of AD and anti-subsidy provisions will be considered as methods to reduce the number of actions brought. Provision of a legal guarantee in these cases is one of the most important gaps covered by this research, and will be addressed in this chapter. In addition, the chapter will address the idea of good faith under these provisions as a way to reduce cases between parties. Finally, it will discuss the idea of establishing an agreement on petrochemicals products to afford these products greater priority under the WTO provisions, and the importance of establishing an international petrochemicals organisation similar to OPEC, as an additional solution, beyond the WTO agreement, to defend these products in the global market.

Chapter 5 will address those legal issues affecting the Saudi legal system that might trigger importing countries to bring cases against Saudi petrochemicals products. It will discuss direct and indirect subsidies from the Saudi government to this sector, and explain the direct effect of these on the pricing of petrochemicals products when exported abroad. Moreover, it will address the fact that even with a

legal framework to maximise competition inside Saudi Arabia, no such competition occurs, because many of the companies are government owned. Saudi Arabia will need to initiate significant changes to afford opportunities to investors, whether Saudi or foreign, to enter the petrochemicals sector. Finally, the chapter will suggest a greater role for GCC members in such cases.

Chapter 6 will discuss alternative dispute resolution mechanisms as being ideal for ending disputes between parties at lesser financial cost and in a timely manner. It will examine the notion of allowing flexibility, enabling companies to enter disputes directly without government involvement. This chapter will suggest the establishment of two institutions under the WTO, the Dispute Resolution Centre and the ITC.

The final chapter will contain the research outcomes and recommendations, in order to improve the AD and anti-subsidy law under the WTO agreement in general, and offer an alternative dispute resolution mechanism, as well as different Saudi legislation and processes, to ensure smoother trade exchange and facilitate the movement of goods between nations.

## **CHAPTER 2: AD AND ANTI-SUBSIDY UNDER THE WTO IN CONTRAST WITH ISLAMIC LAW AND SAUDI ARABIA'S DOMESTIC LAW**

### **2.1 Introduction**

This chapter examines the AD and anti-subsidy rules<sup>1</sup> set out in the WTO agreement,<sup>2</sup> and the extent to which similar rules apply in Islamic law and in Saudi Arabian domestic law. The examination undertaken in this chapter aims to answer research question one: Are Saudi Arabia's existing policies and regulations for exporting petrochemicals products compatible with the WTO rules that are applicable to dumping and subsidies? This analysis will take place in reference to AD and anti-subsidy rulings under the WTO framework and discuss its implementation, as well as the principal arguments and cases that have arisen under the Dispute Settlement Body (DSB).<sup>3</sup>

To examine the compatibility between AD and anti-subsidy rules under the WTO agreement and Saudi Arabian domestic law, it is important to determine first whether AD and anti-subsidy rules are compatible with Islamic law. This is because Saudi Arabia can only adopt regulations with implications for its domestic legal system that are compatible with Islamic law. This is highlighted in its Basic Law of Governance (article seven "Governance in the Kingdom of Saudi Arabia derives its

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<sup>1</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 UNTS 14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201.

<sup>2</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994).

<sup>3</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 UNTS 401, 33 ILM 1226 (1994).

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”<sup>4</sup>). The findings of this chapter will have implications for other countries using Islamic law as their domestic legal systems.

The intention of AD and anti-subsidy rules is to remove unfair competition<sup>5</sup> or unfair trade practices;<sup>6</sup> therefore, they can directly affect free trade and the process of exchange between contracting parties. It is crucial to mention that the WTO agreement is a unique agreement based on negotiations between contracting parties; thus, it differs from other international agreements. However, AD and anti-subsidy actions undertaken globally can themselves represent obstacles to the successful implementation of the WTO agreement, as discussed in this chapter.

This chapter has five sections. Section 1, examines AD and anti-subsidy regulations under the WTO agreement and implementation practices. It also discusses and analyses these in reference to their main tenets, to deliver a clear understanding of AD and anti-subsidy law. In section 2, AD and anti-subsidy are examined in reference to Islamic law provisions, to provide an understanding of the scope of Islamic legal opinion concerning them. Section 3, will analyse AD and anti-subsidy as manifest in Saudi Arabian domestic law. Section 4, will then discuss compatibility between AD and anti-subsidy rules under the WTO agreement, in reference to Islamic law and Saudi Arabian domestic law. The final section concludes the chapter, presenting the results of all examinations and the relevant analyses.

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<sup>4</sup> Saudi Basic Law of Government (Consider the Saudi Constitution), Issued by the Royal Order number A/90 dated 1<sup>st</sup> of March, 1992. Available at the Saudi Council of Ministries <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=4>> accessed on 1 June 2014.

<sup>5</sup> Peter van den Bossche, *The Law and Policy of the World Trade Organization*, (2nd edition, Cambridge University Press, 2009) 508.

<sup>6</sup> Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013) 674.

## **2.2 AD and Anti-Subsidy under the WTO**

In this section, AD and anti-subsidy are examined, by applying an in depth analysis to cases brought and reported by the Dispute Settlement Body, in order to attain a clear and full understanding of the rules. This section is divided into three main parts. First, it addresses AD under the WTO agreement, relative to the key elements and principal related cases under the DSU. Second, it covers the anti-subsidy rules under the WTO agreement, as linked to the most important DSU cases. Finally, it addresses the relationship between AD and anti-subsidy.

### **2.2.1 Dumping under the WTO**

The AD Agreement (AD Agreement) is an Agreement concerning the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,<sup>7</sup> which is often considered the most complex and technical provision under the WTO Agreement.<sup>8</sup> Dumping action refers to unfair competition in international markets, which may injure or threaten similar domestic products.<sup>9</sup> Dumping is not itself unlawful, except where it causes injury to, or threatens, a similar domestic industry.<sup>10</sup> Yet, in some cases, dumping or AD duty can function to circumvent competition rules; when one country imposes a duty on another country this may then bring additional pressure to bear on other countries. This can lead to one country obtaining a concession, whether political or economic, based on an international decision.

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<sup>7</sup>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201.

<sup>8</sup>Edwin Vermulst, *The WTO Anti-agreement*, (1<sup>st</sup> edition, Oxford University Press, 2008) 1.

<sup>9</sup>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201

<sup>10</sup>Peter van den Bossche, *the Law and Policy of the World Trade Organization* (2nd edition, Cambridge University Press, 2009) 508.



In 1904, the first AD rule was issued by Canada.<sup>11</sup> By the 1920s, many other countries had issued similar types of rules to protect their domestic markets.<sup>12</sup> According to international trade agreement rounds, and after the adoption of AD law under GATT article VI<sup>13</sup>, contracting parties maintained an interest in negotiations on AD, as seen during the Kennedy Round.<sup>14</sup> Finally, the WTO Agreement required implementation of Article VI of GATT 1994, stating that dumping was illegal.<sup>15</sup>

The number of AD cases has increased over the past 10 years.<sup>16</sup> However, it this does not mean that the AD Agreement has failed. In reality, many things have changed globally, especially in terms of international trade, which might prompt reconsideration of the agreement in view of the high number of cases.

### ***2.2.1.1 Definition of dumping***

Aggarwal characterised dumping as a form of price discrimination between national markets;<sup>17</sup> clarifying that it refers to unfair competition in the international marketplace. However, this characterisation does not uniformly express a precise definition of dumping. To demonstrate dumping has occurred, similarities must exist between products and equate to injury to those similar products or a threat to the industry producing them. In such cases, the action of dumping is categorised as causing price discrimination.

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<sup>11</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (3<sup>rd</sup> edition, Routledge 2005) 232.

<sup>12</sup> Aradhna Aggarwal, *The Anti-dumping Agreement and Developing Countries, an Introduction*, (1st edition, Oxford University Press, 2007) 49.

<sup>13</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700, Article VI.

<sup>14</sup> Trebilcock MJ and Howse R, (2005) *The Regulation of International Trade*, (3<sup>rd</sup> edn. Routledge) 10016.

<sup>15</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201.

<sup>16</sup> See the Anti-dumping cases under the Dispute Settlement Body, World Trade Organization, available at <<http://www.wto.org/>> accessed on 1 June 2014.

<sup>17</sup> Aradhna Aggarwal, *The Anti-dumping Agreement and Developing Countries, an Introduction*, (1st edition, Oxford University Press 2007) 16.

Bentley and Silberston define dumping as the practice of selling a product for export at a price below its normal value,<sup>18</sup> “Dumping arises from the pricing practices of exporters as both normal value and export prices reflect pricing strategies in home and foreign markets”.<sup>19</sup> Nevertheless, this definition focuses on prices in general and the selling operation itself, which is insufficient evidence upon which to claim dumping.

It is suggested that the closest definition is that provided by Bossche, it suggests “[the] bringing of a product onto the market of another country at a price less than the normal value of that product”.<sup>20</sup> For the purpose of this study, this definition is deemed the most accurate, in that it includes all the details regarding dumping, so that they can be clearly understood. However, were points about similarities and injury or threat included, these would then be clearer and more comprehensive. The definition used in this research is: the bringing of a product to the market of another country at a price less than the normal value of that product, thereby causing injury or threat to an industry producing a similar product.

Nonetheless, in the Appellate Body Report for US-Mexico Stainless Steel the definition of dumping, as stated in the AD Agreement is:

“Dumping” is defined in Article VI: 1 of the GATT 1994 as occurring when a product of one country is introduced into the commerce of another country at less than its normal value. Article VI: 1 further states that dumping is to be “condemned” if it causes or threatens to cause material injury to the domestic industry producing a like product...<sup>21</sup> In the other way, this similar product has to be destined for consumption in the exporting country “...a product is to be consider as being “dumped” if the “export price” of the product “exported” from one country to

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<sup>18</sup>Philip Bentley & Aubrey Silberston, *Anti-dumping Countervailing Action* (Edward Elgar Publishing Limited, 2007) 11.

<sup>19</sup>Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 43.

<sup>20</sup> Peter van den Bossche, *The Law and Policy of the World Trade Organization*, (2nd edition, Cambridge University Press, 2009) 508.

<sup>21</sup>Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 38.

another is less than the comparable price of the “like” product when destined for consumption in the “exporting country.”<sup>22</sup>

Yet, the same case referred to key elements of the dumping as:

The elements of the definition of “dumping” contained in Article VI: 1 of the GATT 1994 and Article 2.1 of the AD Agreement –namely, that “dumping” occurs when a product is “introduced into the commerce of another country” at an “export price” that is less than the “comparable price for the like product in the exporting country”-suggest to us that article VI: 1 of the GATT 1994 and article 2.1 of the AD Agreement address the practice of an exporter.<sup>23</sup>

Based on the previous statement, it can be asserted that there are seven important elements that must be met as pre-conditions for dumping to be said to exist; all seven conditions need to be present before AD can be alleged. They are as follows:

1. The product has to be exported “Introduced”;
2. The product has to be from another country;
3. There has to be a market for competition between goods;
4. The product has to have a normal price and a lower price;
5. There have to be similarities between the products;
6. Differences in pricing must lead to injury or threat to similar products; and
7. There must be a causal link between low price and injury.

### ***2.2.1.2 Key elements of dumping***

The key elements involved in dumping, as mentioned above, are: exporting the product from another country, competitive market, the price, domestic and imported products, and injury or threat to the domestic industry. This section includes an analysis of all these elements.

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<sup>22</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 39.

<sup>23</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 39.

#### 2.2.1.2.1 *Exporting products from another country*

As defined above, to implement AD provisions in any situation, the first point to consider is whether the product is being imported from another country. In other words: "...introduced into the commerce of another country...".<sup>24</sup> However, the introduction of an exported product into another country has to take place in the ordinary course of trade. This is as mentioned in article 2.1, in reference to the US-Japan Hot-Rolled Steel case. The panel cited no clear definition of the word "ordinary" in the AD Agreement: "... However, the AD Agreement does not define the concept of "ordinary course of trade" either in article 2.1 or elsewhere, and establishes no general tests for determining whether sales are made in the ordinary course of trade, or not...".<sup>25</sup> Thus, in the absence of a definition of "ordinary course", the panel gave the AD authorities the right to determine if the product made was similar to that produced domestically or not: "...it seems clear to us, and the parties do not dispute, that investigating authorities must determine whether sales in the home market are made in the ordinary course of trade ...".<sup>26</sup>

There is evidence that a local authority cannot apply provisions pertaining to competition between two or more similar products produced in the same country or within a union of countries. Nevertheless, it is required that the similar imported and dumped product has affected domestic industries:

The domestic industry consists of the domestic producers as a whole of the like products, or of those producers whose collective output constitutes a major preparation of the total domestic production of those

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<sup>24</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS art 2.1.

<sup>25</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, 37- 38.

<sup>26</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, 38.

products. The terms “domestic industry” and domestic producers are also used interchangeable in article 3.1 and 3.4 of the Agreement.<sup>27</sup>

However, if only a portion of the exported products is produced in the country where the dumping case arose, an AD provision could not be applied. This is because the source of the products is the same, as mentioned in the footnote to article four:

...producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person...<sup>28</sup>

This means, the product has to be fully exported from another country, and originate from that country or union of countries.

#### *2.2.1.2.2 Market and competition*

In order to apply AD rules to influence competition in the marketplace, it is important to have a domestic marketplace in which domestic and imported products can compete. This means the domestic marketplace should employ clear regulations regarding competition, to govern operations between domestic and imported products effectively. There should be a good business environment, supportive of both foreign and local investors seeking to conduct business fairly with equal access to opportunities. However, the most important point here is to exercise authoritative control over the market, by checking the prices and competition between products. This will maintain businesses at a good competitive level, and offer protection. Moreover, it is important for authorities to maintain strong information rich databases concerning competition, both nationally and internationally. This will

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<sup>27</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, 57.

<sup>28</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS, footnote of Article 4.

assist in uncovering illegal actions, such as dumping, which might affect the market negatively, either directly or indirectly.

#### *2.2.1.2.3 Price*

When referring to value, and the definition ‘priced less than the normal value’, both domestic prices and export prices are mentioned in the WTO agreement in reference to dumping actions. These relate to the mechanisms for uncovering dumping actions. Price is the most important element reported in AD cases, as an entire case can be built on information about price. Article 2 paragraph 1, mentions that dumping 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...”.<sup>29</sup> However, in the US-Japan Hot-Rolled Steel case, it was mentioned, with regard to the establishment of normal value, that: “...we note that article 2.1 establishes that normal value is the “comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country”.<sup>30</sup>

Simply put, dumping is when an imported similar product is sold at less than its original price in the exporting country. However, this price would also need to be less than the price for a similar product in the importing country. However, arguably, there is no standard for a ‘normal’ price, as pricing alters according to the circumstances of each individual case. In particular, normal value of domestic sales cannot be used as a measure, where there are no relevant domestic sales.<sup>31</sup> Therefore,

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<sup>29</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS, footnote of Article 2.

<sup>30</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, 39.

<sup>31</sup> Edwin Vermulst, *The WTO Anti-agreement*, (1<sup>st</sup> edition, Oxford University Press, 2008) 30.

the normal value of a product is the sale price in the home market, the market where it is produced or the export market.<sup>32</sup>

However, multiple external factors can affect the price, whether directly or indirectly. The cost of manufacturing, taxes, government fees, rate of currency exchange, and inflation, all effect the determination of normal price. Some of these elements are not considered in cases where price is a concern, such as the rate of exchange and inflation. On this particular point, one case affected the United States and Korea concerning unnecessary conversion from the US Dollar to the Korean Won, which allegedly affected price.<sup>33</sup> Therefore, for normal value to be applied four conditions are required:<sup>34</sup>

1. The sale must be in the ordinary course of trade;
2. It must be a like for like product;
3. It must be destined for consumption in the exporting country; and
4. It must be comparable.

The export price and normal value have to be determined and ordered for a case to be ready for AD duty under the these provisions: “Once normal value and export price have been determined in accordance with the provisions of articles 2.1 through 2.3, article 2.4 then establishes rules governing the comparison of normal value and export price”.<sup>35</sup> Thus, price is an important tool for calculating the dumping margin.

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<sup>32</sup> Simon Lester and Bryan Mercurio with Arwel Davies and Kara Leitner, *World Trade Law, Text, Materials and Commentary* (Hart Publishing, 2008) 472.

<sup>33</sup> Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001.

<sup>34</sup> Simon Lester and Bryan Mercurio with Arwel Davies and Kara Leitner, *World Trade Law, Text, Materials and Commentary* (Hart Publishing, 2008) 472.

<sup>35</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, 40.

In other words, without the price of exports or the price of sales, the dumping margin cannot be calculated, as will be seen later in the chapter.

#### *2.2.1.2.4 Similarities*

According to AD Agreements article 2.6, a like product is defined as one that should be, "...identical, i.e. alike in all respects to product under consideration..."<sup>36</sup> Thus, an imported similar product must have characteristics that closely resemble the domestic product. AD cannot be applied in cases where there is no clear identification of like products. This criterion might be clearer if WTO contracting parties prepared a list of like products to clarify this point. With access to an official list, it would be easier to manage similar products without confusion.

A question has been raised relating to similarities wherein the quality and usage of a product is not mentioned. It might be that two products are similar in all respects and elements, although one is of a better quality than the other is. Consequently, a study of the business environment between the two countries (the country in which the products are being dumped and the one which is doing the dumping) is very important, in order to discover the extent of the similarities between the products. While there may be similarities in all respects and products are therefore identical (as mentioned in the AD rules); there may be variations in the uses or quality of products.

#### *2.2.1.2.5 Injury or threat*

This classification is one of the most complicated, and it is hard to prove clearly. Complications arise when calculating the percentage of injury or threat to a domestic

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<sup>36</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS, Article 2.6.



industry; for a case, this has to be, "...more than 50 per cent of the total production of the like product produced by that portion of the domestic industry...".<sup>37</sup> However, the concept of threat to the establishment of domestic industries from an imported similar product is unclear, potentially leading to abuse, or misuse of AD regulations, due to the difficulties of calculation.

The AD Agreement does not set out specific injuries. However, there are three types of injury under this agreement; as follows:

1. Material injury to an established domestic industry;
2. Threat of material injury to an established domestic industry; and
3. Material retardation of the establishing of a domestic industry.<sup>38</sup>

A central rule when citing this type of injury is that it has to be a proven material injury to established domestic industries, which extends beyond threat. Thus, domestic industry has a responsibility to prove injury from the imported product and to present numbers and figures, to enable the investigating authority to locate that injury. However, it may not be easy to prove an injury that has resulted in the material retardation of domestic industry. Many other kinds of retardation can adversely affect established industries, so misdirection may apply.

In article 3 of the AD Agreement, the means of determination of injury are clarified, "A determination of injury for purpose of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination...".<sup>39</sup> This process must be followed up by an investigation, as mentioned in the EC-Bed Linen

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<sup>37</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS, Article 5 paragraph 4.

<sup>38</sup> Judith Czako, Johann Human & Jorge Miranda, *A Handbook on Anti-dumping Investigations*, (Cambridge University Press, 2003) 273 .

<sup>39</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS, Article 3.

case: "...They provide for no exceptions, and they include no qualifications. They must be met every investigating authority in every injury determination".<sup>40</sup> However, a determination of injury must be based on positive evidence and objective examination:

...investigating authorities must ensure that a "determination of injury" is made on the bases of "positive evidence" and an "objective examination... of the volume and effect of imports that are dumped –and to the exclusion of the volume and effect of imports that are not dumped."<sup>41</sup>

There is no such methodology specified under this article for investigating authorities to apply when calculating the volume of dumped imports; "Although paragraphs 1 and 2 of article 3 do not set out a specific methodology that investigating authorities are required to follow when calculating the volume of "dumped imports"".<sup>42</sup>

The investigative authority has the right to determine the extent or existence of any injury or threat to the domestic industry; this has to be based on fact, as mentioned in the Mexico – Corn Syrup case:

The third sentence of article 3.7 explicitly recognizes that it is the investigating authorities who make a determination of threat of material injury, and that such determination – by the investigating authorities – must be based on facts and not merely on allegation, conjecture or remote possibility.<sup>43</sup>

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<sup>40</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, 42.

<sup>41</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, 42.

<sup>42</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, 43.

<sup>43</sup> Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, 26.

In Thailand, the verdict in the H-Beams case represented a different opinion; the judgment stated that injury cannot be based only on the evidence provided by parties to the investigation. Nevertheless, the investigating authority was found to have the right to search for more facts in this case,

...in our view, the ordinary meaning of these terms does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An AD investigation involves the commercial behavior of firms, and, under the provisions of the AD Agreement, involves the collection and assessment of both confidential and non-confidential information.<sup>44</sup>

Moreover, the investigating authorities were not able to perform an investigation based on future injury or threat, as this was deemed too difficult to determine, as the Mexico – Corn Syrup judgment emphasised,

...In determining the existence of a threat of material injury, the investigating authorities will necessarily have to make assumptions relating to “the: occurrence of future events” since such future events “can never be definitively proven by facts”.<sup>45</sup>

The determination of injury or threat is crucial in proving the need to apply AD duty to imported similar products, to protect domestic industries from illegal dumping actions.

#### 2.2.1.2.6 Causal link

Before applying AD rules following any allegation, it is important to establish a link between imported products and injury or threat; i.e. to ascertain,

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<sup>44</sup> Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, 34.

<sup>45</sup> Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 200, 27.

...(c) a causal link between the dumped imports and the alleged injury”.<sup>46</sup> So, AD rules do not address the dumping itself; rather they are linked to threat or injury caused to domestic products: “We note, moreover, that Article VI of the GATT 1994 and AD Agreement deal not with dumping per se, but with dumping that causes or threatens to cause material injury to the domestic industry producing a “like” product.<sup>47</sup>

This causal link must be based on all related information in order to guarantee proper examination to clarify its existence, as mentioned in the *US vs. Stainless Steel* case,

...Article 3.1 of the AD Agreement stipulates that a determination of injury shall be based on an objective examination of both the volume of the dumped imports and the effect of the dumped imports on price in the domestic market for like products, and of the consequent impact of the dumped imports on domestic products of such like products.<sup>48</sup>

However, it is argued herein that a causal link must take the form of a connection between low price and injury, not between the imported product and injury. It is evident that the imported product is not the cause of the injury; injury is due to the low price and similarity to domestic products. Therefore, if the price were set at a normal value, then dumping or injury would not apply. It is evident, therefore, that a proper determination must be made between low price and imported product and injury “...A proper determination as to whether is dumping or not can only be made on the basis of an examination of the exporter’s pricing behaviour as reflected in all of its transactions over a period of time...”<sup>49</sup>

It should be stressed that it is permissible to sell imported products on the international market or to compete in a market legally; prohibition is linked to selling a product below the normal price, thereby causing injury or threat to other producers.

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<sup>46</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS, Article 5 paragraph 2.

<sup>47</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 41.

<sup>48</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 41.

<sup>49</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 44.

It is apparent, then, that a causal link between low price and injury must be proven. Without such a link, such rules do not apply. The investigative authority is responsible for establishing a causal link by collecting relevant information, as mentioned previously.

### ***2.2.1.3 Main steps of the dumping cases***

Dumping cases, at a national level, have to be initiated by complaints from a domestic similar industry; this should involve a complainant who produces more than 50% of an entire internal producer's capacity in the market.<sup>50</sup> However, a government authority can initiate the process on behalf of domestic industry, and a percentage of that domestic industry will then be applied.<sup>51</sup>

Typically, the country affected by the imported dumped products performs the investigation and makes the decision to apply AD duty. It would therefore be fairer if the AD authority could check information collected from both disputants, and then transfer the case to a domestic commercial court.

During an investigation, all parties have a right to defend their interests under AD Agreements: "The panel justified this finding by noting that it would provide interested parties in an AD investigation a "meaningful opportunity to defend their interests" during the investigation...".<sup>52</sup> In addition, article 6.2 stresses, "Throughout the AD investigation all interested parties shall have a full opportunity for the defence of their interests".<sup>53</sup> Thus, AD investigators must perform three different

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<sup>50</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201

<sup>51</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201

<sup>52</sup> Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, 30.

<sup>53</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 6.2.

steps: (1) the initiation of the investigation; (2) a preliminary and final investigation; and (3) observing changes in circumstances requiring a review of duty.

In terms of initiation, the local authority should start an investigation once all similar domestic producers have submitted their applications; they will then send a questionnaire to all parties. It is a practical point, worthy of note, that the authorities must collect all the information related to the investigation to check for alleged dumping and injury: “The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation”.<sup>54</sup> Authorities must check the dumping margin also. In cases where the dumping margin is de minimis or negligible, the action against the imported product should be terminated. This process should not take more than 60 days, to allow the exporting country to adjust its pricing, “...the authorities shall allow exporters at least 60 days to have adjusted their export prices”.<sup>55</sup>

After the process of initiation, the authorities have the right to take measures as discussed in the case of US–Hot-Rolled Steel:

Article 10.7 of the AD Agreement provides that certain preliminary measures may be taken “after initiation”. This implies that at the time of the critical circumstance determination, the authority has already determined, under article 5.3, that the petition contained sufficient information of dumping and injury, and causal link to justify the initiation of the investigation.<sup>56</sup>

However, the period that elapses between the preliminary and final determination has to follow the AD rule on this point “...normally within 12 months and in no case

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<sup>54</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 5 paragraph 3.

<sup>55</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 2 paragraph 4.1.

<sup>56</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, 48.

more than 18 months...”.<sup>57</sup> At this point, the investigating authority would then apply the AD duty according to the available facts and information.

Usually a final determination takes no more than 5 years: “...AD duty shall be terminated on a date not later than five years from its imposition...”.<sup>58</sup> However, without any changes in the circumstances or facts, authorities would be able to extend the effect of AD duty in excess of 5 years. If there is a change in the information being given, especially the price, the review would take place and lead to termination of AD duty or a reduction in it. However, article 11 allows for a review of AD duty upon a request from any of the involved parties.<sup>59</sup>

#### ***2.2.1.4 Termination or suspension of the AD process***

The rejection, termination, or suspension of AD cases can take place according to three possibilities:

1. If a domestic industry of similar product in an importing country has withdrawn its case, it will be terminated immediately as there is no allegation from the domestic industry.<sup>60</sup>
2. If the domestic industry for a similar product cannot prove a dumping action implicating the imported product, or has not fulfilled all the conditions of the AD provisions, in order to continue the AD process.<sup>61</sup>

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<sup>57</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 9 paragraph 3.1.

<sup>58</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 11 paragraph 3.

<sup>59</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 11.

<sup>60</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201

<sup>61</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201

3. If the margin of dumping is de minimis, which means the margin is less than 2 per cent of the export price: "...there shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis".<sup>62</sup>
4. If the volume of dumped imports from a particular country is less than 3 per cent of imports, it will be considered negligible: "...the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member".<sup>63</sup>
5. Price undertakings, which are implied when the importing country voluntarily undertakes to revise its prices or to cease exports at the dumped price:

proceedings may be suspended or terminated without the imposition of provisional measures or AD duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its price or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated.<sup>64</sup>

### ***2.2.1.5 Legal understanding of AD duty***

For the purpose of this study, this point is best addressed in three sections: (1) the legal characterisation of the charge or duty, fine, tax, or tariff; (2) how AD duty is calculated; (3) the beneficiary of the charge.

#### ***2.2.1.5.1 Legal characterisation of AD duty***

The WTO aims to support free trade between members by removing obstacles, in the form of rules, tariffs, etc. As the agreement has reduced tariffs to a minimum between members, benefits are being eroded in cases of dumping when WTO

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<sup>62</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 5 paragraph 8.

<sup>63</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 5 Paragraph 8.

<sup>64</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 8.



agreements are enforced; this is because a decrease in variability is frequently in place from the outset. The legal characterisation of AD duty in this research can be considered as tariff based. Tariffs and AD duties are important as means to protect domestic industries. As stated by Dinlersoz and Dogan “Tariffs and AD duties are two important tools that can protect industries from foreign competition and generate revenue to countries initiating them”.<sup>65</sup> As mentioned previously, AD duty is applied to protect domestic producers from the imported products: “in other words, an AD duty serves the purpose of industry protection”.<sup>66</sup> Thus, tariffs can be applied for various purposes, such as to promote income levels throughout a nation: “A tariff is typically designed to maximise either domestic revenue or domestic welfare”.<sup>67</sup> However, a tariff may also be imposed to protect domestic industries and products by creating a price differential leading customers to prefer a domestic product.

#### 2.2.1.5.2 Calculating the AD duty

Before imposing AD duty all dumping conditions must be fulfilled. Dumping margins, injury or threat and any causal links must be assessed prior to applying AD duty; as in the EC-Bed Linen case:

Members have the right to impose and collect AD duties only after the completion of an investigation in which it has been established that the requirements of dumping, injury, and causation “have been fulfilled”. In other words, the right to impose AD duty under article 9 is a consequence of the prior determination of the existence of dumping margins, injury, and a causal link.<sup>68</sup>

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<sup>65</sup> Emin Dinlersoz and Can Dogan, 'Tariffs versus anti-dumping duties', *Journal of International Review of Economics and Finance* (2010) 436.

<sup>66</sup> Emin Dinlersoz and Can Dogan, 'Tariffs versus anti-dumping duties', *Journal of International Review of Economics and Finance* (2010) 437.

<sup>67</sup> Emin Dinlersoz and Can Dogan, 'Tariffs versus anti-dumping duties', *Journal of International Review of Economics and Finance* (2010) 437.

<sup>68</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, 48.

The aim when applying AD duty is to impede any unfair competition generated by the dumping of similar imported products, which are injurious or threatening to similar domestic products: "...the very purpose of an AD duty is to counteract the injury caused or threatened to be caused by "dumped imports" to the domestic industry...".<sup>69</sup> The aim of all AD processes is to target three points, as mentioned in articles 2.4.2 and the EC – Bed Linen case: "This provision allows Members, in structuring their AD investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted on certain purchasers, targeted to certain regions, or targeted to certain time periods".<sup>70</sup> Calculations of AD duty simply reflect the margin between the price when selling a product from abroad onto the domestic market and the sales price of that product in its home country, where it is lower.

The dumping margin has been defined in the Appellate Body Report US-Mexico Stainless Steel as:

...the difference between the "export price" and the "normal value" (that is, "the domestic price" of the like product in the exporting country) determined in accordance with article VI:2 further clarifies that the "margin of dumping" is in respect of the dumped "product"....<sup>71</sup>

However, it has been confirmed that dumping and the margin of dumping both concepts related to export matters "Other provisions of the AD Agreement also confirm that "dumping" and margin of dumping" are exporter – specific concepts".<sup>72</sup>

Arguably, the Appellate Body was not in agreement with the panel's report with regard to its interpretation of article 9.3:

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<sup>69</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 45.

<sup>70</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049, 19.

<sup>71</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 39.

<sup>72</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 40.

We do not agree that the Appellate Body's interpretation of article 9.3 would favour "importers with high margins of dumping...at the expense of importers who do not dump or who dump at a lower margin", as the Panel suggest.<sup>73</sup>

The proper interpretation is that, "...an "offset" is provided for the so-called "non-dumped" transactions".<sup>74</sup> However, AD duty should not exceed the margin: "The amount of the AD duty shall not exceed the margin of dumping..."<sup>75</sup>

Under article 2.4.2 of the AD Agreement, there are three methodologies for calculating the dumping margin, as mentioned in *US – Softwood Lumber V*: "This provision establishes three methodologies that investigation authorities may use to calculate the "margins of dumping during the investigation phase".<sup>76</sup> These are as follows, weighted average-to-weighted average, transaction-to-transaction and finally weighted average-to-transaction.<sup>77</sup> The first two methodologies, as used by the authorities, are normally introduced to establish the dumping margin. The final methodology is used under two conditions only: i.e. (1) if the authorities find the pattern of the export price, and (2) where there is a clear explanation of why it is not possible to use the first two methodologies. The investigating authorities normally apply these two methodologies to establish dumping margins. The second sentence of article 2.4.2, sets out a third methodology (weighted average-to-transaction), which involves an asymmetric comparison, and may be used only in exceptional circumstances. For example, if the following two conditions are met: (i) "the

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<sup>73</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 50.

<sup>74</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 50.

<sup>75</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., Article 9 paragraph 3.

<sup>76</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, 34.

<sup>77</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, 34.

authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods”; and (ii) “an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison”.<sup>78</sup>

However, in the same case, it was agreed that the investigating authorities would use multiple averaging, under the weighted average to weighted average comparison, methodology.<sup>79</sup> However, the idea differs in cases where the investigating authorities choose to apply multiple comparisons, i.e.

...[i]f an investigation authorities has chosen to undertake multiple comparison, the investigation authority necessarily has to take into account the result of all those comparisons, in order to establish margins of dumping for the product as a whole under article 2.4.2.<sup>80</sup>

Moreover, in the US Softwood Lumber V case, the Appellate Body mentioned the interpretation of zeroing, thus “zeroing is not permissible when calculating margins of dumping by comparing normal value and export prices on a transaction-to-transaction basis is consistent with other provisions of the AD Agreement as well...”.<sup>81</sup> The zeroing concept, as applied in the US has also been clarified in relation to Korea, where

the investigating authority treats as zero the difference between the weighted average normal value and the weighted average export price in the case of those sub-groups where the weighted average normal value is less than the weighted average export price.<sup>82</sup>

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<sup>78</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, 34.

<sup>79</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, 36.

<sup>80</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, 35.

<sup>81</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, 43.

<sup>82</sup> Panel Report, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R, adopted 24 February 2011, 13.

### 2.2.2 Subsidy under the WTO

Subsidy a means to support unfair competition; it is similar to dumping, but does not include the same complicated provisions as dumping. An important point about subsidies relates to developing countries and the impact that cutting subsidies can have on them.

Article XVI of GATT<sup>83</sup> addressed the subsidy issue; reporting that subsidies have a harmful effect on contracting parties within domestic industries. It issued implementation rules for the article, known as the Agreement on Subsidies and Countervailing Measures.<sup>84</sup> The principle underpinning this agreement was mentioned in the US – Export Restraints case “...In our view, the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade...”<sup>85</sup>

Objections expressed by developing countries who have sought to continue subsidising their own domestic industries. Contracting parties have set developing countries agreed time limits, within which to end domestic subsidies; this represents special treatment under the WTO. Such agreements extend permissions to commence a subsidy programme, to help develop national economies, as mentioned in article 27, paragraph 1. However, this does not allow individuals to export subsidies abroad, as mentioned in the Brazil – Aircraft case “...the prohibition on export subsidies—applies to the developing country Member complained

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<sup>83</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700, Article XVI.

<sup>84</sup> The Agreement on Subsidies and Countervailing Measures, 1868 U.N.T.S.

<sup>85</sup> Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, 27.

against...”.<sup>86</sup> Moreover, prohibition is relevant when subsidising a product by developing countries in this case:

Where, as here, it is agreed that the Member in question is a developing country Member within the meaning of article 27.2(b), it is for the Member alleging a violation of article 3.1(a) of the SCM Agreement to demonstrate that the substantive obligation in that provision -- the prohibition on export subsidies -- applies to the developing country Member complained against. That is, it is for the complaining Member to demonstrate that the developing country Member in question is not in compliance with at least one of the elements laid out in article 27.4.<sup>87</sup>

Other countries have argued in favour of subsidising agricultural and other products, and agricultural produce is granted exceptional status commonly.<sup>88</sup>

Following the 2009 world crisis,<sup>89</sup> the majority of countries, whether developed or developing, subsidised their domestic economies directly; this was especially true among the G20 nations.<sup>90</sup> According to anti-subsidy rules, this was a prohibited act. The following sections detail the concept of subsidy and some important points related to it.

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<sup>86</sup> Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, 37.

<sup>87</sup> Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, 37.

<sup>88</sup> Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 33 (1999), 1867 U.N.T.S. 410.

<sup>89</sup> The recent global financial crisis was the largest since the Great Depression of 1929. This crisis, called the mortgage crisis, began in the United States at the beginning of 2007 and gradually spread to affect the entire world, especially Europe. It reached its peak at the end of 2008. Several companies and major banks declared themselves insolvent and some went into liquidation. At that time, governments began to intervene to support the markets, banks and major industrial companies in view of the liquidity required to meet their commitments and protect them from collapse. See David McNally, ‘From Financial Crisis to World-Slump: Accumulation, Financialisation, and the Global Slowdown’, 2009, *Historical Materialism* 17, 35.

<sup>90</sup> The G20 includes the most powerful economic countries in the world, with representatives from all continents. For more information, available at <<http://www.g20.org/>> accessed on 1 June 2014.

### 2.2.2.1 Definition

A standard definition of subsidy states that it is the notion of payments made by a government to a private entity.<sup>91</sup> This definition, limits subsidising action to payment. In fact, there are different types of subsidies. A subsidy refers to all kinds of financial, aid, gifts, features, exemptions or incentives given by a government or any of its related departments, whether directly or indirectly, to support its domestic industries or national economy. The definition used herein encompasses different kinds of direct or indirect forms of subsidy.

In the Canada Aircraft case between Canada and Brazil, the Panel interpreted the word benefit in article 1.1(b) as,

...the ordinary meaning of “benefit” clearly encompasses some form of advantage...in order to determine whether a financial contribution (in the sense of article 1.1 (a) (i)) confers a “benefits”, i.e., an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for financial contribution.<sup>92</sup>

However, there should be a clear distinction between financial contribution and benefit: “...financial contribution and its conferral of a benefit are “separate legal elements in article 1.1...which together determine whether a subsidy exists”.<sup>93</sup>

According to the argument put forward by the Canadians, in the case of US-Export Restraints with Canada, it was proposed that the United States define subsidy as “any government action that confers a benefit, thus avoiding the need to show a financial contribution...”.<sup>94</sup> However, Canada noted four categories, relating to

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<sup>91</sup> Simon Lester and Bryan Mercurio with Arwel Davies and Kara Leitner, *World Trade Law, Text, Materials and Commentary*, (Hart Publishing, 2008) 423.

<sup>92</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, 37.

<sup>93</sup> Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, 23.

<sup>94</sup> Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, 23.

governmental action, which could be considered under the guise of financial contribution. The first three could be considered as direct governmental action:

- (i) makes a direct or potential direct transfer of funds, such as grants, loans, or loan guarantees; (ii) foregoes or does not collect government revenue otherwise due, such as tax credits; and (iii) provides goods or services (other than general infrastructure) or purchases goods...<sup>95</sup>

(ii)

However, in the fourth category, Canada considers the governments' financial indirect aid as specifically;

to meet the terms of that provision, five elements must be satisfied: (a) a government must entrust or direct; (b) a private body; (c) to carry out one or more of the types of functions listed in subparagraphs (i) through (iii); (d) which would normally be vested in a government; and (e) the practice must, in no real sense, differ from practices normally followed by government.<sup>96</sup>

#### ***2.2.2.2 Types of subsidies***

Subsidies can be divided into two types: direct or indirect. Direct subsidies occur when the government, or any of its departments, gives direct financial aid to assist domestic industries: "...there is a financial contribution by a government or any public body within the territory of a Member... [involving a]...direct transfer of funds...".<sup>97</sup> However, this form of aid must aim to reduce either imports or increase exports, as stated in article XVI.<sup>98</sup>

Indirect subsidies under the WTO agreement might include gift giving by the government; for example, freeing land for industry use, which can then affect the price of the end product and its ability to compete in the marketplace: "... [where]

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<sup>95</sup> Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, 24.

<sup>96</sup> Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, 24 .

<sup>97</sup> The Agreement on Subsidies and Countervailing Measures, 1868 U.N.T.S., Article 1 paragraph 1.1(a) (1).

<sup>98</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700, Article XVI.



there is any form of income or price support...”.<sup>99</sup> Thus, all gifts of lands can be classified under the category of price support. This may take the form of an exemption from tax or a special reduction in tax, which might then benefit the organisation concerned by allowing them to obtain raw materials freely or more cheaply than their competitors.

However, if indirect subsidies are given to all industries, whether national or international within a territory, there should be no prohibition implicated, as long as it does not affect other overseas products. The prohibition on subsidies is in place to avoid clear intent to subsidise national products and industries, thereby preventing the economy from improving and developing.

### **2.2.3 Relationship between dumping and subsidies**

Dumping and subsidies encompass different provisions,<sup>100</sup> although they generate similar consequences. Dumping relates more to prices, i.e. comparing the prices of similar products in the domestic market between importing countries and exporting countries.<sup>101</sup> Simply put, if the price in an exporting country is lower than that in an importing country, then this comprises a dumping action. However, the cause of the lower price might relate to a subsidy programme provided by the exporting government, to assist its domestic industry to increase the volume and quality of its exports. Dumping can result from subsidies, but the reverse is not possible. As has

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<sup>99</sup> The Agreement on Subsidies and Countervailing Measures, 1868 U.N.T.S., Article 1 paragraph 1.1 (a) (2).

<sup>100</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>101</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

been clearly defined, the aim of subsidies is to increase exports or reduce imports, both of which can cause dumping.

Dumping and subsidies coincide in effect, in the form of injury or threat. Dumping can injure the domestic market of a similar product from an importing country only. Nevertheless, subsidies might also injure the importing country's domestic products as well as those of the exporting country, as this subsidises the economic or domestic products. Subsidies, however, generally do not relate specifically to similar products.

There is a strong relationship between subsidies and dumping, even where different definitions or aims apply; as their regulations are very similar within the claim process. Consequently, it is of benefit to research both in tandem, as this will provide a fuller understanding of injury and unfair competition regulations under international trade provisions. Some cases, where there is a connection between the two, have effected Saudi Arabia, where dumping has resulted directly from subsidies.

### **2.3 AD and anti-subsidy under Islamic law**

Islamic law (Sharia) derived from the teachings of the Qur'an and the Sunna. Muslims believe the Qur'an is the word of God. The Sunna describes the actions of Prophet Muhammad (peace upon him) as defined by An-Na'im, "The methodology known as ual al-fiqh, through which Muslims have historically understood and applied Islamic precepts as conveyed in the Qur'an and Sunna, was developed by early Muslims scholars".<sup>102</sup> The third source of Islamic law is ijma, or the agreement of jurists taken from among the followers of the Prophet Muhammad; as a source of

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<sup>102</sup> Abdullahi A. An-Na'im, *Islam and the Secular State*, (Harvard University Press, 2009) 11.

law it is supported by the Qur'an and Sunna.<sup>103</sup> Additional sources are qiyas, and ijtiḥad; these are restricted to use when there is no guidance available on the point under discussion in any of the previous three sources. The final source, ijtiḥad, states the controversial opinion that scholars must carefully rely on analogical reasoning to find a solution to a legal problem: "It also defines and regulates the operation of juridical techniques such as ijma (consensus), qiyas (reasoning by analogy), and ijtiḥad (juridical reasoning)".<sup>104</sup> For those qualified to conduct it, to do so is considered a religious duty. Thus, a mujtahid is recognised as an Islamic scholar who is competent at interpreting Islamic law in the form of ijtiḥad.

For the early Muslims, trade played a very important role in their lives. God says in the Holy Qur'an, of trade by the Quraysh Tribe between Syria and Yemen: "For the accustomed security of the Quraysh. Their accustomed security [in] the caravan of winter and summer".<sup>105</sup> When the Prophet Mohammed emigrated from Mecca to Medina in year 622 CE, the first priority following the building of his holy mosque was to open a market for people to trade in.<sup>106</sup>

However, Islamic law has the advantage of striking a balance between individuals and societies' interests: "... Islam has raised a balance between the interests of individuals and society ...".<sup>107</sup> Thus, economics under Islamic law differs from that in capitalist or socialist systems, as its aim is entirely different. Islamic law stresses and encourages people to embark on trade and engage competitively; as God says in the Holy Qur'an "O mankind, eat from whatever is on earth [that is] lawful and good and do not follow the footsteps of Satan. Indeed, he is to you a clear

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<sup>103</sup> Abdullahi A. An-Na'im, *Islam and the Secular State*, (Harvard University Press, 2009) 12.

<sup>104</sup> Abdullahi A. An-Na'im, *Islam and the Secular State*, (Harvard University Press, 2009) 12.

<sup>105</sup> The Holy Quran [106: 1 to 4].

<sup>106</sup> Mohammed Anwr Hamed Ali, *Dumping as One of the Unfair Competition*, (Dar Alnahda Alarabia, 2009) 229.

<sup>107</sup> Mohammed Anwr Hamed Ali, *Dumping as One of the Unfair Competition*, (Dar Alnahda Alarabia, 2009) 11.

enemy”.<sup>108</sup> In addition, God says in the Holy Qur’an “O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful”.<sup>109</sup>

Under Islamic law, traders were taught how to act in the marketplace to promote flexibility and trust. Islamic law prohibited any form of fraud or deception during trade between people: “Muslims are brothers and it is not permissible if they sold any things with any flaw and not shown to the payer”.<sup>110</sup> However, Islamic law also prohibits paying someone for something that is being undersold; Prophet Mohammed said, “A man is not to undersell his brother, nor is he to try to out haggle his brother”.<sup>111</sup> Thus, a trader must not be involved in any form of prohibited trade or sale of products under Islamic law.<sup>112</sup>

This next section discusses the understanding in Islamic law of acts such as dumping and subsidising, analysing key elements in relation to each other. It begins by exploring dumping under Islamic law, and in the second section also examines the notion of subsidy under Islamic law.

### **2.3.1 Dumping under Islamic law**

The rules of competition under Islamic law are the same, whether they affect domestic or international markets. Islamic law encourages the notion of competition

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<sup>108</sup> The Holy Quran [2:168].

<sup>109</sup> The Holy Quran [4:29].

<sup>110</sup> Mohammed Anwr Hamed Ali, *Dumping as One of the Unfair Competition*, (Dar Alnahda Alarabia, 2009) 229, 82.

<sup>111</sup> Sunan Ibn Majah, Vol. 3, Book 12, Hadith 2172.

<sup>112</sup> There are many types of prohibited contracts and products under the Islamic law. As an example of the prohibited contracts such a contract including an interest as God says “...*But Allah has permitted trade and has forbidden interest...*” Quran [2:275]. Also for the prohibited products, such selling alcohol and others as God says “*O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah ], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful*” Quran [5:90].

for good deeds, even between traders. God states in the Holy Qur'an: "... So for this let the competitors compete".<sup>113</sup> Therefore, it is not acceptable that any kind of harm come to the market or products due to the unfair treatment of people. God also says in the Holy Qur'an "And O my people, give full measure and weight in justice and do not deprive the people of their due and do not commit abuse on the earth, spreading corruption".<sup>114</sup> On this point, the Prophet Mohammed stated, "There should be neither harming nor reciprocating harm",<sup>115</sup> as a general principle in any treatment. The final evidence from the Holy Qur'an and the traditions of Prophet Mohammed show the general rules that should be followed when dealing with people inside a market. However, Muslims believe that on the Day of Judgment, there will be a penalty imposed on people who do not follow these rules.

First we consider dumping, which is not a term used in Islamic law. However, the meaning of dumping, i.e. selling products below their normal value in the importing market, is understood and legislated for in Islamic law. Within this context, the rule of individual initiative that exists in Islamic law is of relevance. This refers to each person's responsibility for their own behaviour, in particular, that such behaviour must follow the rules of Islamic law in circumstances concerning good deeds and faith.

Islamic law prohibits authorities from setting a fixed price on any products inside the market, as it respects the principle of a free market without restrictions.<sup>116</sup> However, free pricing must be based on the genuine cost of a product, including also its profit margin. This is because when

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<sup>113</sup> Holy Quran [83:26].

<sup>114</sup> Holy Quran [11: 85].

<sup>115</sup> Sunan Ibn Majah, Vol. 3, Book 13, Hadith 2341.

<sup>116</sup> Ghazi Enaya, *the Control Regulation of the Economic in the Islamic Market*, (Dar Alnafa'es, 1992) 63.

“Prices became excessive during the time of the Messenger of Allah, so they said: 'O Messenger of Allah! Set prices for us!' So he said: 'Indeed Allah is Al-Musa'ir, Al-Qabid, Al-Basir, Ar-Razzaq. And I am hopeful that I meet my Lord and none of you are seeking (recompense from) me for an injustice involving blood or wealth.’<sup>117</sup>

Also, Prophet Mohammed said, “Whoever interferes with the prices among the Muslims to cause those prices to increase, Allah has the right to seat him in a severe fire on the Day of Judgement”.<sup>118</sup> So, Ibn Alqayyim<sup>119</sup> said of price fixing, that

... it can be injustice and prohibited and can be fair and allowed. For that, if the fixing price will harm people and forcing them to sell their products without their interested price or prevent them with what God has permitted to them, then it is prohibited. If the fixing price will have a fair between people as preventing them for not doing what God has not permitted, then it is allowed...<sup>120</sup>

Nonetheless, some Islamic scholars agree to set a fixed price for an item in circumstances where there are urgent economic concerns or potential for huge harm to come to the market or consumers.

Second, it is important for the sale price to be set at a normal value, equating to that for similar products in the market, rather than below it. Regarding this point, Umer ibn Al-khattab,<sup>121</sup> when walking into the market, found a trader selling raisins below the normal price for similar products. Umer said to him: “Either increase the price or leave our market”.<sup>122</sup> Moreover, Imam Malik<sup>123</sup> said: “If there is a man who wants to destroy the market by selling below the normal price, it is better to tell him:

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<sup>117</sup> Jami’ at-Tirmidhi, Vol.3, Book 12, Hadith 1314.

<sup>118</sup> *Musnad Ahmad, Mustadrak al-Hakim* [2/12-13].

<sup>119</sup> Ibn Alqayyim is Mohammed ibn Abo Bakr ibn Ayob. He is one of the late Islamic scholars, from the Ahmed ibn Hambil Sunni school of thought.

<sup>120</sup> Youssef Kamal Mohammed, *Economic Faqh of the Market-Private Activity*, (Dar Alnasher, 1998) 227. (Researcher’s translation).

<sup>121</sup> Umer ibn Alkhattab is the second leader of the early Islamic nation after Prophet Mohammed and Abo Bakr, available at <<http://islamstory.com/%D8%B9%D9%85%D8%B1-%D8%A8%D9%86-%D8%A7%D9%84%D8%AE%D8%B7%D8%A7%D8%A8>>, accessed on 1 June 2014.

<sup>122</sup> Muwatta Malik, Book 31, Hadith 57.

<sup>123</sup> Imam Malik is Malik ibn Anas ibn Malik. He is one of the well known Islamic scholars in the Sunni Islamic school of thought, available at <<http://library.islamweb.net/newlibrary/showalam.php?ids=16867>>, accessed on 1 June 2014.

either raise your price to the normal level or leave the market”.<sup>124</sup> Yet, Imam Alshafi<sup>125</sup> expresses a different opinion, citing Umer ibn Al-khattab’s remorse stating, “what I said was not a determination or a court order, but I wanted only the good for people, so, whatever and whenever sell your product”.<sup>126</sup> Therefore, Imam Alshafi agrees that the man’s aim was not to harm the market; it was only to sell his product.<sup>127</sup> However, if the man at that time wanted to damage the market, Imam Alshafi would have proposed a different result.

In this research, we note that Umer ibn Al-khattab agreed to keep the market safe by protecting other sellers from harm. Imam Malik and Imam Alshafi both agreed that selling a product below market price is prohibited, if it will harm the market.

Third, there is a rule prohibiting monopoly, which might on occasion result from dumping. Prophet Mohammed said, “No one withholds goods till their price rises but a sinner”.<sup>128</sup> Monopolists and price manipulators suffer the penalty of hell fire on the Day of Judgment. This evidence stresses the need for free trade, based on principles of fair competition without doing harm, whether to the market, the consumer or the trader.

However, a question arises here in relation to the penalty for dumping action under Islamic law. Many actions are possible to target dumping under Islamic law. First, the trader could be asked to raise the price to a normal value, as in the story of Umer ibn Al-khattab. This action helps to protect the market from the harm

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<sup>124</sup> Mohammed Alsnusi, *International Trade in the Light of Islamic Law and GATT – A comparative study* (1st edition, Dar Alfikr Algami) 314. (Researcher’s translation).

<sup>125</sup> Imam Alshafi is Mohammed ibn Edrees Alshafi. He is the third Islamic scholar in the Sunni Islamic school of thought and a very important scholar, available at <<http://library.islamweb.net/newlibrary/showalam.php?ids=13790>>, accessed on 1 June 2014.

<sup>126</sup> Mohammed Anwr Hamed Ali, *Dumping as One of the Unfair Competition*, (Dar Alnahda Alarabia, 2009) 229, 139. (Researcher’s translation).

<sup>127</sup> Mohammed Anwr Hamed Ali, *Dumping as One of the Unfair Competition*, (Dar Alnahda Alarabia, 2009) 229, 139. (Researcher’s translation).

<sup>128</sup> Sunan Abi Dawud, Book 23, Hadith 3440.

proceeding from the dumping action. Second, the authority can fix the price if harm or injury is anticipated as a result of the act of dumping; the majority of Islamic scholars concur with this approach. Third, under Islamic law it is possible to impose additional penalties on traders if they are in a position to harm the market by dumping. One such action was mentioned in the story of Umer ibn Al-khattab, where he asked a trader to remove his product from the market. In addition, under Islamic law, a leader can ask a trader, who his selling a product below normal price, to pay compensation for any injury proceeding from this action.

Moreover, Islamic law confirms there is a special system in place to control the market, as defined under the concept of Hisbah. God says “And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful”.<sup>129</sup> Prophet Mohammed said “Whosoever of you sees an evil, let him change it with his hand; and if he is not able to do so, then [let him change it] with his tongue; and if he is not able to do so, then with his heart — and that is the weakest of faith”.<sup>130</sup> These two examples provide a basis for authorities to control the market and check the implementation of free trade between people without incurring harm or injury.

Thus, it is apparent that Islamic law prohibits dumping in a variety of ways, and that Islamic leaders should seek to avoid fixed prices on the market. This can be achieved without the control of Islamic law and without harm to other traders inside the market. This gives traders the opportunity to compete fairly, as the AD authority, i.e. the Islamic leader, controls the market with strict rules. It can therefore be argued that historically the first AD rule was applied under Islamic law, not Canadian law as suggested earlier.

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<sup>129</sup> Holy Quran [3:104].

<sup>130</sup> 40 Hadith Nawawi, Hadith 34.



### 2.3.2 Subsidy under Islamic law

Islamic law protects trade with stringent rules, which guarantee the market is moving in the right direction. However, the most important principle of trade under Islamic law is the existence of a free market without interference from the state or government. However, under Islamic law the state does not like to interfere by subsidising domestic economies, as this contravenes the principles of free trade.

Thus, there is no rule of subsidy under the Islamic law, although it can be seen to apply in a different way. Subsidies must go directly to poor people, paid through Zakah<sup>131</sup> and charity, as God says:

Zakah expenditures are only for the poor and for the needy and for those employed to collect [zakah] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveler - an obligation [imposed] by Allah. And Allah is Knowing and Wise.<sup>132</sup>

However, Islamic law encourages people and authorities to do as God says: “The example of those who spend their wealth in the way of Allah is like a seed [of grain] which grows seven spikes; in each spike is a hundred grains. And Allah multiplies [His reward] for whom He wills. And Allah is all-Encompassing and knowing”.<sup>133</sup>

By this it can be understood that people, and governments must be more cooperative when seeking to overcome their difficulties.

Moreover, subsidies are evident in the Prophet Mohammed’s actions. When someone asked him for money, the Prophet sold some of his own items to give him money. When he did so he said to him, “Go and gather firewood, and I do not want

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<sup>131</sup> Zakah is the third pillar of the Islam, which is to give a fixed percentage of the income under some conditions and circumstances. For that God says “*And establish prayer and give zakah and bow with those who bow [in worship and obedience].*” Quran [2:43].

<sup>132</sup> Holy Quran [9:60].

<sup>133</sup> Holy Quran [2:261].

to see you for fifteen days”.<sup>134</sup> In this way, Prophet Mohammed encouraged him to embark on his own industry and work, also understood as a form of subsidy.

Under Islamic law as mentioned above, there was no such a provision for this action. In addition, if a subsidy could affect the market negatively, it would be considered a prohibited act; Prophet Mohammed said, “There should be neither harming nor reciprocal harm”.<sup>135</sup> In addition, the main principles under Islamic law concerning market and trade seek to ensure fair competition inside the market without causing any harm or injury to trade. However, a Muslim leader has the right to consider whether a subsidy would harm the market or not.

## **2.4 AD and Anti-Subsidy under Saudi Arabian Domestic Law**

When Saudi Arabia joined the WTO agreement, Royal Decree number M/30 dated 13 June 2006 was issued to accept the implementation of new rules with regard to AD and countervailing measures.<sup>136</sup> This rule was adopted by the GCC, to address legal issues as a union. A Royal Decree, issued on 28 January 2013, adopted the amendment and implemented<sup>137</sup> a version of the rule in compliance with the WTO agreement.

The rules issued in 2006 contained only 17 articles, offering a general framework to establish how the GCC countries could deal with relevant cases. This rule established three committees: a Ministerial Committee, a Standing Committee and a Technical Committee, each with a unique role in handling different types of cases. This research suggests no reason for these committees. The GCC countries

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<sup>134</sup> Sunan ibn Majah, Vol. 3, Book 12, Hadith 2198.

<sup>135</sup> Sunan Ibn Majah, Vol. 3, Book 13, Hadith 2341.

<sup>136</sup> The Bureau of Experts at the Saudi Council of Ministries. Available at <http://www.boe.gov.sa/>, accessed on 1 June 2014.

<sup>137</sup> It was adopted by the GCC Summit No. 31 in Abu Dhabi on 7 December 2010. See the official GCC website, available at [www.gcc-sg.org](http://www.gcc-sg.org), accessed on 1 June 2014.

were able to take advantage of the EU countries' rules as an example and counter AD and anti-subsidy cases as a conglomerate. At present, the three committees act as an obstacle to dealing with these legal issues, which represent the bureaucratic process. The implementation of this rule includes 97 articles covering all aspects related to AD, anti-subsidy and countervailing measures.

Thus, when an act of dumping or subsidising of any non-GCC products happens, affecting countries with similar products, the GCC countries must work together to fight this by filing a case, whether using representatives with 50% similar products or through authorities in countries like the Chambers of Commerce or the Ministry of Commerce. They act together, like the EU countries, with regard to AD and anti-subsidy, thereby strengthening their domestic industries and assisting development and improvement in these industries.

However, when GCC countries' products face AD or anti-subsidy actions against their products, the GCC countries deal individually with these matters without support from the GCC countries as a community (as seen in the case against Saudi and Omani petrochemicals products).<sup>138</sup> Saudi Arabia has established its own negotiation committee, headed by His Royal Highness Prince Abdul-Aziz bin Salman, who was a Deputy of the Ministry of Petroleum and Mineral Resources for the Petroleum Sector, dealing with these cases abroad.<sup>139</sup> This committee successfully concluded AD legal actions against Saudi petrochemicals products, but without coordination or cooperation from the GCC countries.<sup>140</sup>

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<sup>138</sup> Indian case number 14/5/2009-DGAD. See this case in the Indian Ministry of Commerce, available at <<http://www.commerce.nic.in/>>, accessed on 1 June 2014.

<sup>139</sup> See the Ministry of Petroleum and Mineral Resources, available at <<http://www.mopm.gov.sa/Arabic/Pages/default.aspx>>, accessed on 1 June 2014.

<sup>140</sup> As it will be seen in the next chapter about India, Turkey and EU cases. Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in/](http://www.commerce.nic.in/)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

To clarify, the above case (filed against Saudi, Omani and Singapore petrochemicals products), was terminated after the committee intervened with the Indian government.<sup>141</sup> However, this case continued in Oman, despite it being a GCC country. This clearly shows that the committee was not working in coordination with the other GCC countries.

On another point, a department in the Saudi Ministry of Commerce examined the AD authorities in Saudi Arabia, and took on more of a role in such cases, whether inside or outside Saudi Arabia. However, this department did not intervene with the committee officially or even work closely with the GCC committee to protect the GCC industries. Thus, it is apparent that there are three bodies handling cases in Saudi Arabia: the committee headed by HRH Prince Abdul-Aziz, the department under the Ministry of Commerce, and finally the umbrella body of the GCC council itself. This confuses the situation, when any sector or industry seeks to deal with cases. Ideally, there should be more coordination and cooperation within the GCC council, as all GCC countries have agreed to handle such legal issues together.

Furthermore, if a dumping case affects one GCC member in another GCC member's country, the question arises: will AD rules be applied? As these countries deal with each other as a single conglomerate, one member cannot apply the AD law against another. However, this research found that competition law is applicable in such cases. Nonetheless, AD law for GCC countries does not mention or cover this point.

Regarding subsidy, when Saudi Arabia signed the WTO agreement, there were several reservations as stated in chapter 1, one of which was its subsidy

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<sup>141</sup> Indian case number 14/5/2009-DGAD. See this case in the Indian Ministry of Commerce, available at <<http://www.commerce.nic.in/>>, accessed on 1 June 2014

programme.<sup>142</sup> Until now, Saudi Arabia's government has been offering subsidies in many areas, such as electricity and gas.<sup>143</sup> These programmes have had a direct effect on competition, both inside Saudi Arabia and outside, in the countries to which the products are exported. The absence of an anti-subsidy law in Saudi Arabia therefore needs to be addressed. To some extent anti-subsidy is covered in the Saudi AD law, adapted from the GCC, where subsidy is mentioned in reference to harmful actions in article 1. On this particular point, Saudi law requires reform, in order to provide a clear view of anti-subsidy and AD and the separation between them.

## **2.5 Compatibility between WTO law, Saudi Arabia's AD and Anti-Subsidy laws and Islamic Law**

The European Union has received complaints regarding the compatibility of the US AD Act of 1916 and the WTO agreement: "We note that EC contests the compatibility of the 1916 Act as such – not of particular instances of application – with certain provisions of the WTO agreement...".<sup>144</sup> In this particular case, the panel recommended the US alter the AD Act 1916 to render it compatible with the WTO agreement: "We therefore recommend that the DSB request the United States to bring the 1916 Act into conformity with its obligations under the WTO Agreement".<sup>145</sup> This request was based on public international law, which requires

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<sup>142</sup> Abdul-Aziz M Aljarallah, *Analysing the Impact of the World Trade Organisation (WTO) on the Sustainability of Competitiveness of the Petrochemical Industry in Saudi Arabia*, (PhD thesis, Durham University 2010) 52. Also, see the World Trade Organisation, available at <[http://www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm)>, accessed on 1 June 2014.

<sup>143</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, 40.

<sup>144</sup> Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R, adopted 26 September 2000, 117.

<sup>145</sup> Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R, adopted 26 September 2000, 166.

nations to fulfil all the obligations included in any agreement signed by that nation.<sup>146</sup>

In the previous example, domestic AD and anti-subsidy laws had to be compatible with AD and anti-subsidy laws under the WTO agreement. This was an obligation imposed on states, as they were signatories to that agreement. Therefore, the following section explores whether Islamic law and Saudi domestic law, concerning AD and anti-subsidy, are compatible with the WTO agreement.

### **2.5.1 Competition between products and normal value**

In reference to AD law, dumping has been defined under article VI of the GATT as a product being “...introduced into the commerce of another country at less than normal value of the products...”.<sup>147</sup> There is no difference between Islamic law, Saudi Arabian domestic law and the WTO agreement in this regard. Islamic law stresses the need for fair competition between products in the marketplace. Umer ibn Al-khattab asked that the product be removed from the market if prices were not increased on similar products. In addition, under Islamic law, if action leads to harm and injury from other products under Islamic law, this will prohibit Muslim leaders from implementing penalties. This article is therefore also compatible with domestic Saudi AD laws.

There is a slight variation when determining normal value and AD duty under Islamic law in comparison with that under the WTO agreement. Nevertheless, it is acceptable to adopt this from the WTO agreement, as the Saudi leader has the right to adopt laws if they do not conflict with Islamic law. The idea of AD under Islamic

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<sup>146</sup> Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R, adopted 26 September 2000, 119.

<sup>147</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

law is simpler than that under the WTO agreement. However, Islamic law, Saudi AD domestic law and the WTO agreement agree, regarding the need for fair competition in the marketplace between products.

### **2.5.2 Fixing the price of such a products**

As mentioned above, the Prophet Mohammed refused to fix prices where this might negatively limit competition in the marketplace; this is also included in the application of the WTO agreement to AD laws, and to insuring fair competition between products. Fixing a price would not be fair to either the trader or the trade process. In this case, Islamic law positions the general rules of competition between traders inside the market, to protect against any interference that affects price. This is entirely appropriate and supportive of the main theory behind AD. However, if there is harm to the market under some scholars' understanding of Islamic law, the leader may then interfere in the market and fix the price. However, no one has the right to interfere in the market and fix prices under the WTO agreement.<sup>148</sup>

### **2.5.3 The injury to other products**

Under Islamic law, it is important to address injury at any point during the trade process. We can refer to the action of Umer ibn Alkhattab (see above) when he returned to the man's house and asked him to sell his product wherever he wished, as his purpose was not to damage the market. In addition, if there is an injury caused by dumping action in a market, under Islamic law, it is prohibited. This principle is applicable to the WTO's AD rules. Moreover, if there were any harm that would be

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<sup>148</sup> See the Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

caused by a subsidising programme, it would then be prohibited under Islamic law, as clarified in this chapter. The idea of no injury to the market under Islamic law is a guiding concept and a pillar of the trading mechanism.

#### **2.5.4 Compatibility with subsidy**

However, there is a difference between Islamic law, Saudi domestic law and the WTO agreement in the area of anti-subsidy. Saudi Arabia still operates some subsidy programmes<sup>149</sup> prohibited under the WTO anti-subsidy agreement. The anti-subsidy concept under Islamic law differs, as the government must support society and the people directly. Moreover, direct subsidising programmes under Islamic law must continue to protect society from poverty. If no harm comes to the market from subsidising a product it can be legitimately subsidised under Islamic law.

#### **2.5.5 Compatibility between Islamic law and WTO agreement**

Islamic law has the flexibility of openness and the capacity to adapt to WTO agreements, if there is no such conflict between both of them and the general principles of Islamic law. If a WTO agreement does not include any prohibition on contracts or products, it will be acceptable. For that reason, AD and anti-subsidy law under the WTO agreement can be adopted under Islamic law, with only slight amendments about subsidy and price fixing. Moreover, Islamic law typically prefers to adapt as society changes, which is one of its key advantages.

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<sup>149</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, vii. Also, See report by Reuters Arabic news, available at <<http://ara.reuters.com/article/businessNews/idARACAE9B2FFP20131110>> accessed 1 June 2014.



## **2.6 Conclusion**

This chapter has examined AD and anti-subsidy rules under the WTO agreement, Islamic law and in Saudi domestic law. It is interesting to observe how these rules derived from evidence presented in the Holy Qur'an and the traditions of the Prophet Mohammed, which show how important it is for traders to operate inside a regulated market. It is evident, as seen in this chapter, that the initial application of the idea of the AD concept historically took place under Islamic law more than fourteen hundreds years previously.

In this chapter, compatibility between the WTO agreement, Islamic law and Saudi domestic law has been highlighted concerning AD and anti-subsidy. As Saudi Arabia relies on Islamic law to underwrite its basic regulations, there are few barriers to the adoption of laws from the WTO agreement. However, other legal systems that use Islamic law as a basis for regulations can perform the same steps without difficulty. At present Saudi Arabia applies AD and anti-subsidy rules under the GCC umbrella; the GCC members defend their products as if they were in one country, in a similar way to the EU. However, historically, the GCC has not become involved in cases of AD and anti-subsidy. In the example of cases involving Saudi Arabia, India and Oman, AD duty was cancelled by Saudi Arabia only, although both countries were GCC members. This indicates insufficient coordination and cooperation between the GCC countries with regard to AD and anti-subsidy cases.

## CHAPTER 3: ANALYSIS OF AD CASES RAISED AGAINST SAUDI ARABIA'S PETROCHEMICALS PRODUCTS

### 3.1 Introduction

This chapter details AD cases filed against Saudi Arabia's petrochemicals products in India, Turkey and the European Union (EU).<sup>1</sup> The petrochemical's sector has traditionally applied AD regulations in order to protect itself.<sup>2</sup> AD cases can generally be divided into those raised at the national or international level. The cases examined in this chapter are confined to those opened at national level.

The second question put forward in this research concerns the impact of AD cases raised against Saudi Arabian petrochemicals products. Therefore, it is important to analyse the cases levelled in depth, to determine the extent to which they might affect national revenues over the long term in Saudi Arabia. Moreover, many countries have used AD regulations for their own aims, by enacting laws in their own interests, as mentioned here by Doreen Bekker,

it is alleged [...] that sometimes, AD is being used as more than just a countermeasure to injuries. In some cases, AD duties are being imposed on imports that are being fairly traded. This allegation implies that it should be possible to cheat the AD Agreement.<sup>3</sup>

The cases considered here (those brought by India, Turkey and the EU against Saudi petrochemicals products) are the most recent, and it is believed that they could have been resolved very differently. In the cases discussed, the results were either

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<sup>1</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at [www.commerce.nic.in](http://www.commerce.nic.in), accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>2</sup> Hylke Vandenbussche and Maurizio Zanardi, "What explains the proliferation of antidumping laws?", *Economic Policy V. 23(53)* 93-138.

<sup>3</sup> Doreen Bekker, "The strategic use of anti-dumping in international trade", (2006) *South African Journal of Economics*, 74: 3, 501.

cancelling AD duty against Saudi Arabian petrochemicals products or ending the investigation before resolution.<sup>4</sup> The termination of cases typically followed political negotiation with the countries alleging dumping, as will be demonstrated in this chapter. Thus, termination of these cases for political reason is links to one of the key themes considered in this research; the role of political negotiations in AD cases.<sup>5</sup>

This chapter will analyse the impact of the cases from a variety of different perspectives: legal, economic and political. It will also consider the positive and negative effects of these cases on importing and exporting countries. However, first, it is important to distinguish between what is meant by national and international level cases. As will be seen in this chapter, India, Turkey and the EU have all used AD regulations frequently against imported Saudi petrochemicals products, and some of these countries have made considerable use of these regulations.<sup>6</sup>

## 3.2 Background

Before proceeding to analyse cases between Saudi Arabia and India, Turkey, and the EU, it is important to mention that the copies of the cases referred to in this thesis are the non-confidential copies, as these were the only versions of proceedings available. There are alternative copies, which remain confidential between the authorities and interested parties, and it was impossible to access these.

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<sup>4</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014.

<sup>5</sup> The reasons for choosing these cases was mentioned in chapter 1 in the section stating the research problem.

<sup>6</sup> There are two groups of Anti-dumping Users: traditional and new Users. Before the 1980s, the traditional users were Australia, Canada, EU and USA. However, since then, they have been joined by other countries, classified as “new users”, which like Brazil, China, India and Mexico. Thomas J. Prusa, *Anti-dumping: A Growing Problem in International Trade*, (Blackwell Publishing Ltd, 2005).

It is necessary to stress the importance of attaining the statistics for national versus international AD cases. National cases are those raised by contracting parties against other members under national jurisdiction. International level cases are those where the dispute is referred to the WTO; this typically occurs when one of the parties disagrees with the domestic procedures employed by the country making the allegations.

A further division in cases made by some scholars is to distinguish between traditional users of AD laws and new users:

In 1980, the list of the top AD users was quite short; the four traditional users accounted for all but two of worldwide AD cases. In 2002 the list of top AD users looked quite different: India (80 cases), United States (35), Thailand (21), EU (20), Australia (14), Peru (13) and PR China (11).<sup>7</sup>

Based on the information put forward in materials pertaining to the cases between Saudi Arabia and India, Turkey and the EU, it is possible to know the extent of the direct impact on the Saudi petrochemicals sector on one side and the national economy on the other. The Saudi Arabian petrochemicals sector is one of the most important industries in Saudi Arabia.<sup>8</sup> Therefore, the next step is to introduce statistics relating to AD cases against Saudi Arabia from a range of sources.

### **3.3 Cases against Saudi Arabia at the national level**

It is difficult to obtain accurate figures for the number of AD cases at national level around the world. This is despite the fact that all contracting parties need to inform the WTO committee of any AD actions they take at the national level under the AD

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<sup>7</sup> Thomas J. Prusa, *Anti-dumping: A Growing Problem in International Trade*, (Blackwell Publishing Ltd, 2005), 690.

<sup>8</sup> Fawaz Hamad Al-Fawaz, "The importance of the petrochemical industry", available at <[http://www.aleqt.com/2006/05/23/article\\_5297.html](http://www.aleqt.com/2006/05/23/article_5297.html)> accessed 1 June 2014.

Agreement.<sup>9</sup> Thus, in this section, AD cases from many sources will be clarified. Moreover, on the Saudi government's side, there are no clear statistics detailing the AD cases applied against Saudi Arabia; when the researcher requested this data via official department channels in Saudi Arabia, the request was refused on the grounds of confidentiality.<sup>10</sup> The officials in the relevant departments consider the information about AD cases to be top secret information; although this should not be the case. AD cases, like other similar cases, are set out in confidential and non-confidential trial copies, and non-confidential copies should ideally be made available to interested parties, such as researchers and interested organisations, but the Saudi authorities refuse this.

According to the WTO statistics regarding AD cases,<sup>11</sup> there were 879 AD initiations out of 4358 cases on products from chemical and allied industries;<sup>12</sup> this represents 20.16% of total AD initiations. In addition, in relation to AD measures in this area there were just 597 cases out of 2795 cases,<sup>13</sup> representing 21.35% of all AD measures in the world. By referring to these numbers and percentages, it is apparent that in many cases the petrochemicals sector is the subject of AD investigations and measures. These percentages show how important it is to identify another solution to disputes, to reduce the high number of AD investigations and cases raised globally. However, Adamantopoulos and Notaris state, "The increase in

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<sup>9</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 16.4.

<sup>10</sup> I have tried many times to contact the Saudi official department in order to obtain non-confidential copies of the anti-dumping cases between them and other countries. My contact was first with SABIC and then the Ministry of Commerce. Both refused to give me a copy of these cases. I tried again by approaching the committee for anti-dumping negotiations, directed by HRH Prince Abdul-Aziz bin Salman, but they refused as well. There is a misunderstanding of these cases in Saudi Arabia, as there is not adequate distinction between confidential and non-confidential copies.

<sup>11</sup> These cases were between 1 January 1995 and 30 June 2013.

<sup>12</sup> The Anti-dumping Initiations by the sector, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 1 June 2014.

<sup>13</sup> The Anti-dumping Initiations by measures, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 1 June 2014.

use of AD measures by non-traditional users, however, will inevitably lead to an increase of WTO AD litigation, and maybe to changes in traditional users' practices regarding article 2".<sup>14</sup>

In addition, this high number of cases against the petrochemicals sector must be analysed in depth and given great consideration, by both researchers and contracting parties. The reason being, that the petrochemicals sector is one of the most important industries in the world, and hundreds of other industries worldwide use petrochemicals products directly or indirectly. Any impact on this sector can have a direct effect on other industries also. In this research, it is asserted that the petrochemicals sector is an important one, directly and indirectly affecting the entire global population.

However, the reported number of AD initiations and investigations varies between sources, as will be analysed. Research by the World Bank Global AD Database<sup>15</sup> shows 6325 AD initiations and investigations worldwide, between 1979 and 2012.<sup>16</sup> However, this number does not include cases of user countries with minimal information, which would then add to this total. There are a huge number of cases, more than reported by WTO statistics; in addition, many details of each case remain unrecorded in official documents. As mentioned, the data referred to here

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<sup>14</sup> Konstantinos Adamantopoulos and Diego De Notaris, "The future of the WTO and the reform of the anti-dumping agreement: a legal perspective", 2000-2001, *Fordham International Law Journal*, 24:30, 47.

<sup>15</sup> The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

<sup>16</sup> In this database, anti-dumping cases have been categorised by countries and each country has its cases nationally in an EXCL file, kept up-to-date to the latest case. These files have very detailed information about each case, which has been carefully collected from each state by this research centre. At the end of this database page will be found the countries of the anti-dumping users with minimum information, and without any numbers of these kinds of cases.

was collected from each country very carefully, and has been used elsewhere in a variety of research papers, published in a range of academic journals.<sup>17</sup>

The database referred to provides accurate information to uncover in depth details of the cases. There are two reasons for the variation in numbers between the research databases mentioned above and the WTO's AD statistics. First, the data from the former extends over a period greater than that of the WTO, as it dates back to 1979. This can assist researchers to explore the legal background and acquire greater knowledge of cases involving international trade between countries more fully. It may also help to develop regulations in the future in accordance with changing legal circumstances. Second, in any AD case, the country making the allegations has to initiate the AD case in accordance with their membership duty; this database includes many non-member countries, therefore, returning higher figures than reported in the WTO statistics.

Concerning the two databases, if we examine WTO AD statistics, it is apparent that Saudi Arabia has faced 28 initiations and measures,<sup>18</sup> and 20 cases as a third party under the DSU.<sup>19</sup> These are entirely different from the figures held on the Global AD Database. According to Global AD Database statistics, Saudi Arabia has faced 34 AD initiations and investigations, not including countries that applied AD regulations with minimal information cases.<sup>20</sup> There were six initiations in Australia, one in Canada, three in China, four in the European Union, nine in India, one in New Zealand, two in Pakistan, three in South Africa, three also in Turkey, and finally one

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<sup>17</sup> For example, Prof Zanardihis used this data in his research. He is a Professor in Economics at the Université Libre de Bruxelles and a specialist in statistics of economic figures.

<sup>18</sup> The Anti-dumping Initiations by country, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 1 June 2014.

<sup>19</sup> Dispute by Country/Territory, Dispute Settlement under the World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)> accessed 1 June 2014.

<sup>20</sup> The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014

in the United States and one in Taiwan.<sup>21</sup> Twenty-six of these cases were against Saudi petrochemicals products, accounting for 76.47% of all AD investigations against Saudi Arabia.

The cases selected for this research are those initiated by India, Turkey and the European Union, due to sufficiency of information. Attempts were made to acquire data on cases from China also, but no English copies of these cases could be acquired from the Chinese Ministry of Commerce,<sup>22</sup> Chinese official newspapers or the Saudi Arabian official departments. Nonetheless, it is considered that the cases selected are suitable for analysis purposes and will deliver reliable evidence. The cases are:

- European Union in 2011 for the exporting of Polyethylene that originated from Saudi Arabia;<sup>23</sup>
- Turkey in 2008 for the exporting of Ethylene that originated from Saudi Arabia;<sup>24</sup> and
- India in 2009 for the exporting of Polypropylene that originated from Saudi Arabia.<sup>25</sup>

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<sup>21</sup> The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

<sup>22</sup> Many efforts have been made to find alternative ways to locate these cases, including the Chinese official Ministries' websites. The Chinese Ministry of Commerce, which is responsible for anti-dumping cases, has not, however, translated these cases into English, so they cannot easily be found. See <<http://www.mofcom.gov.cn/>>, accessed on 1 June 2014.

<sup>23</sup> The EU Anti-dumping case against Saudi Arabia: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>24</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569.

<sup>25</sup> The Indian Anti-dumping case against Saudi Arabia: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014.



### **3.3.1 Analysis of cases**

Before analysing the AD cases between Saudi Arabia and India, Turkey and EU, it is important to set out the main principles deemed applicable to dumping under the WTO, as discussed in Chapter 2. In order to have a dumping margin, export and normal prices must be clear. In addition, the product must be ‘similar to’ a product produced by the domestic industry as well as representing a clear ‘injury or threat’ to the domestic industry. A ‘causal link’ must exist between the injury and the export price. Hence, the first part of this section will analyse export and normal pricing with the dumping margin. Second, discussion turns to the notion of a similar product and the impact on domestic industry, before finally considering the injury or threat and proof of a causal link. However, it is also an important component of this research, to determine whether subsidy played a role in the dumping in these cases; thus, this forms the final part of this section.

#### ***3.3.1.1 Export price, normal value and dumping margin***

Before commencing the discussion stage of this section, regarding export price, normal value and dumping margin, it is important to remember that dumping refers to selling an exported product for less than its normal value, as stated in article VI, GATT.<sup>26</sup> In cases where the export price is clear, there is no concern, as all prices are matched with real information. However, a problem arises where there is no clear export price or normal value; such cases, are hard to prove, as there is no evidence.

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<sup>26</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700, Article VI.

According to Reid M. Bolton "... in many cases there is no easy way to determine what a normal price is for the purposes of AD investigations".<sup>27</sup>

As mentioned in Article 2 of VI implementation, section 2.2 states that where there are no sales of a like product in an export country, or where there is a low volume of sales regarding the market situation, in such a situation,

the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administration, selling and general cost and for profits.<sup>28</sup>

This article clearly demonstrates that it is possible to calculate the margin of dumping in specific circumstances. The cost will normally be calculated where it is under investigation by an exporter or producer. However, the amount for administrative, selling and general costs and profits will be based on actual data, kept by the exporter or producer under investigation.<sup>29</sup> In cases where there is no export price or where the export price is "unreliable",<sup>30</sup>

the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.<sup>31</sup>

Following this brief review of dumping and the relevant key elements discussed in Chapter Two, cases between Saudi Arabia and India, Turkey, and the EU, will be

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<sup>27</sup> Reid M. Bolton, "Anti-dumping and Distrust Reducing Anti-dumping Duties under the W.T.O. Through Heightened Scrutiny", *Berkeley Journal of International Law*, 2011, 66, 74.

<sup>28</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 2.2.

<sup>29</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 2.2.1.1 & 2.2.2.

<sup>30</sup> "Unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party" Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 2.3.

<sup>31</sup> "Unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party" Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 2.3.

examined in order to answer the second research question: Did the AD cases brought by Turkey, India and the EU countries against Saudi petrochemicals products have an impact on these products?

*3.3.1.1.1 EU case number 2011/c 49/10*

In a case, initiated by the EU countries in AD proceedings concerning the import of certain Polyethylene Terephthalate products from Saudi Arabia and Oman to the European Union, it was declared,

...the allegation of dumping is based on a comparison of a constructed normal value (manufactured costs, selling, general and administration costs (SG&A) and profit) with the export price (at ex-works level) of the product under investigation when sold for export to the Union.<sup>32</sup>

The above quotation shows that the EU applied article 2.4 of the implementation of article VI, GATT. However, the information remains unclear, as this is an initiation without examination by the authority. Usually, in such an initiation, the authority does not apply the articles to the facts; usually it simply offers brief information to initiate AD proceedings, by sending out questionnaires and receiving them back from interested parties. However, in this initiation, it was mentioned that the complaint provided necessary evidence of the negative impact of the dumped product on the EU:

The prima facie evidence provided by the complainant shows that the volume and price of the imported product under investigation have, among other consequences, had a negative impact on the quantities sold, the level of the prices changed and the market share held by the Union industry...<sup>33</sup>

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<sup>32</sup> The EU Anti-dumping case against Saudi Arabia: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>33</sup> The EU Anti-dumping case against Saudi Arabia: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

The prices of the complainant, i.e. the EU industries were affected negatively, which triggered the AD investigation.

Thus, this examination is not a clear example, as the authority used the same articles as those set out in the WTO regulations on AD, but the complainant withdrew the case.<sup>34</sup>

#### *3.3.1.1.2 Turkish case number 2008/40*

This case concerned the export of Mono ethylene Glycol (MEG) from Saudi Arabia, Kuwait and Bulgaria in 2008. As mentioned, determination of the normal value in this initiation in article 4 (1) was, “due to the production costs of the domestic market, prices reached [which are] directly determined by adding a reasonable profit generated value [are] taken as the normal value for each of the three countries.”<sup>35</sup>

In relation to article 4 (1), the Turkish authority identified the export price in this initiation. However, a decision was made by the Turkish authority in the AD determinations regarding the same case (number 2010/11), after the authority had received completed questionnaires from the interested referring to the domestic selling price in Saudi Arabia and Kuwait:

[was] based on costs and export price. However, in these countries, which [provide] the basic raw materials used in the production of MEG, “Ethane” is only produced by state-owned companies and the price of the supply/demand conditions are identified and announced by the authorities.<sup>36</sup>

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<sup>34</sup> Case number 2011/835/EU, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union 330/45.

<sup>35</sup> Case number 2008/40 brought by the Turkish anti-dumping authority against the Saudi petrochemicals products.

<sup>36</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569, 4.

The judgment mentioned that these countries could access very cheap raw materials, which could result in lack of fair competition between industries producing similar products abroad.

In addition, in reference to the same point, it was stated that Saudi Arabia fixes prices internally, meaning there is no competition inside Saudi Arabia between the industries for the similar products "...[a] price fixing mechanism for the review of the terms of these prices [to] reflect the market...".<sup>37</sup> Nonetheless, "the total cost provided by these importing companies does not reflect market conditions and the cost of labour and other overhead costs, raw materials...".<sup>38</sup> Therefore, although Saudi Arabia has issued a competition law to prescribe competition between products, the conditions for genuine competition inside Saudi Arabia remain unfulfilled.

A further related point is that, in a report issued by the Saudi American Bank in Saudi Arabia (SAMBA), it was stated that Saudi Arabia is subsidising its petrochemicals sector through cheap feedstock:

Ethane has been the feedstock of choice for Saudi products for one simple reason: the cost advantage is substantial. Owing to the Kingdom's substantial gas resources, ethane is supported by Saudi Aramco to petrochemicals producers at \$0.75 per million BTUs. This compares with a current market price of \$3.5 per million BTUs for most producers in the US, who also tend to use ethane (the price was approaching \$14 per million BTUs around a year ago).<sup>39</sup>

This statement shows involvement in petrochemicals pricing by the Saudi government, through Saudi Aramco, which sells raw materials below the global market price.

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<sup>37</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 3.

<sup>38</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 3.

<sup>39</sup> Saudi American Bank in Saudi Arabia (SAMBA), Report Series August 2009, available at <<http://www.samba.com/>> accessed 1 June 2014.

The above quotations from the Turkish AD case raise two important issues, which affect the export price: one regarding the Saudi domestic market conditions and the other in relation to the involvement of the state in the domestic market. Regarding the first point, the two states, Saudi Arabia and Kuwait, did not create the necessary market conditions in their domestic markets, which was a form of unfair competition. The fixed price led to unfair competition, as mentioned in the Turkish decision. In relation to Saudi Arabia, all the market conditions in the domestic markets were made available, although they were not mentioned in the decision; nor were the rules for fair competition or the opportunity for domestic and foreign investors to invest in Saudi Arabia in this sector.<sup>40</sup> It might be that foreign investors do not want to invest in this particular area in Saudi Arabia because of associated economic benefits and priorities; however, ultimately a competitive market functions as a positive investment atmosphere. Despite this, the Saudi petrochemicals sector is mostly government-owned (through SABIC); with the result that prices are usually fixed, or at the very least subject to governmental interference.

Secondly, with regard to raw materials; this should not be an issue, as long as the government does not become involved in markets and pricing; thus, raw materials could be sold to domestic petrochemicals industries at the global price. However, Saudi Arabia is well endowed with oil and gas reserves; thus, it can supply low cost materials to any industries manufacturing products comprised of these elements. Nonetheless, the state must open its market to these types of industry and

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<sup>40</sup> In 2006, the Saudi General Investment Authority established the National Competitiveness Centre, which is responsible for advising the various Saudi investment authorities and departments in order to improve competition inside the Saudi market to the international standards required. This centre has frequently organised international conferences in Saudi Arabia in this legal/economic area, so that experts can discuss how to achieve the best standards. There is evidence that the Saudi government is doing its best to create a good competitive atmosphere inside the Saudi market and not as mentioned in the anti-dumping statement against the Saudi companies. For more information about this centre, available at <<http://www.saudincc.org.sa/>>, accessed 1 June 2014.

supply all industries (whether government-owned or otherwise) equally; in fact the option of an open market might not be a possibility in Saudi Arabia, due to government involvement in the market price, i.e. through subsidy.<sup>41</sup>

Regarding normal value, the Turkish authority applied the following provision:

where the normal value was based on sales in the domestic market, the domestic market of the country of origin for similar products within the framework of normal commercial transactions or to pay the prices paid by buyers on the basis of an independent calculation”.<sup>42</sup>

Clearly, raw materials in Saudi Arabia are not subject to the same market conditions as in Turkey. In fact, normal value is based on Western Europe market conditions: “...with a much higher profit by using investment returns (hence this higher profit will be in the normal value) in favour of Saudi Arabia and Kuwait”.<sup>43</sup> It can be seen in this research, that to apply this to the case concerned is erroneous, as Western Europe differs entirely from Saudi Arabia and Kuwait in many respects; i.e. economically, legally, and in terms of development and technology. Moreover, Western Europe does not have the same oil and gas resources as these two countries, and so similar market conditions do not apply. A comparison should be made at the same level of trade as market and ex-factory, as mentioned in article 2.4 of the implementations of Article VI of GATT.<sup>44</sup> The Turkish authority should try to find another country to offer an appropriate comparison for Saudi Arabia and Kuwait, such as Venezuela.

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<sup>41</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14., Article 1, para 1.1 (a) (2) .

<sup>42</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 4.

<sup>43</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 4.

<sup>44</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 2.4.

In relation to the above statement, the Turkish authority calculated the dumping margin for Saudi Arabia (SABIC) as 30.1% for firms that were not cooperative,<sup>45</sup> which must be reconsidered, as the application is not compatible with the GATT with regard to article VI and its implementation.

### *3.3.1.1.3 Indian case number 14/5/2009-DGAD*

In the case of India, the initiation of an AD procedure was in response to imports of Polypropylene from Saudi Arabia, Oman and Singapore into India. There are more details available for this case than for the previous cases, as the entire AD investigation process in India was concluded with the application of AD duty. This case raises the same issue as the Turkish case with regard to normal value:

they were not able to obtain any documentary evidence or reliable information with regard to domestic price in the subject countries.....The applicant has also stated that the raw materials are based on the market conditions and are being sourced from state-owned enterprises.<sup>46</sup>

These allegations against Saudi companies and others are detailed further, later in the preliminary and final findings of this case.

With regard to normal value, the Indian authorities applied the same method as the Turkish, i.e. referring to GATT, as mentioned in the Preliminary Findings:

...whether the domestic sales of the subject goods by the responding exporters in their home markets were representative and viable permitting determinations of normal value on the basis of domestic selling prices and whether the ordinary course of trade test was satisfied as per the data provided by respondents,[is] subject to verification...<sup>47</sup>

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<sup>45</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569.

<sup>46</sup> The Indian Anti-dumping case against Saudi Arabia: 14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <www.commerce.nic.in>, accessed 1 June 2014, 2 para 7.

<sup>47</sup>The Indian Anti-dumping case against Saudi Arabia: 14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <www.commerce.nic.in>, accessed 1 June 2014, (page 6 of these Preliminary Findings).



However, the authorities noted, regarding the Supreme Court of India case of M/s Reliance Industries Ltd., that the single weighted average for normal value should be separated for each of the subject countries: "...then determine a separate single weighted average normal value for each of the subject countries as a whole and the same is compared with the ex-factory export realisation of each cooperating respondent".<sup>48</sup> Based on the above information, the normal value for each Saudi industry was given separately as follows:

1. With regard to M/s Advanced Polypropylene Co. : " ...Considering the fact that the prices of petroleum in general and as well as of the subject goods fell significantly during this period.....the authority has proceeded to construct the normal value on the basis of the unit cost [to] make and sell ...".<sup>49</sup> The authority aimed to find a way to protect its domestic industries by applying AD duty to exported products, especially from Saudi Arabia. However, there is no relationship between the price of petroleum and the normal value, as the price of petroleum is priced globally. This means, the authority has not professionally determined the normal value correctly.
2. With regard to the M/s Saudi Polyolefins Company, the authority determined normal value based on total domestic sales, as it was provided with details of the selling price, which were agreed to be legally acceptable.<sup>50</sup>
3. With regard to M/s Saudi Basic Industries Corporation (SABIC), the authority was described as non-co-operative, because it did not provide any

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<sup>48</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <www.commerce.nic.in>, accessed 1 June 2014, (page 6 of the Preliminary Findings).

<sup>49</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <www.commerce.nic.in>, accessed 1 June 2014, (page 7 of the Preliminary Findings)

<sup>50</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <www.commerce.nic.in>, accessed 1 June 2014, (page 7 of the Preliminary Findings)

details as required. However, in this examination, there was no mention of what basis the authority calculated the normal value or the other elements related to it.<sup>51</sup>

4. With regard to M/s Exxon Mobil Chemical Asia Pacific - Saudi Arabia, the same statement was made as for SABIC; namely, that the company did not co-operate with the Indian authority in this matter.<sup>52</sup> Here too there was no method shown to explain how the authority would determine normal value.

In the Indian case, the dumping margin was clearer than in the Turkish and EU cases. After the authority considered the export price and normal value, as discussed above, a dumping margin was applied to the Saudi petrochemical industries. The margin was 53.59% for the Advanced Polypropylene Co., 1.89% for the M/s Saudi Polyolefins Company, and 185.68% for the non-cooperative producers and exporters.<sup>53</sup> The only comment made about the dumping margins was in relation to M/s Saudi Polyolefins Company as well as M/s Advanced Polypropylene Co. The first company's percentage was regarded as de minimis,<sup>54</sup> and the authority did not apply any AD duty on the goods it exported. The second company could not understand how the authority linked the price of petroleum and normal value. This price would be expected to have no effect on normal value, as it is globally priced and there is no interference by government.

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<sup>51</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014, (page 7 of the Preliminary Findings).

<sup>52</sup> The Indian Anti-dumping case against Saudi Arabia: 14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014, (page 7 of the Preliminary Findings).

<sup>53</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014.

<sup>54</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 5.8.

### 3.3.1.2 *Similar products and the domestic industry*

In order to apply AD provisions, it is important to identify like products, as well as the domestic industry for similar products. According to the GATT and the implementation of article VI, the like product must be identical in all respects if AD regulations are to apply.<sup>55</sup> However, in the case of the domestic industry, reference must be made to domestic producers of like products, unless there is a relationship between the exporting and domestic industries.<sup>56</sup> Nonetheless, in practice, domestic industries must deliver more than 50% of the total<sup>57</sup> for like products in AD cases. Therefore, on this particular point, there were no issues related to identifying like products within the domestic industry, as like products were identical in all three cases, and there was no requirement for further clarification. In some cases, however, the definition of “like product” could be raised as an issue between parties: “Since the definition of ‘like product’ has not been settled in the AD context, administering authorities enjoy much discretion in determin[ing] the product scope of AD investigations”.<sup>58</sup> However, in some cases, as in the Footwear case between China and Indonesia, it was not easy to distinguish between slippers and outdoor shoes, and the court “...had to be satisfied in order to consider slippers and outdoor shoes as one product”.<sup>59</sup> The case failed because these were not deemed identical products: “The test failed in the other direction (i.e., the Commission could not determine that

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<sup>55</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 2.6.

<sup>56</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 4.1 (i) and footnote 11 of this Article.

<sup>57</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 5.4.

<sup>58</sup> Konstantinos Adamantopoulos and Diego De Notaris, “The future of the WTO and the reform of the anti-dumping agreement: a legal perspective”, 2000-2001, *Fordham International Law Journal*, 24:30, 63.

<sup>59</sup> Konstantinos Adamantopoulos and Diego De Notaris, “The future of the WTO and the reform of the anti-dumping agreement: a legal perspective”, 2000-2001, *Fordham International Law Journal*, 24:30, 37.

outdoor shoes could be replaced by slippers for outdoor use, due to slippers' 'usual flimsiness'".<sup>60</sup> Even though both can be regarded as shoes, the use of shoes was a deciding factor, suggesting a difference in products.

#### 3.3.1.2.1 EU case number 2011/c 49/10

Returning to the EU case against Saudi Arabia and Oman, the product was Polyethylene Terephthalate. The product was identical in all respects to the domestic product as clarified: "The product subject to this investigation is Polyethylene Terephthalate having a viscosity number of 78 ml/g or higher, according to the ISO Standard 1628-5".<sup>61</sup> However, the Committee of Polyethylene Terephthalate (PET) industries filled this case on behalf of the union industries, "...by the Committee of PET Manufactures in Europe (CPME)...on behalf of the producers representing a major proportion, in this case more than 50% of the total Union production of certain polyethylene terephthalate".<sup>62</sup>

Before considering another case, however, it is important to mention the process of "Sampling". A huge number of Union producers have been involved in AD cases. In order to conclude such cases on time the Commission typically selects one producer as representative of Union producers; i.e. "The Commission has decided to limit to a reasonable number the Union producers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). The sampling is

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<sup>60</sup> Konstantinos Adamantopoulos and Diego De Notaris, "The future of the WTO and the reform of the anti-dumping agreement: a legal perspective", 2000-2001, *Fordham International Law Journal*, 24:30, 37.

<sup>61</sup> Case number 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union C 49/16.

<sup>62</sup> Case number 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union C 49/16.

carried out in accordance with article 17 of the basic Regulation”.<sup>63</sup> This statement shows no conflict between this article and the AD regulations in the GATT agreement. It is deemed an acceptable way of organising allegations between interested parties.

#### *3.3.1.2.2 Turkish case number 2008/40*

In the Turkish case concerning MEG, the documents refer to the product under the Turkish Custom Tariff Authority. Moreover, further clarification states; i.e. “...the formula (CH<sub>2</sub>OH)<sub>2</sub>, which MEG, glycols is the smallest compound to colourless, odourless, clear and very hygroscopic syrup liquid”.<sup>64</sup> In addition, the legal percentages under the WTO in AD cases referring to domestic similar producers were mentioned clearly in the initiation.

#### *3.3.1.2.3 Indian case number 14/5/2009-DGAD*

In the Indian case, the product’s name was clarified: The product under consideration is “Polypropylene (i.e., photopolymers of propylene and copolymers of propylene and ethylene)”. These subject goods are classified under Custom Headings 39021000 and 39023000.<sup>65</sup>

Moreover, the initiation pointed to different uses of the subject product “...The subject goods are used as woven sacks for cement, food-grains, sugar,

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<sup>63</sup> Case number 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union C 49/18.

<sup>64</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569, 1.

<sup>65</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014, (page 1 of the Initiation Notification).

fertilizer, bags for fruits & vegetables, TQ & BOPP films, containers etc.”<sup>66</sup> The identical nature of the two products is addressed, thus:

There are no differences either in the technical specifications, quality, functions or end-uses of the dumped imports and the domestically produced subject goods and the product under consideration manufactured by the applicant. The two are technically and commercially substitutable and hence should be treated as ‘like article’ under the AD Rules.<sup>67</sup>

However, a domestic producer raised the case on behalf of domestic similar industries: “The application has been filed by M/s Reliance Industry Ltd. on behalf of the domestic industry”. The total number of industries and similar producers reached the legal percentage required to proceed with an AD case: “... the total domestic production of the like article and is more than 50% of Indian production of the like article”.<sup>68</sup>

Accordingly, it can be seen that the authorities in AD cases against Saudi products applied AD regulations properly and that the domestic regulations relating to GATT on AD were also applicable. However, the Indian case was legally clearer when identifying the like product, as it mentioned the diversity of uses of the like product, thereby applying the correct legal written formula and procedure.

### ***3.3.1.3 Injury and causal link***

This section is one of the most important and difficult in relation to the application of AD regulations. Without injury and a causal link, AD provisions could not be

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<sup>66</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014, (pages 1 & 2 of the Initiation Notification).

<sup>67</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014, (page 2 of the Initiation Notification).

<sup>68</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014, (page 1 of the Initiation Notification).

applied. As mentioned in Chapter Two, dumping itself is not illegal but is penalised if it causes or threatens material or other injury to an established industry, or one that is planned. Before examining these cases, it is important to consider both elements in relation to the implementation of Article VI of GATT.

On the subject of injury, article VI states that dumping can cause injury or threat to a domestic industry: “...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...”.<sup>69</sup> Thus, it must be based on positive evidence including examination of the volume of dumped imports and the effect of pricing on domestic producers.<sup>70</sup> The authority should check two points: increases in quantities dumped and the price undercutting of like products in the domestic market. However, as mentioned in Chapter Two of this research, the causal link must be between the lowest prices for importing the product and the injury or threat as known at this point. It is agreed that the cause of dumping is the importing of the product, but not the product itself; otherwise, this would mean that any imported product could be regarded as dumped, which is not the case. The injury is caused by the low price of the imported product.

#### *3.3.1.2.1 EU case number 2011/c 49/10*

This initiation details the identified injury as:

Injury means material injury to the union industry or threat of material injury to the industry, or material retardation of the establishment of such an industry. A determination of injury is based on positive evidence and involves an objective determination of the volume of dumped imports,

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<sup>69</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700, Article VI.

<sup>70</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 3.1.

their effect on prices on the Union market and the consequent impact of those imports on the Union industry....<sup>71</sup>

However, the initiation mentioned an increase in the imported product in terms of market share: “The Complainant has provided evidence that impacts of the product under investigations from the countries concerned have increased overall in absolute terms and have increased in terms market share”.<sup>72</sup> Consequently, this caused a negative impact on the dumped Saudi Arabian product, which

...had a negative impact on quantities sold, the level of the prices charged and market share held by Union industry, resulting in substantial adverse effects on the overall performance, the financial situation and the employment situation of the Union industry.<sup>73</sup>

In this initiation, and as provided by the Union’s complainant industry, the injury could be classified into three particular points, quantities sold, price charged and market share by union industries. Yet, this must be linked to the low price of the imported similar product, if AD duty were to be applied. However, the complainant withdrew the case, so it will be difficult to examine the three points of injury and find a causal link.

#### *3.3.1.3.2 Turkish case number 2008/40*

Referring back to the Turkish case: the authority examined whether there was an increase in the volume of Saudi exported products. It was demonstrated that there was an increase during the period under examination, and also that dumped imports affected the prices of domestic producers. It was stated that value increased in this period affecting Turkish domestic producers. Moreover, the Turkish authority

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<sup>71</sup> Case number 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union C 49/18.

<sup>72</sup> Case number 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union C 49/16.

<sup>73</sup> Case number 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union C 49/16.



examined economic indicators for domestic production: sales, exports, market share, inventories, capacity, employment, fees, productivity, domestic price, costs, cash flow, growth, capital increase and increase in investment; all were evidence of the effect of dumping on the domestic industry, although not evidence of dumping itself.<sup>74</sup>

#### *3.3.1.3.3 Indian case number 14/5/2009-DGAD*

In this case, the initiation stated that the applicant had put forward all the related evidence regarding the injury:

The applicant has furnished evidence regarding the injury having taken place as a result of the alleged dumping in the form of increased volume of dumped imports, price underselling, price suppression, and substantial decline in profitability, return and cash flow for the domestic industries.<sup>75</sup>

However, in the preliminary findings, and after the authority had examined all the evidence, it found an increase in imports from 100 (in 2005-06) to 164 in the period under investigation.<sup>76</sup> With regard to demand and market share, the imports from these countries continued in the range of 5% to 6%, and the market share of domestic industry improved.<sup>77</sup>

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<sup>74</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569.

<sup>75</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014, (page 2 of the Initiation Notification)

<sup>76</sup> The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014, (page 17 of the Preliminary Findings)

<sup>77</sup>The Indian Anti-dumping case against Saudi Arabia:14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at [www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014, (page 17 of the Preliminary Findings)

Thus, capacity fell in the period of investigation compared to previous years, and the sales volumes of both importing and domestic industries were enhanced.<sup>78</sup> There was also an increase concerning landed value from subject countries as well as heavy discounts post shipment from exported countries.<sup>79</sup> There was also positive price underselling in each of the subject countries. These elements are all considered evidence of the effect of dumping inside India's market, as referred to in the GATT agreement in relation to article VI and its implementation.

#### ***3.3.1.4 Whether there is any "subsidising" for Saudi products as well as for the domestic products of the importing countries***

It is important to examine whether there are any kinds of subsidies from the Saudi government for the products in the three AD cases. Usually there are two different implementation processes for AD and anti-subsidy under the GATT agreement; although, in practice all cases have to be dealt with separately, even if they are related in some circumstances. By checking the WTO reports with regard to subsidy cases, there was no case found against Saudi Arabia concerning anti-subsidy regulations. Nonetheless, this does not mean there is no any allegation concerning this point, because it may be integrated within AD cases.

Thus, if we reconsider the Turkish case mentioned above, two issues were reported in this case. One with regard to market conditions and the other in relation to the involvement of the state (Saudi Arabia) in its domestic market, which affects the export price. As shown in the definitions of subsidy regulations, a subsidy is

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<sup>78</sup>The Indian Anti-dumping case against Saudi Arabia: 14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014, (page 17 of the Preliminary Findings).

<sup>79</sup>The Indian Anti-dumping case against Saudi Arabia: 14/5/2009-DGAD, India v Oman, Saudi Arabia and Singapore [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014, (page 17 of the Preliminary Findings).

deemed to exist, among other conditions, if: "... there is any form of income or price support in the sense of Article XVI of GATT 1994..."<sup>80</sup> Thus, this expressed the involvement of the Saudi government in the domestic market as affecting the export price as a kind of subsidy.

Having examined many of the WTO members' legal actions relative to AD and anti-subsidy, the research shows more attention is generally paid to the former than the latter. The anti-subsidy cases under the DSU numbered only 102.<sup>81</sup> Thus, it is recommended that the WTO takes more action on this point and activates the Agreement on Subsidy and Countervailing Measures more fully.

### ***3.3.1.5 Termination of AD***

At the end of this section, when analysing AD cases against Saudi Arabia, it emerges that the European Union Commission has been very careful when making decisions with regard to AD regulations, more so than the authorities in the other cases (the Indian authority in particular). The argument and use of language in the European case was very strong and more specific in terms of detail, than the Indian case. The European Union authority used an element considered as evidence of the dumping itself, unlike the Indian case. Thus, it can be seen that the Indian case was abusive in its application of the regulation, meaning that it might not have complied with the GATT regulation and article VI implementation.

However, these cases were terminated for many different reasons; however, after this the Saudi Arabian government put political pressure on these countries in a

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<sup>80</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Article 1.1 (a) (2).

<sup>81</sup> See the official WTO website on disputes related to Anti-Subsidy, available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A20](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A20)> accessed 1 June 2014.

different way. In the EU case, the complainant withdrew from allegations on 12<sup>th</sup> of October, 2011.<sup>82</sup> Following the Turkish case, the Saudi Government expressed its thanks and appreciation to the Turkish government after termination of AD duty against the Saudi petrochemicals products mentioned in the case.<sup>83</sup> Agreement was achieved through the regular weekly council of ministries, which met on 26<sup>th</sup> of March, 2012. From the Turkish perspective, there were no official documents demonstrating the reason for terminating AD duty against Saudi petrochemicals products.

Moreover, the Indian case included a unique form of termination. The Indian AD decision was dated 9<sup>th</sup> of August, 2012; the Indian authority retained AD duty on Oman and Singapore but dropped it from the Saudi petrochemicals products. It was mentioned in this decision, that: “On December 30, 2011 the Central Government has withdrawn the duties imposed on the imports from Saudi Arabia by Notification 130/2011...”.<sup>84</sup> Thus, based on the previous statement and the time elapsed between the termination of these cases, it can be clearly seen that Saudi Arabia put political pressure on the committee assessing the AD. This may have led to increased priority to negotiate in future AD cases against Saudi products. Finally, all three cases have a direct impact, whether on the alleging countries or Saudi Arabia, as will be seen later in this chapter.

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<sup>82</sup> Case number 2011/835/EU, *EU v Oman and Saudi Arabia* [2011], official Journal of the European Union L 330/45.

<sup>83</sup> See the Report by the Saudi Council of Ministers in the official Saudi Press Agency website, available at <[http://www.spa.gov.sa/minister\\_of\\_concil.php?cid=29&pg=1](http://www.spa.gov.sa/minister_of_concil.php?cid=29&pg=1)> accessed 1 June 2014.

<sup>84</sup> The Indian Anti-dumping case against Saudi Arabia: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014, (page 6 of the Indian Anti-dumping decision date 9 August 2012).

### 3.4 Cases against Saudi Arabia at the international level

The dispute settlement report on AD cases<sup>85</sup> mentioned no disputes against Saudi Arabia. However, Saudi Arabia has been involved in a total of 20 cases under the Dispute Settlement Understanding (DSU) as a third party.<sup>86</sup> Thus, AD cases against Saudi Arabia have continued to further the DSU level under the WTO agreement. In this research, the reasons for the non-pursuit of cases against Saudi Arabia at the international level under the WTO may be as follows:

#### 3.4.1 WTO membership

The majority of AD cases against Saudi Arabia were established before Saudi Arabia joined the WTO. According to the statistics from the Global AD Database, 11 out of 34 cases occurred before Saudi Arabia joined the World Trade Organisation at the end of 2005 (this equates to 32.35%).<sup>87</sup>

In addition, Saudi Arabia fought for ten years to become a member of the WTO,<sup>88</sup> and negotiations did not prioritise these cases. The priority was to fulfil the conditions and requirements of becoming a member of the WTO. Thus, most Saudi companies faced action against them without any real support from the Saudi government, as Saudi Arabia did not regard AD actions as a threat to its industries.

However, the Saudi Arabian government acted by appointing a committee (under the Ministry of Petroleum),<sup>89</sup> to address and negotiate. This committee aimed

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<sup>85</sup> WTO Dispute Settlement: One-Page Case Summaries, 1995-2011, 2012 Edition, available at <[http://wto.org/english/res\\_e/publications\\_e/dispu\\_settlement\\_e.htm](http://wto.org/english/res_e/publications_e/dispu_settlement_e.htm)> accessed 1 June 2014.

<sup>86</sup> Dispute Settlement by Country, the WTO official website, available at <[http://wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)> accessed 1 June 2014.

<sup>87</sup> The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

<sup>88</sup> Ministry of Commerce and Industry, available at <<http://www.mci.gov.sa/>> accessed 1 June 2014.

<sup>89</sup> The committee was headed by HRH Prince Abdul-Aziz bin Salman, who is the Assistant Minister of Petroleum and Mineral Resources for Petroleum.

to terminate AD cases against Saudi Arabian products overseas, which involved petrochemicals products. Protecting Saudi industries domestically was the responsibility of another department, under the Ministry of Commerce.<sup>90</sup> It can be seen in this research, that whether an AD dispute is inside or outside Saudi Arabia, the same department should deal with it, in order to establish more comprehensive knowledge and understanding in such cases.

### **3.4.2 Experience**

Saudi Arabia is still a new member of the WTO and has limited experience of how to deal with AD cases, whether locally or overseas. Even when facing cases of AD against its products after the joining the WTO in 2005, it had minimal experience of how to handle cases. Consequently, Saudi Arabia was not involved in any AD cases at the DUS level. On the other hand, in some of the AD cases mentioned above, Saudi petrochemical companies did not follow up on matters seriously, or participate in a trial in the country where the allegation was made.<sup>91</sup> In general, Saudi companies preferred an alternative way to resolve AD cases.

### **3.4.3 Saudi Arabia's interest in the oil sector**

Saudi Arabia had no interest in focusing on industries in general or petrochemical industries in particular, nor did it expressly offer these industries government support in cases of dumping. Their entire focus was on the oil sector, as it is the primary source of income into the country. However, Saudi Arabia recognised the

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<sup>90</sup> Ministry of Commerce and Industry, available at <<http://www.mci.gov.sa/>> accessed 1 June 2014.

<sup>91</sup> The Anti-dumping cases between Saudi Arabia and EU, Turkey and EU. Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in/)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

importance of diversifying national revenues in order to manage fluctuations in oil prices and to ensure national economic stability without focusing on oil profits.<sup>92</sup> Moreover, the Saudi government planned to extend and develop the production of petrochemicals,<sup>93</sup> although these cases can be an obstacle to free trade and the movement of goods between countries.

#### **3.4.4 Saudi Arabia's special policy**

Some of the AD cases against Saudi Arabia were connected with political action, even where they related purely to legal matters. Saudi Arabia has a special political approach that differs from that of other countries;<sup>94</sup> it emphasises quiet negotiation focused on larger political issues only. For this reason, Saudi Arabia has not paid substantial attention to AD cases, as these have generally involved minor issues, when compared to major political concerns. On the other hand, Saudi political policy does not support international escalation, such as with AD cases, because Saudi Arabia prefers to maintain a good relationship with countries worldwide. Thus, Saudi industries, when facing cases like these, must address matters unaided, and in some cases without any government support.

#### **3.4.5 Alternative solutions**

As mentioned above, the Saudi government has not expressed interest in legal AD measures, meaning that those Saudi industries facing AD cases have to resolve them independently. This has led to the emergence of some alternative solutions to

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<sup>92</sup> Eid Al-Juhani, *The Kingdom of Saudi Arabia after one hundred years*, Dara King Abdul-Aziz, v 14, 257.

<sup>93</sup> The National Industrial Strategic for Industry 2020. See the Saudi Industrial Development Funds, available at <<http://www.sidf.gov.sa/>> accessed 1 June 2014.

<sup>94</sup> The Saudi foreign policy, The Ministry of Foreign Affiance, available at <http://www.mofa.gov.sa/sites/mofaen/KingdomForeignPolicy/Pages/KingdomPolicy34645.aspx>, accessed 1 June 2014.

resolving such cases. One such solution is to leave the importing country's market, or at least to prevent exports for a short period, until a legal alternative can be found. Another solution is to form a union or coalition with local industries in the importing country, or to establish a Saudi industry in that country, owned by the Saudi company. Typically, this has involved buying up the entire shareholdings of companies inside the importing market.<sup>95</sup> This then makes it difficult for an importing country to apply AD regulations against Saudi companies subsequently; as such action would conflict with article 4 of the implementation of article VI, GATT.<sup>96</sup>

For the above reasons, it is logical not to engage in AD cases at DSU level against Saudi Arabia. Saudi industries cannot support their actions in the WTO setting without assistance from their government, which has not been available thus far.

### **3.5. The impact of the AD cases**

AD action has a broad impact on all concerned (importers and exporters); for this reason, contracting parties strive to prohibit illegal dumping actions, as they themselves result in unfair competition. The impact on importing and exporting countries is similar in some instances; however, it is also necessary to ask, how

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<sup>95</sup> SABIC has purchased many petrochemical industries in China, the EU and other regions of the world. It plans to develop this industry further in Saudi Arabia as a means of obtaining considerable income and benefits, as well as to escape from the imposition of anti-dumping allegations in cases such as the ones under discussion. Moreover, on the TV programme "Special Interview" on the Al Arabya news channel, on 4 December 2012, Mr Yang Fo Tshang (the then Chinese Deputy Foreign Minister and former adviser to the Centre for the Chinese-Arab Cooperation Forum), stated that Saudi Arabia had invested a considerable amount in the petrochemical sector in China and that the exchange rate between Saudi Arabia and China was around 65 billion US Dollars last year. See SABIC, available at <[www.sabic.com](http://www.sabic.com)> accessed 1 June 2014.

<sup>96</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 4.1 (i) and footnote 11 of this Article.



recent AD cases against Saudi Petrochemicals products have affected these products?

The following section clarifies the impact of illegal action on Saudi Arabian petrochemicals products. It considers that, just as there is an impact from dumping, the applying of AD duty on exporting countries can have a direct impact on domestic industries as well. Therefore, the impact is on both sides, not only on the importing countries. However, the AD regulation should be applied with careful consideration.

### **3.5.1 The legal impact**

Repeated use of AD actions, without legal justification or strong proof of necessity, undermines the credibility of the legislation and the legitimate aims for which it was created. It is therefore essential that its use be in accordance with correct legal procedures and standards set under the WTO agreement. The aim of the legislation is to ensure fair competition between products in the international marketplace, which helps to accelerate the pace of trade between nations and support it. However, the frequent use of such legislation to extend the best opportunities to local producers or to monopolise the local markets ahead of international producers, renders regulations worthless.

It can be seen from this research that the frequent use of AD processes is to allow unfair competition, albeit in a new way and with legal cover. Due to the increasing frequency of legal issues of this nature between contracting parties and since the global economic crisis, it has become necessary for countries, which are parties to GATT to review texts in accordance with their new economic circumstances and to investigate the abuse of laws. In reviewing these laws, therefore, it is necessary to impose sanctions, or act legally against a state that is

using legal actions in an abusive way or in bad faith. This would then promote the use of such laws in accordance with the aims for which they were developed, as legal safeguards exist in practice; i.e. to complain to the WTO as well as to the investigator and decision-maker in such cases. In other words, these are not sufficient to achieve a legal trial with results that will satisfy all parties concerned.

- *Creating a negotiation AD committee*

Recent AD cases against Saudi petrochemicals products have had a direct legal impact on Saudi Arabia. Saudi Arabia has directly established a negotiation committee to uncover a legal solution to allegations through direct negotiations, for the first time.<sup>97</sup> This is a major step forward from the Saudi government, representing its recognition of the negative direct impact of AD cases on petrochemicals industries. The importance of this negotiation committee to the government is evident, as one of the governmental officials responsible for the committee succeeding in its duty is a Royal Prince.<sup>98</sup>

- *Amending the recent AD regulation.*

Saudi Arabia recognised the importance of making an amendment to the legal AD system under the GCC; this was enacted on 28 January 2013.<sup>99</sup> This change was to make the regulation more compatible with the WTO, and to strengthen the protection of similar domestic products inside Saudi Arabia from competition.

These two legal steps illustrate the extent to which the Saudi government has broadened its legal understanding of the AD regulation and its potential to influence the Saudi economy in general negatively, and Saudi petrochemicals products in

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<sup>97</sup> A Royal Decree was issued to establish this committee on 13 April 2011.

<sup>98</sup> The committee was headed by HRH Prince Abdul-Aziz bin Salman, who is the Assistant Minister of Petroleum and Mineral Resources for Petroleum.

<sup>99</sup> The Saudi Press Agency, available at <<http://www.spa.gov.sa/>> accessed 1 June 2014.

particular. This was the first time that the Saudi government took legal action in such a case with the aim of trying to find a solution to protect its petrochemicals products. Consequently, these two steps directly affected the Saudi government, generating more calls for legal action in such cases in consideration of possible damage to Saudi petrochemicals protect.

### **3.5.2 The economic impact**

It is important to assess the impact of the recent AD cases against Saudi petrochemicals products. The subsections below discuss the impact of AD cases from different perspectives: price, competition, sales quantities, production, development and national plans, employment, and impact on national income.

#### ***3.5.2.1 Price and profit***

The first impact to consider is that affecting price, which is the main element or tool applied when making an AD calculation. Thus, the first element to examine is whether we are considering export price, normal price or domestic price when calculating the dumping margin. In order to understand the impact of dumping on price and profit, three hypotheses will be considered:

1. In cases where the price of an exported product is lower than the cost of a similar domestic product, the latter will be affected and will be considered as dumping if there is attendant injury or a causal link. This is similar to the guidelines in the AD cases against Saudi Arabia mentioned above. However, this price should have a direct impact on the profit and other economic elements related to it. Moreover, it will not represent proper competition

between the products. Conversely, the exporter will accrue greater profits, as well as strengthening the presence of products in the importing market.

2. In cases where the price of an exported product is similar or a little lower than the cost of a similar domestic product, it will be difficult to allege dumping, as it might be a case of de minimis or negligence.<sup>100</sup>
3. In cases where the price of an exported product is similar or a little higher than the cost of a similar product, the domestic industry for that similar product will be able to generate profit and develop the industry as soon as the selling volume moves in the right direction. However, competition between the domestic product and the exported product will then be high, as well as meeting the aim of the GATT agreement, which would favour the consumer.

Nonetheless, in the previous hypothesis, there were few alterations made to prices. Most of the importing countries complaining about Saudi products, had a suitable level of pricing inside their domestic markets, and so were able to continue making a profit.<sup>101</sup> However, Saudi Arabia was affected by AD cases targeting its petrochemicals products, and suffering AD duty. It has been reported that Saudi Arabia lost around 5 Billion Saudi Riyals in 2013 because of AD cases brought against its petrochemicals products.<sup>102</sup> Correspondingly, statistics taken from financial statements for the years 2009 to 2012, illustrate that Saudi petrochemicals products had lost value, as these statements showed reduced ability to sell during

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<sup>100</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 U.N.T.S. 201. Article 5.8.

<sup>101</sup> See SABIC Annual Reports between 2009 and 2012. Available at [www.sabic.com](http://www.sabic.com).

<sup>102</sup> Alsharq Alawsat Newspaper, Report about the Anti-dumping cases against the Saudi Petrochemicals products, available at [http://classic.aawsat.com/details.asp?section=6&article=724839&issueno=12558#.Uy8zz55\\_suc](http://classic.aawsat.com/details.asp?section=6&article=724839&issueno=12558#.Uy8zz55_suc), accessed 1 June 2014.

those years.<sup>103</sup> Consequently, the price rose, which will have a direct effect on competitive ability of competition and sales volumes.

### ***3.5.2.2 Competition***

There is a direct impact proceeding from competition between these petrochemicals products. This will have an immediate effect on the domestic industries targeted by the exporting producer. The competition would then not be as good as it should be. Initially, the domestic producer will try to compete as much as possible using such tools as pricing or offers, but it will not be able to continue competing. In contrast, the exporting producer will find it easier to exert their influence to their own benefit in the importing country.

With regard to the AD cases against Saudi Arabian petrochemicals products, the competition continues at the same level, as all companies have the ability to compete inside the complainant's markets. There were no strategic decisions made to leave any of the complainant countries.<sup>104</sup> Saudi Petrochemicals products continue to be sold inside these countries; moreover, some reports shows investment in petrochemicals products has actually increased.<sup>105</sup>

It appears that competition has not really altered, yet some elements from within the domestic Saudi market have exerted an effect. Fixing prices and cheap raw materials have been the two most important elements domestically inside Saudi Arabia; these have had a direct effect on the competition and other products in the international markets. Thus, even where there is capacity to compete with Saudi products, these actions are not judged legal under the WTO agreement.

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<sup>103</sup> See SABIC Annual Reports between 2009 and 2012. Available at [www. Sabic.com](http://www.Sabic.com).

<sup>104</sup> See SABIC Annual Reports between 2009 to 2012. Available at [www. Sabic.com](http://www. Sabic.com).

<sup>105</sup> See SABIC Annual Reports between 2009 to 2012. Available at [www. Sabic.com](http://www. Sabic.com).

### ***3.5.2.3 Selling quantities***

Selling quantities are placed in an inverse relationship between the domestic industry and exporting producers. While exporting producers' sales quantities increase in a dumping situation, the sales quantities of importing countries decrease. However, this will not be the situation in every dumping case, only when there is a high level of dumping.

In cases involving Saudi Arabia, the selling quantity affecting the Saudi producers and importing countries was unpredictable, sometimes it increased and at other times it did not.<sup>106</sup>

### ***3.5.2.4 Industrial producing***

In the case of dumping, domestic industrial producers were typically unable to increase production and could either decrease or cease to produce a particular kind of product. Conversely, the exporting producer might then choose to make more of a similar product, as it would expect this to sell better inside the importing country, or to continue to sell at the same level. However, domestic industrial producers might not be affected significantly, and in such cases, the effects then relate to the amount of dumping. The impact of dumping might not relate to industrial production at all, as stated in the dumping definition in article VI: "...or materially retards the establishment of a domestic industry...".<sup>107</sup> In fact, most cases against Saudi products did not mention retardation of the establishment of the domestic industry, and domestic companies continued to produce similar products without any problems. Therefore, it can be seen that Saudi petrochemicals companies continue to

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<sup>106</sup> SABIC annual reports, available at <<http://www.sabic.com/>>, accessed on 1 June 2014.

<sup>107</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700, Article VI.

produce the quantities expected in according to the following years' financial reports.<sup>108</sup>

#### ***3.5.2.5 Development and national plans***

There was a clear direct impact on the development of the domestic industry for the Saudi petrochemicals sector as well as on all the national strategy plans associated with industries of this kind, especially where a particular industry is important to the importing nation. A dumping action can retard future plans for both an industry and the country itself. However, AD duty has an effect on export industries as well as on national strategy plans.

Regarding Saudi Arabian cases, AD cases would be expected to have a direct affect on company's petrochemicals plans, and on their national plans, especially their strategic plans for 2020, as mentioned in the preceding chapter. The aim of the 2020 plan is to increase production ability, which can be done by entering new international markets to sell these petrochemicals products. In this context, AD cases against these Saudi petrochemicals products are evidently likely to weaken producers' ability to compete in international markets, hindering the plan. Therefore, the Saudi government has to consider AD cases as representing serious action against its petrochemicals products, with the ability to delay the planned national strategy. This explains why, the Saudi government, has appointed a new committee to deal with this problem and to find a solution to avoid delay to the national strategy plan for 2020.

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<sup>108</sup> See SABIC annual Report between 2009 to 2012. Available at [www. Sabic.com](http://www.Sabic.com).

### ***3.5.2.6 Employment***

In the cases considered above, dumping by Saudi producers had not affected the employment processes undertaken within the petrochemicals industries of the importing countries or inside the Saudi petrochemicals sector. This is due to the very strict Labour laws inside Saudi Arabia that make it difficult to make employees redundant in any sector.<sup>109</sup> Moreover, national statistics also show no notable loss of jobs in Saudi Arabia.<sup>110</sup> However, AD duty was expected to affect the Saudi supply side, because producers chose not to hire additional employees in the absence of positive future expectations. The effects in this regard, however, are limited and not as easily identifiable or applicable to other areas.

In addition, as mentioned above, the strategic plan for 2020 aims to generate more capacity to hire more employees in this sector in Saudi Arabia. However, if AD duty continues to affect Saudi petrochemicals product, it will affect expansion negatively. For that, the Saudi government has taken steps to end AD actions against Saudi petrochemicals products.

### ***3.5.2.7 National income***

There is an indirect effect from dumping cases on both exporting and importing countries, especially where the industries involved are important. Petrochemicals production is difficult to manage cost effectively, whether it is run by the private or public sector. Typically, dumping has an indirect effect on national income for both exporters and importers. Initially dumping could reduce sales quantities in the

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<sup>109</sup> Saudi Labour Law issued by the Royal Decree number M/51 dated 26/9/2005, see this law in the official website of the Saudi Council of Ministries, <http://www.boe.gov.sa/>, accessed on 7 February 2015.

<sup>110</sup> See the official website of the Saudi Department of Statistics and Information, <http://www.cdsi.gov.sa/>, accessed on 7 February 2015.



importing country or threaten the development of the sector; this will in turn affect the taxes being collected, and thereby the national income.

In the case of Saudi Arabia, national income might be affected by the application of duty, as petrochemicals are the second most important source of national revenue after sales of oil and gas. It is evident, therefore, that there will be an indirect impact from AD regulations on both the exporting and importing countries. However, this impact is hard to measure, as the major national revenue is from oil and gas. Nevertheless, the government should consider and study the impact of this if they want a better future for the Saudi petrochemicals sector.

### **3.5.3 The political impact**

No particular AD case has been shown to have a direct or indirect impact on political relations between both exporting and importing countries. However, it is not impossible that such impact could arise; potentially leading to political conflict as stated by Reid M. Bolton:

For example, when the United States recently announced that it was placing tariffs on Chinese automobile tires under the WTO's safeguard provision (7), China announced only two days later that it would be initiating an AD investigation into whether exporters in the United States were dumping automobile and chicken products into China (8).<sup>111</sup>

This statement shows the extent to which politics can affect AD cases between WTO contracting parties, raising political issues between the conflicting parties.

In the case of Saudi Arabia, the country's media reported the AD case with India as a high profile disagreement; some newspapers even demanded the expulsion of Indian workers from Saudi Arabia as a way to defend Saudi petrochemicals. This case, therefore, had the potential to affect international relations between Saudi

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<sup>111</sup> Reid M. Bolton, "Anti-dumping and Distrust Reducing Anti-dumping Duties under the W.T.O. Through Heightened Scrutiny", *Berkeley Journal of International Law*, 2011, 66, 67.

Arabia and India. However, both parties agreed to initiate negotiations between themselves, pursuing diplomatic approaches to find a solution.

The GATT refers to negotiation between countries or “contracting parties”, as an important tool that can have a considerable effect. It may result in parties being ordered to close a case without investigation or even after AD duty has been applied, as arose in these AD cases.<sup>112</sup> Political pressure means direct political negotiation between governments to apply diplomatic methods to end the conflict or dispute. Some countries, e.g. Japan, prefer to negotiate by appointing a committee of experts with real authority and experience in finding a solution.

However, such negotiation might not involve a government directly; it might involve representatives of the domestic industries themselves. This is generally easier than negotiating with a government, which may need to consider governmental policy and procedures, lengthening the time spent in negotiation. However, in some circumstances, it might be necessary for a negotiation to be with the government itself, ultimately depending on the facts of the case and the political atmosphere.

The negotiations between Saudi Arabia and EU, Turkey and India relative to AD investigations in recent AD cases against its petrochemical products resulted in the termination of all investigations and duties.<sup>113</sup> This result was positive, and so negotiation was an important step preceding the investigation or trial phase. This step helped to limit the increasing numbers of AD cases among the WTO members,

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<sup>112</sup> The Cases between EU, Turkey, India and Saudi Arabia. Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>113</sup> The Cases between Saudi Arabia and EU, Turkey and India. Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at [www.commerce.nic.in](http://www.commerce.nic.in), accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

and made it possible to find alternative solutions. This approach should be legalised under the GATT agreement. Political pressure will be discussed more thoroughly in the next chapter in relation to the AD investigation.

### **3.6 Conclusion**

This chapter has reported on the many AD cases raised against Saudi Arabian petrochemicals products at the national level. Some of these cases were analysed to answer the second research question concerning the effect of these cases within Saudi Arabia. The responsibility for compatibility is on the domestic legal systems of those countries making allegations, which need to check the applicability of regulations. In this analysis, all the countries concerned observed the WTO agreement and its implementation in terms of AD regulations. However, in applying these regulations to facts, it was apparent that on some points the parties did not follow WTO provisions, giving more space to domestic producers inside the market ahead of the exporting producer. This action is referred to as new unfair competition, but falls within the law and the WTO umbrella. The problem lies not in the regulations, but in their application to the facts, as some contracting parties have sought to apply these regulations in a way that abuses the exporting producer. Thus, it is argued that contracting parties should reform AD and anti-subsidy regulations to avoid this kind of misuse.

In addition, it should be noted that cases against Saudi Arabian products are important as they often relate to the petrochemicals sector, which is one of the most significant industry sectors in Saudi Arabia after oil. Until recently, however, the WTO has not distinguished between a country like Saudi Arabia, which has considerable resources with regard to petrochemical elements and raw materials, and

other countries; this an important point to address. In general, the petrochemicals sector around the world has led to many cases of this kind, and alternative solutions to prosecution need to be found, to move the global economy forward. Therefore, in the chapters that follow some legal suggestions relating to this issue are proposed.

This chapter has also considered the impact of AD allegations on countries. An AD action can have a direct effect on all parties, and can harm the economy of the conflicting parties. If such regulations are applied against an exporting country, this can affect the industries of that country, and also harm the importing county and its industries. As mentioned, AD cases could impede the free movement of goods and products between nations, resulting in a need for further reform to the regulations between contracting parties, or replacement with another set of regulations, as will be discussed in the following chapters.

## CHAPTER 4: DISPUTE RESOLUTION UNDER THE WTO LAW ON AD AND ANTI-SUBSIDY MEASURES WITH PROPOSED SOLUTIONS FOR THE PETROCHEMICALS SECTOR

### 4.1 Introduction

This chapter examines some aspects of AD and anti-subsidy regulations,<sup>1</sup> exploring methods available to resolve related legal matters. AD and anti-subsidy laws might require change or reform to address legal and practical considerations. This chapter answers the sixth research question: Is there an effective mechanism for the resolution of disputes on AD and anti-subsidy under the WTO? Both regulations have suffered reduced effectiveness because of the large number brought by new parties; “As hard as it is to believe, the sharp increase in new users may understate how concentrated the use of AD was until recently”.<sup>2</sup> In addition, during the recent global economic crises, and since the beginning of 2008, there have been an increasing number of AD cases,<sup>3</sup> partly linked to subsidies, offered as bailouts to the US and EU industry sectors during 2009.<sup>4</sup> Recent legal challenges will help to elaborate on some legal points related to AD and anti-subsidy regulations, to increase compatibility with global economic and trade-related changes. However, more flexibility is required from all parties, to meet the target of developing AD and anti-subsidies under the WTO agreement: “As the Chair noted, a successful

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<sup>1</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>2</sup> Thomas J. Prusa, *Anti-dumping: a growing problem in international trade*, (Blackwell Publishing Ltd, 2005), 687.

<sup>3</sup> Dan Wei, ‘Antidumping in Emerging Countries in the post-crisis Era: A case Study on Brazil and China’, 2013, *Journal of International Economic Law*, 921, 927.

<sup>4</sup> David McNally, ‘From Financial Crisis to World-Slump: Accumulation, Financialisation, and the Global Slowdown’, 2009, *Historical Materialism* 17, 35.

conclusion to the negotiations will ‘require additional flexibility in Members’ positions’.<sup>5</sup>

It has been proposed that AD regulations might require complete replacement and integration into competition law,<sup>6</sup> as will be discussed later in this chapter. This would be a more helpful and an appropriate solution to support the movement of goods and free trade around the world. Changes to competition law would offer greater coverage in all areas, including dumping, by reducing the high number of AD cases.<sup>7</sup> Indeed, there is already an argument that AD and anti-subsidy policies are redundant, as competition law protects all parties in relation to the market mechanism. With regard to anti-subsidy, developing countries need to see benefits when subsidising industrial sectors, such as placing their products in a position to compete with those of developed countries. This will also have a positive impact on developed countries, as will be discussed in this chapter. All these elements will help to reduce and protect petrochemicals products from AD and anti-subsidy cases, which is an important aim of this thesis.

This chapter also analyses some of the legal defects related to AD from a practical perspective (AD duty, the price of domestic similar products after AD measures). The legal guarantees to all parties in an AD investigation are also examined herein. These factors lead to a need to address the conditions of good faith under the WTO agreement, as an aspect of dispute resolution, and to avoid double

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<sup>5</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edition, Cambridge University Press, 2013), 304.

<sup>6</sup> In the European Nations and most of the world called Competition law and in the USA called Anti-Trust law. Richard Whish & David Bailey, *Competition Law*, (Seventh Edition, Oxford University Press 2012).

<sup>7</sup> As mentioned in chapter 3 and according to two sources: 1- World Trade Organisation’s website, figures for anti-dumping measures,, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)>, accessed 19 April 2014 and, 2- The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

remedy. Finally, a solution for the petrochemicals sector, to avoid the high number of cases brought against them under the WTO, will be proposed. This will contain one proposal operating within the WTO framework and another beyond its scope.

## **4.2 The measures that can be challenged under AD law**

This section will introduce and challenge legal and practical points raised under the AD law, with a view to resolving AD cases. This will help reduce AD cases in the future, particularly those brought against petrochemicals products, as is the stated aim of this thesis. At present, petrochemicals products account for the highest percentage of AD cases, when compared to other products,<sup>8</sup> “Another interesting fact [...] is that a high percentage of AD actions affect the base metals (mainly iron and steel) and chemical sectors”.<sup>9</sup>

This work aims to uncover how petrochemicals industries can best avoid cases, thereby resolving legal issues; also, whether resolution should be achieved at the domestic level or internationally. The AD process can restrict free trade between countries, and without reconsideration, this might become an obstacle. According to Thomas “Over the last 30 years, however, AD has emerged as the leading obstacle to implementation of the free and fair trading system established under the GATT/WTO”.<sup>10</sup> In other words, AD law represents a serious problem hindering international free trade between countries. “Today AD is a bigger problem for

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<sup>8</sup> Petrochemicals products account for between 20 and 22% of the total anti-dumping cases around the world, which is a high proportion. See the Anti-dumping Initiations by the sector, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 21 February 2014. Also, see The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

<sup>9</sup> Doreen Bekker, ‘The strategic use of anti-dumping in international trade’, 2006, *South African Journal of Economics*, 74, 3, 501, 511.

<sup>10</sup> Thomas J. Prusa, *Anti-dumping: a growing problem in international trade*, (Blackwell Publishing Ltd, 2005), 683.

international trade than economically meaningful dumping...”.<sup>11</sup> More negative interpretations of AD suggest that it might lead to a cold war between countries as stated by Thomas “... if AD rules are not formally reformed, there seem to be two possible scenarios: an “AD cold war” or an “AD epidemic””.<sup>12</sup> Based on this, contracting parties must therefore take this matter seriously if they want to change or replace the regulation in the WTO agreement.

Since AD regulations require some updating to suit changing circumstances, this research suggests two factors as a basis for a proposed change to the law:

1. In the practical application of the laws, some legal defects have been found, which mean they cannot continue unchanged. Furthermore, there are some legal matters related to the formatting, legal processes or misunderstanding of these regulations, which have a prejudicial effect on the judicial process and decisions.
2. The regulations have become outdated, as the world is changing rapidly and circumstances have changed also; thus, unless they are updated regularly these laws might not have a direct effect on the application of the law contributing to global developments.

Before moving to the next section, it is worth exploring earlier suggestions related to the reform of AD regulations. One of the ideas suggested thus far is to export products without restriction, once countries have improved their economic welfare. Adam Smith initially proposed this, and later Ricardo observed, “countries will improve their economic welfare if they specialise in the production of those products in which they have a comparative advantage and are able to export their surplus

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<sup>11</sup> Thomas J. Prusa, *Anti-dumping: a growing problem in international trade*, (Blackwell Publishing Ltd, 2005), 683.

<sup>12</sup> Thomas J. Prusa, *Anti-dumping: a growing problem in international trade*, (Blackwell Publishing Ltd, 2005), 699.



production without restriction”.<sup>13</sup> Thus, competition is supported and overproduction is not a concern. However, this idea has two notable flaws: First, in reality it is not possible to develop domestic industries in all countries (especially in developing countries) that will function complementarily to meet global needs. Second, this approach would reduce competition between countries, potentially leading to monopolisation over a few products by a few countries. Several changes were placed in contention, for consideration by the Doha Development Round:

...clarifying how domestic agencies notify the affected foreign firms and their affiliates for the purpose of quantifying total sales.....removing discretion from domestic agencies when calculating the dumping margin.....eliminating the practice of “zeroing”.....ending the use of third-country benchmarks to calculate the normal value, and restricting the opportunities for creating “constructed values” that have no benchmark in reality.....the burden of proof that domestic firms must present to the investigating agency in order to open an investigation.<sup>14</sup>

Moreover, alternative suggestions included implementing an anti-trust law (competition law) rather than an AD law, as will be discussed later in this chapter.<sup>15</sup>

These suggestions could trigger changes to AD processes, ultimately reducing AD cases and resolving related issues. However, some WTO members have suggested an additional option to avoid AD measures, which would involve signing a mutual agreement that they would not bring AD actions<sup>16</sup> when exporting products to each other; such an agreement is already in place between Chile and Canada.<sup>17</sup>

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<sup>13</sup> Adam Smith, Divad Ricordo, Founded in Doreen Bekker, ‘The Strategic use of anti-dumping in international trade’, 2006, *South African Journal of Economics*, 74, 3, 501, 507.

<sup>14</sup> Reid M. Bolton, ‘Anti-dumping and Distrust Reducing Anti-Dumping Duties under the W.T.O. Through Heightened Scrutiny’, *Berkeley Journal of International Law*, 2011, 66, 83. (Footnote Omitted).

<sup>15</sup> Reid M. Bolton, ‘Anti-dumping and Distrust Reducing Anti-Dumping Duties under the W.T.O. Through Heightened Scrutiny’, *Berkeley Journal of International Law*, 2011, 66, 84.

<sup>16</sup> Reid M. Bolton, ‘Anti-dumping and Distrust Reducing Anti-Dumping Duties under the W.T.O. Through Heightened Scrutiny’, *Berkeley Journal of International Law*, 2011, 66, 86.

<sup>17</sup> The case between Chile and Canada, Free Trade Agreement, Ch. M, July 5, 1997, 36 I.L.M. 1079.

#### 4.2.1 AD duty

The most important legal matters relate to the AD duty itself. It is known that AD legal procedures cannot be initiated without a written allegation from the domestic industries regarding a threat or injury to similar products;<sup>18</sup> moreover, there must be potential for 50% or more of the total amount of trade for a similar product inside the domestic market.<sup>19</sup> These processes were referenced in cases between Saudi Arabia and other countries,<sup>20</sup> as discussed in Chapter 3. Without the principle of injury or threat to domestic products, AD would not apply and AD duty would not be relevant.<sup>21</sup> However, in reality, after all the legal conditions and legal processes have been observed in order to apply the AD duty, duty is usually paid directly to the governments of the importing countries<sup>22</sup> whose industries have been injured or threatened. This means, the domestic industries themselves receive nothing from the duty, even though it is their companies and products that have been damaged by the importing and dumping of products.

Arguably, while the government collects duty, which is classified in this research as equivalent to a tariff,<sup>23</sup> the domestic industry that has been injured or threatened may frequently continue to face financial ruin. Thus, only governments

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<sup>18</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700, Article VI.

<sup>19</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201, Article 5.4.

<sup>20</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>21</sup> The dumping action itself is not prohibited unless there is an injury or threat to the domestic industries; see <sup>21</sup> Peter van den Bossche, *the Law and Policy of the World Trade Organization* (2nd edition, Cambridge University Press, 2009) 508.

<sup>22</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. In this case, it was mentioned that the anti-dumping duty will be collected by the Indian government.

<sup>23</sup> As was mentioned in chapter 2, tariff and anti-dumping has the same function See, Emin Dinlersoz and Can Dogan, 'Tariffs versus anti-dumping duties', *Journal of International Review of Economics and Finance* (2010) 436.

benefit directly from the application of the AD law. Moreover, governments also continue to accrue additional economic benefits from protecting the domestic products, as they receive taxes from these industries.

An example of the above point is the case of Saudi Arabia and India,<sup>24</sup> where the Indian Ministry of Finance was responsible for the imposition and collection of AD duty,<sup>25</sup> which means that the duty went directly to the Indian government. In European Countries, the EU usually collects the duty and gives it to national customs authorities: “The duties are paid by the importer in the EU and collected by the national customs authorities of the EU countries concerned”.<sup>26</sup> Thus, ultimately the government receives the duty, despite the case being predicated on injury or threat to the domestic sector.

It is essential, if the AD law or similar domestic law is to be just, that injured industries receive compensation from the AD duty paid because of the AD conflict. However, such a provision is yet to be legalised under the AD Agreement and would need to be mentioned in decisions made in relation to AD allegations. However, compensation has to be a fixed percentage of the AD margin, and compensation must be limited, so as not to exceed a fixed percentage of the total dumping margin. In this way, domestic industry will receive fair compensation to cover the damage and injuries caused by the imported products. However, all these processes must be subject to a legal guarantee, as will be discussed later in this chapter.

Some would argue that applying AD duty to similar exported products would provide a good opportunity for domestic producers to offset losses, reducing the

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<sup>24</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014.

<sup>25</sup> Indian Customs Tariff Act, 1975 - Sections 9A, 9B (as amended in 1995).

<sup>26</sup> See the European Commission official website, available at <[http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/index\\_en.htm](http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/index_en.htm)>, accessed 1 June 2014.

need for compensation. Theoretically, this might be correct; however, in practice, it would be impossible. The reasons for this are twofold: one is the competition inside the domestic market, and the second is variable consumption patterns. First, competition between the producers of similar products might already be very high, whether or not products were exported or manufactured for the domestic market. Therefore, AD duty on dumped exported products would not generate any beneficial effect in relation to those domestic industries injured by these products. Consequently, the producers of the domestic products would not receive any offset of their losses because of the AD action. This was not always the case; previously cases that ended with duties being imposed necessarily led to decreased imports. We also discovered that it is not a general rule that cases that end in favour of the importers led to increased imports.<sup>27</sup> On the second point, the consumer might continue to buy imported similar products, even after AD duty has been applied, despite the price being higher. Once again, domestic industries would not then receive any reparation for their losses with regard to the action taken. The solution with regard to this point would be to reconsider the way that AD duty works, and replace it with compensation as part of the AD decision.

Before considering the next legal point, a question arises regarding whether bestowing compensation would encourage producers of similar domestic products to bring actions, in order to receive compensation where possible. It might be possible; however, the process of applying compensation to AD decisions would lead to the reform of many legal barriers and complex conditions affecting domestic industry. This would be achieved through a process of legal guarantee in AD cases, under which competition policies would be discussed. This reform would help to reduce

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<sup>27</sup> Corinne M. Krupp & Patricia S. Pollard, 'Market responses to antidumping laws: some evidence from the US. Chemical industry', 1996, *The Canadian Journal of Economic* 199, 215.

the number of false AD claims, as the parties concerned would be subject to penalties when making false claims. Indeed:

...the United States and the European Community may finally seek to reform AD because other countries have also realized how large a loophole it, how easy it is to use, and perhaps most important, how easy it is to misuse.<sup>28</sup>

#### **4.2.2 The rising price of domestic similar products**

The purpose of AD regulations is to ensure that competition between domestic and international in similar products is lawful and devoid of price discrimination.<sup>29</sup>

However, condemnation of AD might occur because those bringing actions may want to monopolise the market in the importing countries,<sup>30</sup> which could affect the national economy. All AD that is condemned is criticised in relation to price; this is the most important concern of the AD process. AD processes have a direct effect on price especially chemicals products, “There is evidence for most of the chemicals that the AD cases did affect import volumes”<sup>31</sup>

In AD cases, domestic industries might claim AD applies against exported similar products, as an excuse to raise the prices of similar domestic products, as the international product prices will be higher after AD duty is applied. This might serve domestic industries by allowing them to increase prices domestically. This means domestic industries would receive greater profits, and international similar products would be forced out, or offered at lower cost than domestic and other domestic similar products. However, the AD process may have a positive impact on domestic

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<sup>28</sup> Thomas J. Prusa, ‘On the Spread and Impact of Anti-Dumping’, 2001, *the Canadian Journal of Economic*, 591, 592.

<sup>29</sup> Aradhna Aggarwal, *The Anti-dumping Agreement and Developing Countries, an Introduction*, (1st edition, Oxford University Press 2007) 16.

<sup>30</sup> Robert D. Willing, ‘Economic Effect of Antidumping Policy’ 1 998, *Brookings Institution*, 57, 67.

<sup>31</sup> Corinne M. Krupp & Patricia S. Pollard, ‘Market responses to antidumping laws: some evidence from the US. Chemical industry’, 1996, *the Canadian Journal of Economic*, 199, 215.

and non-dumped products; “Furthermore, the dumping margin generally had a positive effect on non-dumped imports...”.<sup>32</sup>

This generates unfair competition between domestic and international similar products but from a different perspective. The rising price of similar domestic products, after applying AD duty on international products was not been covered by the WTO AD Agreement.<sup>33</sup> It suggests unfair competition between domestic industries, who have taken advantage by applying duty against exported products; thus, ultimately the AD legal system has not had an adequate effect on ensuring genuinely fair competition between all parties, after applying AD. Attention under AD regulations is directed toward protecting similar domestic products without extending that protection to international products.

Moreover, there might be intent from similar domestic producers to monopolise the market. They may reach mutual agreements in order to show a closer lower price when compared to imported similar products, allowing them to prove the dumping action is due to the imported product. Such practices do not fall within the AD Agreement.

Thus, when authorities apply AD duty to an imported similar product, they should also check prices regularly for all products, whether domestic or imported, in order to extend appropriate protection to all parties. The only follow up commonly undertaken is intended to protect domestic products.<sup>34</sup> If there is any unrealistic rise in the prices of domestic industries, this should be halted by those departments responsible for controlling domestic prices. This controlling of market prices, when

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<sup>32</sup> Corinne M. Krupp & Patricia S. Pollard, ‘Market responses to antidumping laws: some evidence from the US. Chemical industry’, 1996, *the Canadian Journal of Economic*, 199, 217.

<sup>33</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>34</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201. Article 11.

collecting facts for all parties, before, after, and even during the process of the AD, would have considerable impact on capacity to maintain the stability of market processes.

In addition, the producers of similar exported products should have the right to prove domestic producers of similar products have brought AD cases, allowing them to benefit by raising their prices in such instances.<sup>35</sup> This would enable producers to remove some of the AD duties levied against their products, or at least help them to review the duties at an earlier stage.

However, a price rise might also affect additional AD cases subsequently, in review. AD laws under the WTO agreement should include a cap on domestic industries' prices after a pre-established period, to ensure there is no trickery involved in the movement of products within domestic industries.

#### **4.2.3 Legal guarantees**

One of the challenges and legal points raised in this chapter, regarding AD regulations, involves ensuring a full guarantee in all investigations, as well as implementation of legal processes to assist complainant parties at the national level. In fact, throughout the number of AD cases against Saudi Arabia outlined in Chapter 3,<sup>36</sup> a guarantee was not found to be sufficiently comprehensive to meet the needs of contracting parties in the case of conflicts relating to AD and legal anti-subsidy matters.

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<sup>35</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201. Article 6. This article relates to the evidence being used in the whole anti-dumping process; in the case above the same article shall be used in order to prove this point.

<sup>36</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

As seen in previous chapters, when Saudi Arabia faced AD cases from India, Turkey and the EU, the same AD authorities handled the investigations, and the primary and final decisions.<sup>37</sup> Thus, the importing countries' authorities might then take the opportunity to apply AD duty against imported products, ultimately for the benefit of the domestic industries of those countries. However, it is not sufficient to be fully neutral concerning AD processes, as local authorities benefit from imposing the AD duty. These authorities are supposed to act to limit harm to their country's domestic industries from imported products. Thus, we might ask: how can the same department conduct an investigation and exercise judgment against these imported products? The problems arising from this can be summarised as follows:

1. Those authorities who conduct AD investigations are the same ones who make decisions on these kinds of cases, and logically someone cannot be both officer and judge in the same case.
2. As domestic industries and authorities have the same nationality and share the same interests, and moreover as the authority has the duty to protect domestic industries, it is likely to seek to force through an application of AD duty on imported products. It can be seen, that in some circumstances there is opportunity for abuse by those authorities applying the duty.

Thus, if this is the situation, how can an investigation and decision in relation to AD be wholly neutral? It is crucial to answer this question here, as it will support the concept of a legal guarantee for all parties under AD regulations.

The relevant AD authorities usually conduct investigations and follow up on the market in coordination with other government departments, with regard to AD

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<sup>37</sup> In the Indian case, the entire anti-dumping process was overseen by the Directorate General of Anti-dumping & Allied Duties, under the Indian Ministry of Commerce. The EU case against Saudi Arabia was handled by the Commission for the European Communities. In the Turkish case, it was handled by the Ministry of Economics.



allegations. However, the authorities should ideally not be involved in decisions regarding AD. The duty of authorities', as administrators, is clearly to organise AD procedures inside their own countries, but they should not act as a Juridical Authority, unless they are also able to act as prosecutors in cases handled by local courts. These authorities therefore must carry out their duties to ensure all matters related to AD processes are proceeding in a suitable direction. The authorities are in a position to conduct all the investigations between the parties to a conflict and can also prepare related documents, to enable the local trade court to make a decision. After this, the entire case must be transferred to the local trade court so that the judge can make an AD decision and determine whether to continue the AD process or otherwise. Using this method, will ensure the process goes forward with a full guarantee, protecting the neutrality of all parties.

Examples of this can clearly be seen in all of the cases discussed in Chapter 3; these were brought against Saudi petrochemicals products in India, Turkey and the EU.<sup>38</sup> All cases were considered at every step by the AD authorities, who were ultimately responsible for imposing the AD duty. The authorities guided the entirety of the AD process, raising the issue of lack of neutrality, as they conducted the investigations, collected evidence, and finally pronounced judgment against Saudi products.

It is suggested that the only way to ensure neutrality is to place the judgment in the hands of the domestic trade courts to avoid misunderstandings or confusion.<sup>39</sup>

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<sup>38</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>39</sup> In the United States, the International Trade Commission usually deals with anti-dumping case and makes the decisions. Yet, the anti-dumping law under section 731 et seq. of the Tariff Act of 1930, 19 U.S.C. 1673 et seq. provides the right to appeal in front the U.S. Court of International Trade in Newark. See the official website of the US international Trade Commission, available at <<http://www.usitc.gov/>> accessed 1 June 2014.

Courts must offer a comprehensive guarantee of neutrality toward exported products, if regulations are to be applied satisfactorily. Therefore, the contracting parties must take the necessary steps to apply a legal guarantee in AD cases, to ensure fairness and neutrality at the national level in AD procedures. This will help to reduce the increasing number of AD allegations and promote greater stability in international trade, as mentioned previously. In addition to ensuring a better flow of movement between nations and avoiding complicated AD cases.

#### **4.2.4 AD regulation is old legislation**

The first AD law was issued in Canada in 1906,<sup>40</sup> after which the great majority of nations adopted the law within their domestic legal systems, “Over the period 1980-2003 the number of countries with an AD law went from 36 to 97”.<sup>41</sup> Recently the majority of the WTO countries adopted AD regulations. “... nearly 100 WTO members adopted AD legislation”.<sup>42</sup> In the case of powerful countries, this adoption has, pushed the founders of the GATT<sup>43</sup> to adopt an International Trade Agreement as described in article VI, and other international trade agreements worldwide.<sup>44</sup> Finally, in article VI, the WTO established an implementation agreement to organise the mechanism for trade.

It can be seen that the adoption of this law by contracting parties served a purpose; nonetheless, the increased movement of goods internationally, and the high level of technology around the world altered the circumstances affecting application

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<sup>40</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (3<sup>rd</sup> edition, Routledge 2005) 232.

<sup>41</sup> Emin Dinlersoz and Can Dogan, ‘Tariffs versus anti-dumping duties’, 2009, *International Review of Economic and Finance*, 436, 437. (Footnote Omitted).

<sup>42</sup> Dan Wei, ‘Antidumping in Emerging Countries in the post-crisis Era: A case Study on Brazil and China’, 2013, *Journal of International Economic Law*, 921, P 922.

<sup>43</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700.

<sup>44</sup> Like the North American Free Trade Agreement (NAFTA) 32 I.L.M. 289 and 605 (1993). This agreement has adopted the anti-dumping regulation.

of the law considerably. In this research, therefore, AD regulations are considered as obstacles. Prusa stated, “Over the last 30 years, however, AD has emerged as the leading obstacle to the free and fair trading system established under the GATT/WTO”.<sup>45</sup> Thus, the AD Agreement needs to be reconsidered regarding the significant number of cases. Wei stated, “since the beginning of global crisis in 2008, there has been a sharp increase”.<sup>46</sup> Accordingly, there is no longer a need for contracting parties continuing to refer to article VI and its implementation.<sup>47</sup> Three points can be made to stress why the legislation should be regarded as obstructive:

1. Throughout this research, it has been found that AD legislation might become an obstacle to obtain the target of the international trade agreement. The frequent bringing of AD allegations, whether by old or new users,<sup>48</sup> could represent a misuse, and is not intentional, as these regulations were issued to support trade between nations. Thus, AD laws in practice may be an obstacle to free trade movement between nations, thus, it is better to find another legal solution to resolve this matter.
2. Based on the frequent use of the regulation by new users, it can be seen that it is being used to benefit domestic industries, and to prevent the sale of imported products inside the domestic market. This is advantageous as it offers more trade opportunities for domestic producers, as well as increasing

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<sup>45</sup> Thomas J. Prusa, *Anti-dumping: a growing problem in international trade*, (Blackwell Publishing Ltd, 2005) 683.

<sup>46</sup> Dan Wei, ‘Antidumping in Emerging Countries in the post-crisis Era: A case Study on Brazil and China’, 2013, *Journal of International Economic Law*, 921, 927.

<sup>47</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>48</sup> There are two groups of Anti-dumping Users: traditional and new Users. Before the 1980s, the traditional users were Australia, Canada, EU and USA. However, since then, they have been joined by other countries, classified as “new users”, like Brazil, China, India and Mexico.

Thomas J. Prusa, *Anti-dumping: A Growing Problem in International Trade*, (Blackwell Publishing Ltd, 2005)

prices in response to the application of AD duty on exported products, especially in view of the world economic crises.

3. It is necessary to provide legislation to cover all aspects of the trade between nations, as will be seen in this section.

It is time to introduce updated rules to cover all economic and legal aspects relating to the export of products to the world market. The contracting parties must consider introducing competition law to cover all areas of trade within the international markets. Competition would give the authorities significant powers to resolve AD complaints.<sup>49</sup> Bergh, D. Camesasca consider “...four objectives of competition policy first to achieve favourable economic results; second, to create and maintain competitive processes; third, to prescribe norms of fair conduct; and fourth, to restrict the growth of large firms...”<sup>50</sup> So that the broad objective of competition policy is to make markets work better. ‘Working better’ involves two important subsidiary objectives: efficiency and fairness.

In particular “...competition law is now applied to many economic activities...”<sup>51</sup> Thus, a competition law could be a global solution. In addition, they explain: “The global reach of competition laws is reflected in the creation of the international Competition Network”;<sup>52</sup> “... the benefits of competition are lower prices, better products, wider choice and greater efficiency...”<sup>53</sup> Consequently, a competition law would offer numerous benefits direct to industry and consumers, such as lower prices and better quality products for all parties.

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<sup>49</sup> K M Tharakan, ‘Is Anti-Dumping Here to Stay’, 1999, *Blackwell Publishers Ltd*, 179, 191-192.

<sup>50</sup> Roger Van den Bergh & Peter Comesasca, *European Competition and Economics, A Comparative Perspective*, (Intersentia-Hart 2001) 31.

<sup>51</sup> Richard Whish & David Balley, *Competition Law*, (Seventh Edition, Oxford University Press 2012)

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<sup>52</sup> Richard Whish & David Balley, *Competition Law*, (Seventh Edition, Oxford University Press 2012)

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<sup>53</sup> Richard Whish & David Balley, *Competition Law*, (Seventh Edition, Oxford University Press 2012)

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Dumping is typically condemned as unfair competition, when offered against other products in the market. It mostly relates to the price of a product, which is a chief component of the AD Agreement. AD regulations are generally used to examine the dumping circumstances related to the pricing of similar products, as well as the causal link. However, when establishing a competition law, all aspects of price and surrounding circumstances should be accounted for, and any new law should be broader in range than the AD law. For example, the price under competition law is the market price “The theoretical model just outlined suggests that in perfect competition any producer will be able to sell his products only at the market price”.<sup>54</sup>

Arguably, any AD law is a form of price discrimination, aiming to support competition between all producers in the market, whether domestic or international. This view does not consider consumers, although they crucial to any market.

The ‘unfairness’ to which AD law is directed [prices that are too low] is generally seen in antitrust law as evidence of the proper working of the competitive process, and as a phenomenon beneficial to the consumers whom antitrust law fundamentally protects.<sup>55</sup>

Consequently, AD regulations do not extend protection to customers. This is because AD law encompasses limited procedures by which to defend competition inside a particular market. Ehrenhaft argues “The AD law, while condemning injurious international price discrimination does not provide a formal meeting competition defence”.<sup>56</sup> Thus, it can be deemed a weak point of the AD regulation. By contrast, competition law functions differently as illustrated elsewhere by Ehrenhaft “The

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<sup>54</sup> Richard Whish & David Bailey, *Competition Law*, (Seventh Edition, Oxford University Press 2012) 6.

<sup>55</sup> Peter D. Ehrenhaft, ‘Is Interface of Antidumping and Antitrust Laws Possible?’, 2002, *The George Washington International Law Review*, 363, 375.

<sup>56</sup> Peter D. Ehrenhaft, ‘Is Interface of Antidumping and Antitrust Laws Possible?’, 2002, *The George Washington International Law Review*, 363, 394.

goals of competition laws in other countries tend to be less inconsistent with the objectives of AD enforcement. Concepts of ‘fairness’ and protection of competitors play a role in the competition polices...”.<sup>57</sup> The mechanism of competition law ultimately aims to deliver authentic competition between producers to the benefit of the consumer. “It is of course correct in principle that competition law should be regarded as having a ‘consumer protection’ function...”.<sup>58</sup> In addition, this benefit also considers competitors. Therefore, Whish and Balley ensure that “competition law should be concerned with competitors as well as the process of competition”.<sup>59</sup>

Moreover, when applying an AD regulation, it is generally necessary to present information related to imported products, such as the normal price in the exporting country. This price is tied to the internal economic system of the exporting country, and there is no such relationship between it and the sale price in the importing country. The economic tools and atmosphere differ entirely from one country to another. Moreover, AD measures can be considered as interference in other countries’ policies. In contrast, competition law usually deals with polices associated with competition in markets, in order to fulfil the requirements of competition between products and goods, without the need to seek information from other countries. AD regulations have proven unsuitable, therefore, there is a need for other regulations to protect all parties in the trade treatment: “Given both the large number of AD users and also the huge impact AD duties have on trade, AD will surely a top issue for the next WTO round”.<sup>60</sup>

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<sup>57</sup> Peter D. Ehrenhaft, ‘Is Interface of Antidumping and Antitrust Laws Possible?’, 2002, *The George Washington International Law Review*, 363, 375.

<sup>58</sup> Richard Whish & David Balley, *Competition Law*, (Seventh Edition, Oxford University Press 2012) 20.

<sup>59</sup> Richard Whish & David Balley, *Competition Law*, (Seventh Edition, Oxford University Press 2012) 21.

<sup>60</sup> Thomas J. Prusa, ‘On the Spread and Impact of Anti-Dumping’, 2001, *the Canadian Journal of Economic*, 591, 610.

There are arguments against substituting AD law with a competition law; as while the first protects domestic producers as a priority, the second protects domestic consumers: “As currently implemented AD law is designed to protect domestic producers while competition law is aimed at protecting domestic consumers”.<sup>61</sup> However, competition law governs relationships between sellers and buyers, clarifying the competitive set up for all parties, whether domestic producers or exporters producers. Thus, it is argued that advantages and protection are afforded to all parties under competition law.

### **4.3 Changes in the perception of anti-subsidy measures**

Subsidies are defined in Article 1 of the Agreement on Subsidies and Countervailing Measures as “...a financial contribution by government...”.<sup>62</sup> This financial contribution extends to domestic enterprise or industries, assisting them in developing and supporting competition with other similar products. Not only is financial support offered, there may also be a case for price support,<sup>63</sup> especially in sectors, demanding greater stability through the pricing of products. All subsidies are prohibited under the WTO, and there are a number of processes for investigating cases of subsidies, similar to AD cases. However, there is no minimal distinction between dumping and subsidies, as both directly affect price and are strongly correlated.

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<sup>61</sup> Thomas J Prusa, *Cumulation and Anti-dumping: A Challenge to Competition*, (Blackwell Publishers Ltd, 1998), 1021-1022. (Footnote Omitted).

<sup>62</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Article 1.1 (a)(1).

<sup>63</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Article 1.1 (a)(2).

This section considers and discusses two points concerning anti-subsidy regulations. The first point relates to developing countries, and the second concerns financial support and the agreement given for many sectors, in response to the economic crises in the USA and EU.<sup>64</sup> Developing countries have found the anti-subsidy regulation to be contrary to their interests. Following implementation of Article 27 of the Agreement on Subsidies and Countervailing Measures<sup>65</sup>, these countries were given a timeframe in which to stop supporting their domestic industries and enterprises. However, most of these countries are still developing, and require more time to establish their domestic sectors. Developed countries have spent decades supporting their sectors and industries, in order for them to become mature and able to compete in the international market. Thus, the law supports developed countries by allowing them to monopolise the international market, as developing countries' products are generally unable to compete with the former. Moreover, powerful countries are aiming to avoid supporting developing countries in order to offer authentically competitive products to the international market:

On the one hand, the United States and the European Community preach that reducing government interference and accosting free markets will maximize growth and welfare. On the other hand, it often seems that just when developing countries begin to efficiently operate and became competitive in particular markets, industrialized countries shut down those precise markets with a trade policy that is universally decried by economists.<sup>66</sup>

It appears unfair that developing countries are not afforded the opportunity to take the time to develop their sectors and industries. Therefore, the contracting parties

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<sup>64</sup> David McNally, 'From Financial Crisis to World-Slump: Accumulation, Financialisation, and the Global Slowdown', 2009, *Historical Materialism* 17, 35.

<sup>65</sup> This article has given developing countries, eight years from the date of entry, force of the WTO Agreement, which is not practically enough for the majority of these nations. See article 27 of The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14.

<sup>66</sup> Thomas J. Prusa, 'On the Spread and Impact of Anti-Dumping', 2001, *the Canadian Journal of Economic*, 591, 592.



need to reconsider article 27, in order to allow developing countries an equal opportunity to that enjoyed by developed countries in relation to their products. Evidently, developed countries are exerting their authority and control over the international market, as they have had the opportunity to develop their products for a lengthy period without facing genuine international competition. This means developing countries are unable to compete fully, which has a negative impact on them, leaving them unable to develop their products to the same extent. However, developed countries do not want to extend opportunities to developing countries to develop their sectors and the current AD law is evidence of this:

The new reality depicted in Table 3 must be troubling for AD's two strongest supporters: the United States and the EU. They would like to retain AD so that they can protect their politically important industries. Yet, preserving this option means that many politically important export-oriented industries now face AD protection in many important export markets.<sup>67</sup>

It is known that developed countries pressurise developing countries, and fail to extend opportunities to them in the international market. This is apparent from the increasing number of AD cases brought by developing countries, who are seeking legal protection from developed countries, in order to gain the time to develop their sectors and industries.

However, the situation is complex; developing countries are aware there are many benefits to derive from inviting developed industries to locate their premises within their borders. This process can help developing countries to improve their economies and industries, and in turn reduces illegal immigration; as the developing countries stabilise, the drive to emigrate is reduced. Thus supporting development will solve problems of illegal immigration as well as reduce unemployment. In

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<sup>67</sup> Thomas J. Prusa, *Anti-dumping: a growing problem in international trade*, (Blackwell Publishing Ltd, 2005), 693.

addition, developed countries will then be in a position to gather more taxes, as sales prices will increase once the developing countries products are better able to compete in the developed countries' markets. Moreover, this trend will lead to a reduction in the need to send aid to developing countries.

With regard to the second point, when the world was facing an economic crisis, the G20<sup>68</sup> made many decisions intended to help the economy to recover, including pumping money into the affected sectors to increase liquidity.<sup>69</sup> An example of this is the considerable financial aid delivered, in the form of 10 Billion Euros, from the Eurozone countries and the International Monetary Fund (IMF) to support Cyprus.<sup>70</sup> This appears to breach prohibition subsidies, as the governments of these countries were subsidising various sectors such as industry and banking. This clearly demonstrates how the most powerful countries were happy to make laws serving their interests, although they do not extend a similar consideration to developing countries. Indeed,

It has been long argued that the international system was set up in a way that favours its most powerful members, and that these advanced industrial countries have shaped globalization to further their own interests rather than creating a fair set of rules, let alone rules that promote the well-being of those in the poorest countries.<sup>71</sup>

Thus, the anti-subsidy regulations under the WTO agreement need to be reconsidered to deliver more time to developing countries to develop and improve their sectors. In the longer term, this will benefit all nations, whether developed or developing, as it will help to establish a new international trade map between nations.

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<sup>68</sup> G20's countries, available at <<http://www.g20.org/>> accessed 1 June 2014.

<sup>69</sup> David McNally, 'From Financial Crisis to World-Slump: Accumulation, Financialisation, and the Global Slowdown', 2009, *Historical Materialism* 17, 35.

<sup>70</sup> BBC, available at <<http://www.bbc.co.uk/news/business-21797888>> accessed 1 June 2014.

<sup>71</sup> Mihaela Papa, 'Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?', 2013, *Journal of International Dispute Settlement*, 83, 83.

## 4.4 Good faith

It was mentioned in article 26 of the Vienna Convention on the law of treaty that any agreement must be established in good faith, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.<sup>72</sup> Good faith itself is an important concept when seeking to resolve disputes between contracting parties. The WTO encompasses fairness between contracting parties in trade; yet, some parties prefer other approaches. According to Doreen “...Countries would choose to cheat on the international agreement and impose AD duties on what seem to be legitimate imports”.<sup>73</sup> Apparently, each contracting party must act in good faith in all its trade dealings in relation to either domestic or exported products. Bossche and Zdouc proved that “...the obligation on Members to use WTO dispute settlement proceedings in good faith...”.<sup>74</sup> Good faith demands honesty in the treatment of all parties. Andrew explains “...The ordinary meaning of good faith is ‘honesty of purpose or sincerity of declaration’ or ‘expectation of such qualities in others’...”.<sup>75</sup> It seems that establishing good faith is a legal moral obligation for all contracting parties to an agreement, associated members and the international trade community. This obligation is stated in Article X of the GATT “.....Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings”.<sup>76</sup> Each of the contracting parties must abide by the WTO agreement, as it is a legal obligation, and should be applied to Dispute Settlement

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<sup>72</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679.

<sup>73</sup> Bekker, ‘The strategic use of anti-dumping in international trade’, 2006, *South African Journal of Economics*, 74, 3, 501, 507.

<sup>74</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edition, Cambridge University Press, 2013), 267.

<sup>75</sup> Andrew D. Mitchell, ‘Good Faith In WTO Dispute Settlement’, 2006, *Melbourne Journal of International Law*, 339, 340.

<sup>76</sup> GATT 1947 Article X: 3 (a): “Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.”.

Understanding (DSU):<sup>77</sup> Mitchell observes, “Procedural good faith must be integrated further into the DSU to ensure that claims are disputed appropriately and that the WTO respects the constructed boundaries of regulatory autonomy”.<sup>78</sup> A case where this was contravened is described in the following example:

In US-FSC (2000), the appellate Body found that the United States had failed to act in good faith, by failing to bring procedural deficiencies ‘seasonably and promptly’ to the attention of the complainant and the panel, so that corrections, if needed, could have been made. In Argentina – Poultry AD Duties (2003), Argentina argued that Brazil failed to act in good faith by first challenging Argentina’s AD measure before a MERCOSUR Ad Hoc Tribunal and then, having lost that case, challenging the same measure in WTO dispute settlement proceedings.<sup>79</sup>

By acting in good faith, AD and anti-subsidy cases between contracting parties globally will be limited, which will reflect a dispute resolution in itself. Good faith is not fulfilled without three elements as stated by Mitchell “...general elements of ‘honesty, fairness and reasonableness...’”.<sup>80</sup> However, through the previous settlement and analysis of the AD cases against Saudi Arabia from India, Turkey and the EU,<sup>81</sup> good faith can be found to have three principles: Neutrality, Compatibility and Transparency.

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<sup>77</sup> Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

<sup>78</sup> Andrew Adelman, ‘Procedural good faith obligations in WTO disputes resolution: arguing for stronger protections in DSU article 3.7’, 2013, *The Georgetown Journal of Legal Ethics*, 541, 555.

<sup>79</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edition, Cambridge University Press, 2013), 267. (Footnote Omitted).

<sup>80</sup> Andrew D. Mitchell, ‘Good Faith In WTO Dispute Settlement’, 2006, *Melbourne Journal of International Law*, 339, 344.

<sup>81</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

#### **4.4.1 Principle of neutrality**

All dealings between contracting parties should be subject to full neutrality. Every investigative step in any dispute has to proceed neutrally from the perspective of the investigating party. In order to emphasise this point, the investigator should play a role as defender of the economic system and treat exported products in accordance with this principle. Furthermore, a general principle of international law is “...to carry out treaty obligations in good faith (i.e. based on Article 26 of the Vienna Convention on the Law Treaties)...”.<sup>82</sup> Part of this principle, was extended as mentioned above in relation to cases against Saudi petrochemicals products in India, Turkey and the EU. In addition, the principle also applies to products exported to the domestic market, among other areas. However, arguably, the investigative authorities for contracting parties have thus far failed to follow and fulfil this principle, as no such legal guarantee of neutrality has been applied in AD cases. Rather good faith principles are followed in international trade dealings between contracting parties.

#### **4.4.2 Principle of compatibility**

The principle of compatibility is crucial, as all contracting parties must abide by it to become members of the WTO. This principle applies, as states guarantee conformity to the WTO agreement in all domestic regulations and legal processes: “Distinct from international principle, domestic laws also reflect good faith tenets, and good faith is a recognised legal notion reflected in almost all jurisdictions”.<sup>83</sup> Domestic regulations have to be applicable to international trading standards, and this is

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<sup>82</sup>Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law Text, Materials and Commentary*, (2nd edition, Oxford, Hart Publishing, 2012) 526.

<sup>83</sup> Andrew Adelman, ‘Procedural good faith obligations in WTO disputes resolution: arguing for stronger protections in DSU article 3.7’, 2013, *The Georgetown Journal of Legal Ethics*, 541, 543.

achievable through a clear understanding of this agreement and its correct interpretation. Chang-Fa lo observes, "...it would be a reasonable interpretation that these three elements (i.e. ordinary meaning if the text, the context, and the object and purpose) should all be subject to the good faith principle".<sup>84</sup> Thus, the interpretation has to be according to the ordinary meaning of the WTO agreement. In addition, he stressed, "...the terms of a treaty are to be given with the ordinary meaning. Also the context and the object and purpose of the treaty are elements to be based for the interpretation of treaty terms".<sup>85</sup> However, the WTO has the authority to order a contracting party to amend its domestic laws in order to match the recommended principle; as in cases between the US and Japan (see Chapter 6).<sup>86</sup> States must review the laws related to international trade regularly, as well as reviewing the investigation processes. In addition, this principle must apply to the domestic judicial and taxation system, as well as the administration process.

Compatibility was discussed in Chapter 3 in relation to cases against Saudi petrochemicals products, which showed some Saudi regulations as incompatible with the processes of the WTO, and in need of reform by the Saudi government. In the AD case brought by Turkey against Saudi Arabian petrochemicals products, a concern was the lack of authentic competition between Saudi Arabian petrochemicals products inside the Saudi market:

...[was] based on costs and export price. However, in these countries, which [provide] the basic raw materials used in the production of MEG, "Ethane" is only produced by state-owned companies and the price of the

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<sup>84</sup> Chang-Fa Lo, 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding', 2010, *Journal of International Dispute Settlement*, 431, 433.

<sup>85</sup> Chang-Fa Lo, 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding', 2010, *Journal of International Dispute Settlement*, 431, 432.

<sup>86</sup> Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697.

supply/demand conditions are identified and announced by the authorities.<sup>87</sup>

This example reveals the importance of insuring legal compatibility between Saudi domestic laws on this particular point; the enforcement of the WTO agreement can help to reduce the number of AD cases being considered, acting as a form of dispute resolution in itself.

#### **4.4.3 Principle of transparency**

The way forward for any state in today's world is to be transparent in its dealings, especially in reference to international trade and the exchange of goods. One way to apply this principle is through the publication of all data related to trade. Authorities' decisions and investigative processes must also be transparent. Before any international company invests anywhere in the world, it must first study the laws and regulations of the country that it wishes to invest in. Thus, in the absence of publications concerning legislation and the implementation of proper related legal processes, companies might face issues limiting investment. In this research, the issue faced was the need to collect all necessary details with regard to cases against Saudi Arabia, considered as resulting from misunderstandings relative to WTO provisions. In addition, Saudi Arabia was not sufficiently transparent about the AD cases brought against its petrochemicals products by India, Turkey and EU, as non-confidential information about these cases is not publicly available. As mentioned previously, it has been difficult to obtain information from sources in Saudi Arabia.

Finally, without these three principles, it would not be possible to apply good faith, which may breach WTO provisions. The contracting parties must therefore

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<sup>87</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 4.

fully abide by these principles to attain their overall aim of the smooth movement of goods and products without legal issues arising.

#### 4.5 Double remedies

‘Double remedies’ refer to the situation that arises when two legal provisions apply to the same situation. Thus, as mentioned under the GATT, article VI (5), it is prohibited to apply AD and countervailing duties together to compensate for dumping or export subsidies.<sup>88</sup> However, as mentioned previously, the link between dumping and subsidising products is not sufficiently clear. It may be difficult to distinguish between the two, as dumping can be a consequence of product subsidies; in other words, it might be the reason why a product has a low price. Dumping relates to the pricing practices of the private sector, whereas subsidy relates to financial support and other types of support from the government.<sup>89</sup> The subsidising of products has had a considerable effect on dumping, and affects pricing directly, causing prices to drop, and finally leading to goods being dumped on the international market: As reported by Lester, Mercurio and Davies,

In this situation, it has been argued, a remedy against the export subsidies would also address any resultant dumping, as both arise from the same source. Thus, concurrent remedies against both the dumping and the subsidies would constitute a ‘double remedy’.<sup>90</sup>

However, it is not easy to separate the subsidising of exported products and domestic subsidies of the same product: “In reality, the divide between export subsidies and

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<sup>88</sup> Article VI (5): “No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization”.

<sup>89</sup> Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law Text, Materials and Commentary*, (2nd edition, Oxford, Hart Publishing, 2012) 526.

<sup>90</sup> Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law Text, Materials and Commentary*, (2nd edition, Oxford, Hart Publishing, 2012) 527.



domestic subsidies may not be as clear as suggested by article VI: 5”.<sup>91</sup> Typically, the impact directly relates to the dumping calculation, and the dumping margin is then affected by prices.

The case that best reflects this, is that brought by Turkey against Saudi petrochemicals products,<sup>92</sup> which was analysed in Chapter 3. It was explained that Saudi Arabia has a state-owned company that produces the raw materials for the petrochemicals industry, with the result that the fixed price does not reflect the market price. Therefore, the subsidy was being used by the Saudi government and as such was reflected directly in the dumping investigation; thus, the Turkish AD authority could not delineate clearly between export subsidies and domestic subsidies. However, this affected the AD margin, as the calculation of the margin included the low price and was affected by subsidies. There was no double remedy in this case, as the issue of not drawing a clear line between subsidies and dumping is a common one, which needs to be reconsidered by contracting parties.

#### **4.6 Petrochemicals treaty under the WTO agreement**

In this section, a new option will be presented, suggesting the application of a new global treaty to protect petrochemicals products under the WTO agreement. This would make petrochemical product exchanges between contracting parties easier and smoother, without any obstacles affecting the agreement, as these products will be the ones most affected by AD provisions; as illustrated by Doreen “a high percentage of AD actions affect the base metals (mainly iron and steel) and chemical sectors”.<sup>93</sup>

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<sup>91</sup> Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law Text, Materials and Commentary*, (2nd edition, Oxford, Hart Publishing, 2012) 527-528.

<sup>92</sup> Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569.

<sup>93</sup> Doreen Bekker, ‘The strategic use of anti-dumping in international trade’, 2006, *South African Journal of Economics*, 74, 3, 501, 511.

This option would also establish a new agreement, and a method for petrochemicals export and production, without any of the attendant fears associated with AD cases. There is a precedent, as within the WTO, contracting parties have already agreed to extend special treatment to agriculture, in order not to provoke legal disputes, as these products relate directly to human lives. In contrast, petrochemicals products face the highest proportion of AD cases, and without new methods for resolving these, the number is likely to increase, becoming an obstacle to offering these products. The percentage of AD cases brought against petrochemicals products is 20.16%, and these account for 21.35% of total AD initiations and measures in the world.<sup>94</sup>

There is an option, for the WTO to extend special treatment to petrochemicals products, based on the treatment of agriculture. Much like agriculture, the petrochemicals sector is important to people's lives; without petrochemicals products, the manufacture of thousands of other industrial products would be impossible. Despite this, to date oil has remained outside the purview of the GATT agreement. Hussein states:

Oil was not explicitly excluded from the General Agreement on Tariffs and Trade (GATT) 1947, but the principal trading parties to GATT, mainly OECD members, treated oil as if it was. Their main goal was to keep this precious source of energy flowing to feed their energy-hungry economies after World War II and avoid problems that might cause unnecessary oil supply disruptions.<sup>95</sup>

As petrochemicals are derivatives of oil, they should arguably be given the same priority as oil. The lack of action on this to date has resulted in an impact on

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<sup>94</sup>The Anti-dumping Initiations and measures by the sector, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 1 June 2014.

<sup>95</sup> Hussein Abdullah, 'Oil exports under GATT and the WTO', 2005, Organization of the Petroleum Exporting Countries, 267, 273.

upstream and downstream prices for oil products, because of AD measures: Krupp and Skeath explain,

... There is anecdotal evidence suggesting that the downstream users of products that are the subject of AD duties are harmed by higher prices, a less competitive upstream market, and, in some cases, by supply shortages of the imports affected by the investigation itself and by the AD duties.<sup>96</sup>

There is a negative impact on downstream industries, caused by AD measures as reported here:

Finally, our downstream analysis provides some evidence for the hypothesis that negative consequences of upstream AD actions might be felt downstream. We find that the final dumping margins have significant negative effects on the quantity of downstream production.<sup>97</sup>

Approximately ten years ago, the Saudi Royal Prince, Talaal Bin Abdul-Aziz,<sup>98</sup> gave a seminar in the College of Business Administration at Kuwait University on 'The Effect of the WTO on the Arabian and GCC countries'. At the seminar, he spoke of the importance of petrochemicals products, citing two reasons: 1) petrochemicals products area an important element within the global market; and 2) there will be an increase in AD cases in such products.<sup>99</sup> However, he continued by speaking about the negative effect of the WTO on the GCC petrochemicals industries, pointing out that these industries and their products face the weapon of AD when they are exported abroad.<sup>100</sup> He then proposed to protect these industries from AD action through the coordinated efforts of the GCC countries in negotiations, to assist

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<sup>96</sup> Corinne M. Krupp & Susan Skeath, 'Evidence on the upstream and downstream impacts of antidumping cases', 2002, *North American Journal of Economic and Finance*, 163, 173.

<sup>97</sup> Corinne M. Krupp & Susan Skeath, 'Evidence on the upstream and downstream impacts of antidumping cases', 2002, *North American Journal of Economic and Finance*, 163, 174.

<sup>98</sup> His Royal Highness Prince Talaal Bin Abdul-Aziz is the brother of the Saudi King Abdullah Bin Abdul-Aziz and also the son of the Saudi founder King Abdul-Aziz Al-Soud.

<sup>99</sup> HRH Prince Talaal, available at <<http://www.princetalal.net/new/subpart.php?partid=64>> accessed 1 June 2014. (Researcher's Translation).

<sup>100</sup> HRH Prince Talaa, available at 1 <<http://www.princetalal.net/new/subpart.php?partid=64>> accessed 1 June 2014. (Researcher's Translation).

dispute resolutions under the WTO.<sup>101</sup> This statement by the Saudi Royal Prince emphasises the importance of these products to the GCC exporting countries, and the rest of the world (for the reasons given above). However, although a body establishing coordination between the GCC countries has been established, it remains weak, and so greater coordination globally would establish a clearer agreement between the contracting parties that would provide greater freedom of movement for these types of products, without raising legal issues.

Therefore, contracting parties could consider drawing up an agreement to protect products. The reasons for providing the agreement at this point in time are as follows:

1. There are many legal barriers to these products, as the worldwide market is highly competitive. To emphasise this point once more, a fifth of AD cases affect petrochemicals products, as do the majority of anti-subsidy cases. Eventually, this could become an obstacle to the distribution of such products, and so more negotiations between contracting parties are essential to insure the smoother and easier exchange of such products.
2. As mentioned previously, petrochemicals products are a basic element for most industrial products. Without such elements, these industries might not be able to manufacture their products, which will then affect national economies and consumers.
3. The petrochemical industries are not easy to establish or run, and some of these industries are facing financial problems. In addition, business people typically try to avoid investing in this sector, especially in Saudi Arabia;

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<sup>101</sup> HRH Prince Talaal, available at <<http://www.princetalal.net/new/subpart.php?partid=64>> accessed 1 June 2014. (Researcher's Translation).

preferring lower risk and lower cost investments, because the costs in this sector are very high and require a long-term investment.

4. In the WTO agreement, there was a reference to the “Agreement on Agriculture”.<sup>102</sup> This would also support inclusion of a similar agreement on a “Basic Petrochemical Element”; thereby, an important sector would be supported and its continuation guaranteed.

It is therefore important for contracting parties to consider an agreement, to avoid legal cases relating to petrochemicals products. As mentioned above, this solution would avoid around a fifth of AD cases,<sup>103</sup> and would help the world economy to recover from the crises referred to earlier, by increasing industrial production at lower costs. Furthermore, it would enable new industries to become established around the world, which would mean a global revolution for those products.

In any petrochemicals agreement made under the WTO, the contracting parties would need to be discussing many issues. There are three main elements to address: (1) Developing countries and the establishment of their petrochemicals industries, and their classification of developing countries according to their economic figures. Some of the poorer developing countries require more subsidising to establish and improve their petrochemicals’ sectors. (2) The treatment of countries with huge oil and gas reserves, where the raw materials are very cheap. (3) The treatment of developed countries, which have a high level of technology within the petrochemicals sector. Clarification of the relationship between would be of benefit

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<sup>102</sup> This agreement is part of the WTO, which includes 21 Articles with many Annexes. The agreement affords agriculture special treatment in the international trade market, with special rules for subsidising in this sector and for exporting policies. For more information about this agreement, see *Legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations*, World Trade Organization (Cambridge University Press, 1999).

<sup>103</sup> As the anti-dumping initiations and measures against the petrochemicals products are around 20% to 22% of the anti-dumping cases. See the Anti-dumping Initiations and measures by the sector, World Trade Organisation, available at [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm) accessed 1 June 2014.

to all contracting parties. There should also be conditions under which the powerful countries can offer help and support to the poorest developing countries. Additionally, those countries with large oil and gas reserves should be treated differently to the benefit of all parties.

Any agreement based on this model, should also cover the elements that the contracting parties might wish to discuss and agree to; so that it would be in accordance with the general terms of the WTO agreement. Any suggested agreement must not adversely affect the competition between contracting parties with regard to these products; a balance must be attained between the three elements outlined and competition law. This would then assist in the further development of this sector and its products, as contracting parties would then be able to eliminate AD cases and the attendant obstacles they bring.

#### **4.7. Alternative solutions for the petrochemicals sector beyond the WTO framework**

As mentioned above, and throughout this research, petrochemicals products are deemed important elements for industry in general. These products are components in thousands of other products worldwide. Thus, it is essential to protect them from AD and anti-subsidy actions and from interference by governments or other organisations. Therefore, if contracting parties cannot agree on a new framework with which to treat the petrochemicals sector under the WTO, the establishment of an International Petrochemicals Organisation (IPO) is recommended.

To date, oil producers have already established their own international organisation (OPEC) to protect products, by maintaining production at a fixed level, and to enable prices to also be maintained; thereby assisting both producers and

consumers. The same proposition could be applied to petrochemicals products (listed below are suggested action points and associated benefits), as follows:

1. Where possible, any legal matters, interference from any parties, or any threat to these industries should be avoided, to maintain production at a level that is acceptable to producers and consumers.
2. The role of producers around the world should be co-ordinated in reference to quantities and prices, to avoid conflict between them, and guarantee coordination with consumers.
3. These industries should be developed by exchanging experiences between all parties and by supporting all research into these products.
4. Prices should be linked to an international indicator and currency, as is the case with oil, to avoid price differentials and governmental financial support, so that the price will be the same globally regardless of subsidy.

This international organisation would have a direct effect on industry and consumers, as it would be reflected in all other industries associated with or reliant on petrochemicals products. It would also offer processes to help the global economy improve after an economic crisis.

To achieve this, the GCC has established the Gulf Petrochemicals and Chemicals Association, which is similar to other international associations.<sup>104</sup> At present, these petrochemicals associations are unable to influence and sustain national industries against AD allegations. Non-profit organisations offer examples of international organisations with the potential to be established worldwide with

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<sup>104</sup> There are many other many national and regional petrochemical associations, which are usually run by the industries in this sector. For example, the American Fuel and Petrochemicals Manufacturers, available at <[www.afpm.org](http://www.afpm.org)>, the European Petrochemicals Association, available at <[www.epca.eu](http://www.epca.eu)>, the Association of Petrochemicals Products in Europe, available at <[www.petrochemistry.net](http://www.petrochemistry.net)>, the Japan Petrochemicals Association, available at <[www.jpca.or.jp](http://www.jpca.or.jp)>, and the Malaysian Petrochemicals Association, available at <[www.mpa.org.my](http://www.mpa.org.my)>.

governmental support, and which would have a direct effect on this sector. Any new organisation pertaining to petrochemicals products would reflect positively on thousands of products worldwide. It would also eradicate 20% of AD cases and allow the petrochemicals industries to strive to improve their products, rather than focusing on AD cases.

At the first meeting of the Developing Eight (D-8)<sup>105</sup> in Iran in October 2013, the eight countries involved agreed to establish an international organisation for petrochemicals producers, similar to OPEC. The organisation would need to protect industry around the world and ensure greater improvement and development without prompting legal action. Egypt and Turkey agreed to the establishment of the D-8, and both are members of it.<sup>106</sup> The D-8 invited Saudi Arabia and Qatar to join in order to protect their petrochemicals industry in the international market.<sup>107</sup> However, a Saudi official<sup>108</sup> working in this sector commented that a more common procedure now is to have petrochemicals unions, rather than international organisations. Nonetheless, an international organisation of this type would seem to be beneficial.<sup>109</sup>

Any international petrochemicals organisation proposed in this research should cooperate and coordinate directly with the WTO and OPEC, as well as benefitting the petrochemical industries and their products. Cooperation between these organisations would mean greater investment in the sector without any of the

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<sup>105</sup> The D-8 consists of eight developing countries: Bangladesh, Egypt, Indonesia, Iran, Malaysia, Nigeria, Pakistan and Turkey, available at <<http://www.developing8.org/Default.aspx>> accessed 1 June 2014.

<sup>106</sup> Almasrallyoum Newspaper, available at <<http://www.almasrallyoum.com/node/1757576>> accessed 1 June 2014.

<sup>107</sup> Alriyadh Newspaper, available at <<http://www.alriyadh.com/2010/08/03/article548933.html>> accessed 1 June 2014.

<sup>108</sup> Eng. Mohammed Al-Mady, who is the CEO of SABIC and Chairman of the Gulf Petrochemicals and Chemicals Association.

<sup>109</sup> Almasrallyoum Newspaper, available at <<http://www.almasrallyoum.com/node/1757576>> accessed 1 June 2014.



attendant legal issues that affect AD or anti-subsidy. Moreover, WTO legislation would be affected by this new organisation, as some of its laws would need to be changed if it were to become compatible with the views of the organisation; this would in turn have a positive impact on other industries.

## **4.8 Conclusion**

This chapter has introduced many ideas with regard to dispute resolution, in particular describing policies intended to protect petrochemicals products from AD and anti-subsidy provisions. The contracting parties, in view of the high number of AD cases in recent years targeted against petrochemicals products, should reconsider the legal provisions under the WTO. Currently, the AD legal system is a set of outmoded regulations. AD and anti-subsidy regulations should address the idea of “fair competition”, in order to be applicable in the economic legal system, but generally fail to do so.

All previous legal points and suggestions raised could be addressed in a second generation WTO agreement, regarding international trade between nations. A new round would be required to support discussion between contracting parties. Ideally this round could take place in Saudi Arabia and be called the “Riyadh Round”. With regard to anti-subsidy regulations, these should be studied by the contracting parties; especially in reference to the financial support extended to the more powerful countries, in order to support the economic systems in the US and EU. This type of financial support is illegal, as established by the WTO agreement. Although, recommendations proposed here are that additional time be given to developing countries before ending the subsidising of sectors, to support their growth. This is essential, as some of these countries have already stopped producing

certain products, because they were unable to compete in the international market; this will ultimately have a negative effect on developed countries too.

Any redeveloped standard would be intended to provide additional help to reduce disputes affecting petrochemicals products, and regarding AD and anti-subsidy laws. The mechanism of good faith could resolve legal issues under the WTO agreement, and this would make the implementation of WTO requirements smoother and easier. The legal points raised in this chapter regarding AD and anti-subsidy regulations would have an important effect on interpreting WTO provisions correctly, and would not allow for any kind of misuse or misunderstanding.

The challenging AD duty would result in a greater organising of this duty and better use of the provision. As mentioned above, at present this duty usually benefits governments, while the companies injured by the illegal action receive no benefit. With regard to good faith, the implementing of the three principles (neutrality, compatibility and transparency) would help to reduce the number of AD cases raised against the petrochemicals sector. A realistic change would mean altering AD provisions to form a Competition Law that would be broader in scope, and provide umbrella protection to oppose unfair treatment during trade between nations, rather than using a separate agreement for each aspect of international trade.

The final important discussion point in this chapter related to the protection of petrochemicals products. Contracting parties should consider making an agreement between under the WTO in order to protect these products, to limit AD cases. Such an agreement would facilitate dealings concerning these products, freeing them from legal disputes between contracting parties. In addition, the establishment of an International Petrochemical Organisation (IPO) could result in greater coordination and cooperation between contracting parties with regard to these

products, thereby benefitting all contracting parties and their economies, and helping them to overcome the recent global economic crisis.

# CHAPTER 5: MEASURES SAUDI ARABIA SHOULD IMPLEMENT IN ORDER TO PREVENT THE IMPOSITION OF AD DUTY ON ITS PETROCHEMICALS PRODUCTS

## 5.1 Introduction

This chapter will address the measures that Saudi Arabia should implement to prevent having to pay AD duty abroad in future. When analysing AD cases against Saudi Arabian petrochemicals products,<sup>1</sup> it is apparent that some of the legal points mentioned require a solution to avoid being subject to condemnation. AD cases may have the negative effect of reducing the quantity of exported petrochemicals products, as well as reducing the steps toward developing and improving the sector.

In addition, many legal issues within the Saudi Arabian domestic legal system need to be addressed, as they are directly implicated in AD cases against its petrochemicals products. This research argues that in order to resolve the increase in the number of AD cases abroad levied against Saudi petrochemicals products; some internal legal economic policies in Saudi Arabia must be amended. Discovering the reasons and scope of these internal legal matters will enable products to be exported abroad without becoming subject to AD cases; this will support a smooth and well-controlled operating mechanism in the export process.

First, it is essential to note that Saudi Arabia is on the Cooperation Council for the GCC countries,<sup>2</sup> all of which share the same export situations, production

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<sup>1</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>2</sup> The GCC is an international organisation, comprising six countries as full members: Saudi Arabia, Kuwait, Bahrain, Qatar, United Arab Emirates and Oman. It has admitted both Iraq and Yemen to

circumstances and a considerable volume of oil and gas resources.<sup>3</sup> These countries have an agreement in place to deal with AD cases abroad as a whole; in future all the cases will be dealt with by a special department in the GCC, called “The Secretariat of AD”.<sup>4</sup> This department will be responsible for managing AD proceedings inside these states, with the aim of protecting petrochemicals products relative to imported similar products. The GCC countries must aim to manage AD cases in a similar way to those cases brought in the European Union in order to protect their products inside the EU zone.<sup>5</sup> However, experience with AD cases in India has shown that Saudi Arabia can deal with such cases without cooperation or coordination with Oman, as it was one of the parties in that AD case.<sup>6</sup> The GCC countries are at present demanding more consideration and a greater understanding of the need to extend special treatment to them.

This chapter will discuss nine measures that Saudi Arabia should implement to avoid the imposition of AD duty on its petrochemicals products abroad. The first measure relates to monitoring prices inside the Saudi markets. The second measure relates to reforming the Saudi domestic subsidy programme domestically. The third focuses on promoting competition between petrochemicals products inside the Saudi market. The fourth measure suggests privatising the government’s extensive shares in the petrochemicals sector. The fifth measure suggests enhancing coordination and

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partial membership. Discussion about establishing it began in 1968, and Saudi Arabia and Kuwait attempted to overcome the obstacles and difficulties threatening it. The announcement of the establishment of this council was finally made in Riyadh on 4 February 1981, available at <<http://www.gcc-sg.org/>> accessed 1 June 2014.

<sup>3</sup> The GCC countries are wealthy with oil and Gas, around 477.4 billion barrels of oil and 1479.5 thousand billion cubic feet, which they are around 50% of the total world’s reservation of oil and gas, available at <<http://www.gcc-sg.org/>>, accessed 1 June 2014.

<sup>4</sup> For more information, available at <<http://www.gcc-tsad.org/>> accessed 1 June 2014.

<sup>5</sup> The European Countries deal with anti-dumping cases for the whole union under the auspices of the European Commission. For more information about the processes undertaken under this commission, available at <[http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/index\\_en.htm](http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/index_en.htm)> accessed 1 June 2014.

<sup>6</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014.

cooperation between the related Saudi governmental departments, which handle exports. The sixth measure is to promote legal awareness of global AD legislation. The seventh measure is to review GCC AD law and related domestic regulations in Saudi Arabia. The eighth measure is to protect transparency in the Saudi Arabian petrochemicals sector. The final measure discusses the role of the GCC in the AD cases, in particular how it can positively affect Saudi Arabia and the other GCC countries.

## **5.2 Measures Saudi Arabia should implement to avoid AD duty**

This section considers what measures Saudi Arabia should introduce to its domestic economic legal system to prevent the imposition of AD duty on its petrochemicals products. These measures directly relate to the export process, and could have a positive impact on the import of Saudi petrochemicals products. This section will consider pricing, subsidy, competition and the Saudi Government's share in these industries, legal awareness of the WTO, and reviews of laws related to the export and economic mechanism, as they relate to the potential resolution of problems associated with AD cases levied against Saudi petrochemicals products.

However, the Saudi petrochemicals industry has found a legal way to avoid the AD cases brought against them by purchasing all or some shares in industrial producers inside complainant countries.<sup>7</sup> It is questionable whether this is a final solution putting an end to AD cases against Saudi Arabian petrochemicals products.

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<sup>7</sup> On occasion, SABIC (Saudi Basic Industries Corporation) has announced its purchase of shares in other companies abroad or the establishing of new industries in other countries around the world in the media. The most recent announcement was after the Chinese government closed the anti-dumping cases with the Saudi petrochemical companies, which form SABIC. SABIC established an industrial base in China for similar products to those in dispute. Through SABIC's financial reports, it can be seen that it has industries in the same countries that filed anti-dumping cases against Saudi petrochemical products. For example, it has industries in India, China, the USA, the UK and most EU countries. (See SABIC financial report 2011), available at <<http://www.sabic.com/>> accessed 1 June 2014.

As required by AD regulations,<sup>8</sup> domestic similar products must be supported by all other domestic industries producing the same products.<sup>9</sup> In this case, Saudi shares inside these countries might not equate to the required percentage;<sup>10</sup> thus, cases might still be brought against Saudi products. Thus, the Saudi government needs to take additional legal steps to avoid the bringing of AD cases against its petrochemicals products.

Pricing is the primary issue under debate, in particular, the reasons for different pricing in relation to Saudi petrochemicals products. In addition to pricing, this section will address the issue of subsidies for the Saudi petrochemicals industries as a reason for AD cases being brought against these products. The issues of subsidy and government ownership and the management of the petrochemicals sector inside Saudi Arabia are interrelated, as will be highlighted here. Finally, the aim of the AD law is to insure fair competition between similar products, and to support healthy competition in the international market, which will ultimately be reflected in the development of such products and improvements to their quality. However, in this research competition between petrochemicals products within the Saudi market is not sufficiently compatible with the WTO standard. The Saudi government needs to examine this economic legal issue seriously to insure genuine competition between petrochemicals products inside the domestic market, as this will have many benefits in the long term for the Saudi economy and revenue.

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<sup>8</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>9</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201, Article 5.4.

<sup>10</sup> The share of SABIC in these countries might not reach 50%, which is necessary to apply for anti-dumping cases against imported similar products.

### 5.2.1 Monitoring price

Dumping is perceived as a form of price discrimination in the international marketplace; it leads to unfair competition<sup>11</sup> because it affects all other similar products in that market. Thus, pricing has a direct effect on AD cases, and is the first element examined when seeking to impose AD duty on exports and to manage normal pricing.<sup>12</sup> Price is also referenced when clarifying the margin for AD duty on any particular dumped product.

However, on a cost-basis, price has two important basic elements: costs and profits. According to Kotler and Armstrong, “Cost-based pricing involves setting prices based on the costs of producing, distributing, and selling the product plus a fair rate of return for its effort and risk”.<sup>13</sup> The concern with Saudi AD cases, as has been examined in Chapter 3,<sup>14</sup> relates to cost, not profit. Kotler and Armstrong observe, “A company’s costs may be an important element in its pricing strategy”.<sup>15</sup> The cost typically includes the price of raw materials and administrative fees. Thus, the cost of raw materials relates to many other elements, whether the raw materials are imported or produced in the domestic marketplace. If they are imported, the price might be affected by the currency exchange rate,<sup>16</sup> as well as by circumstances in the international market and in the countries from which these elements were imported.

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<sup>11</sup> Aradhna Aggarwal, *The Anti-dumping Agreement and Developing Countries, an Introduction*, (1st edition, Oxford University Press 2007) 16.

<sup>12</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>13</sup> Philip Kotler & Gary Armstrong, *Principle of Marketing*, (15<sup>th</sup> edition, Person Education Limited, 2014), 317.

<sup>14</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>15</sup> Philip Kotler & Gary Armstrong, *Principle of Marketing*, (15<sup>th</sup> edition, Person Education Limited, 2014), 317.

<sup>16</sup> A case between the United States and Korea regarding unnecessary conversion from the US Dollar to the Korean Won. See the Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001.



All these aspects are interrelated; thus, a single element can affect all the others in a trade arrangement. As a result, the internal market price for similar products in the exporting country has a direct effect on AD cases in the importing country. This is why governmental departments should undertake price monitoring to avoid cases of dumping.

Until now, the Saudi government has applied very weak monitoring to the internal market with regard pricing,<sup>17</sup> uncovering clear statistics, will require clearer policies on this point. Stronger monitoring can protect the internal market from unfair competition between domestic products and imported products brought against the Saudi market. Meanwhile, it will help to have reliable data regarding the pricing of products inside the Saudi market, especially petrochemicals products, to help avoid the bringing of AD cases against Saudi exports.

Prices can be monitored where transparent statistics are available regarding not only the internal market, but also the external markets. Relevant government departments and internal industries in Saudi Arabia must employ a strong data set regarding similar product pricing. They also need to gather more information about market circumstances and the costs associated with producing products inside the importing countries. This information will help to establish a suitable price for Saudi products accounting for the export process; this will help to reduce and avoid the AD cases brought against these products abroad.

Saudi Arabia needs to implement more rules and guidelines to monitor prices in the Saudi market. Monitoring has to be done on the basis of the free market and

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<sup>17</sup> The Saudi government started monitoring the price to market several years ago, through the Ministry of Commerce, but its role remains very weak. It only focuses on prices related to food and no attention is paid to prices related to the Saudi industries, whether petrochemicals or others. Moreover, four years ago, it established a private organisation, the “Consumer Protection Association”, to help monitor prices, but it is still not at the level it should be. For more information see the Consumer Protection Association and the Ministry of Commerce official website in Saudi Arabia, available at <[www.cpa.org.sa](http://www.cpa.org.sa)> and <[www.mci.gov.sa](http://www.mci.gov.sa)> accessed 1 June 2014.

free trade principles without interference from the government and to insure reliable data outside the Saudi market. In recent years, the Saudi government realised the importance of price monitoring, although it currently focuses on food products only;<sup>18</sup> there is yet no emphasis on the other products required to protect Saudi industries. Thus, the Saudi government strongly recommends paying more attention to the element of price, as a priority when defending Saudi products abroad from AD duty, and thereby avoiding legal action in the future.

How can Saudi Arabia monitor prices? This is an important question to answer, especially as it relates to the free market price. This means, the Saudi Arabian government should avoid any interference in pricing and allocate price setting according to market competition between all producers and traders. Initially, this will require the establishment of a legal framework, enforcing regulations in order to insure a legal basis for collecting information from different areas. This will help the authority to legalise their actions and procedures, and to collect information without raising conflicts with other regulations domestically or with the WTO.

In addition, this requires the establishment of an authority to manage the collection of information and to establish databases by cooperating and coordinating with different governmental and non-governmental sectors inside Saudi Arabia. The authority has to locate different sources of information, which will then enable calculation of accurate market price figures that correspond to reality. After the appointed authority has collected all the relevant information, it would then continue monitoring by checking the domestic market regularly to guarantee up-to-date prices and manage changes to prices. Internationally, the database on pricing would help to maintain a balance between the prices inside the country and those outside when

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<sup>18</sup> The Ministry of Commerce and Industry in Saudi Arabia, available at <[www.mci.gov.sa](http://www.mci.gov.sa)> accessed 1 June 2014.

exporting products abroad. This would then facilitate a reduction in the number of AD cases against Saudi petrochemicals products in particular and against other Saudi exported products in general. It would also help to generate an authentically competitive atmosphere inside the Saudi marketplace.<sup>19</sup>

The WTO provision does not prohibit price monitoring as described in this research.<sup>20</sup> It is useful in any country, including the UK, and is frequently used to clarify economic and political factors and to make important economic policies.<sup>21</sup> Insuring government agencies are monitoring prices in the internal market will help to manage inflation and allow the government to adjust taxation and minimum income. This information is important to establish the direction of the internal market in terms of growth, when following international regulations and WTO provisions.<sup>22</sup>

### **5.2.2 Reforming Saudi Arabian Subsidy programmes**

Subsidy programmes raise legal issues against Saudi petrochemical industries, leading to the application of AD duty against products. However, the subsidy usually has to be applied either directly or indirectly to domestic industries. Directly by

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<sup>19</sup> It will help to establish real competition without such a cartel in the petrochemicals products.

<sup>20</sup> Under footnote 4 in article 11 of the Agreement on Safeguards, it mentions the prohibition of the monitoring system on prices. However, monitoring requires genuine statistics about prices inside the market. Yet, developing countries has been excluded by a special measure under article 9 of the same agreement. However, the only purpose to monitoring prices inside Saudi Arabia is to make sure there is no illegal movement between goods inside the market. Thus, this agreement cannot be applied as there is no option to fix the price or reduce the quantities of imported products. See the Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex **1A**, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

<sup>21</sup> The UK department of energy monitors energy and power prices and publishes these statistics in public as described in the article *Industrial price statistics: data sources and methodology*, available at <https://www.gov.uk/government/publications/industrial-price-statistics-data-sources-and-methodologies> accessed 1 June 2014.

<sup>22</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

giving financial support to these industries<sup>23</sup>, and indirectly by giving facilities or materials to the domestic industries, such as giving free land to establish industries or waiving taxes in order to support the product pricing.<sup>24</sup>

The Trade Policy Review by the WTO, Section 71 states,

Saudi Arabia has notified the WTO that it does not have any subsidy programmes that are inconsistent with the provisions of the Agreement on Subsidies and Countervailing Measures, and does not maintain or use any prohibited subsidies within the scope of Article 3 of the Agreement.<sup>25</sup>

This statement includes the Saudi Arabian official announcement to the WTO with regard to subsidy programmes: there are no prohibitions on subsidy programmes, which could affect the Saudi market or Saudi industries. However, the same report continues in Section 72:

To this end, three main entities are aiming to expand Saudi non-oil exports: (i) the Saudi Export Programme (SEP) of the Saudi Fund for Development (SFD); (ii) the Saudi Export Development Centre (SEDC); and (iii) the Saudi Export Development Authority (SEDA).<sup>26</sup>

These forms of support are characterised as incompatible with anti-subsidy's regulations under the WTO agreement.<sup>27</sup> Subsidy programmes have a direct effect on product pricing, as identified in Article 1 of the Subsidies Agreement.<sup>28</sup> Therefore, programmes initiated by the Saudi government must be reformed to meet WTO provisions.

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<sup>23</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Article 1.1.

<sup>24</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Article 1.1.

<sup>25</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, 40.

<sup>26</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, 40.

<sup>27</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14.

<sup>28</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Article 1.

However, officials<sup>29</sup> in the Petroleum and Petrochemicals Research Institute in King Abdul-Aziz City for Science and Technology (KACST)<sup>30</sup> announced the Saudi government is planning to input around 26 billion US dollars into the petrochemicals sector in Saudi Arabia<sup>31</sup> to develop and improve related industries. These funds will ultimately be paid to SABIC, as it owns the majority of these industries or has part shares in recipient companies, as mentioned above.<sup>32</sup> This represents a direct subsidising of the sector, which is prohibited under the WTO provisions,<sup>33</sup> due to applying AD and anti-subsidy's measures against these products.

In a report by the Minister for Petroleum and Gas in Oman, the Minister warned all GCC countries against subsidy programmes, as this directly affects associated prices, including fuel and electricity prices;<sup>34</sup> thereby reducing the power and wealth in these GCC countries, including Saudi Arabia. This statement shows Saudi Arabia's approach to supporting the petrochemicals industries differs from approaches elsewhere, and this affects the price of petrochemicals when exported to other countries.

It is recommended that support be given equally to Saudi and non-Saudi petrochemicals industries inside Saudi Arabia, to produce more wealth and develop products, regardless of whether the capital for these industries is obtained from local or foreign investors. However, it can be seen that Saudi Arabia has initiated a

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<sup>29</sup> Dr Abdul Malik Bin Taleb is one of the researchers in the Petroleum and Petrochemicals Research Institute in King Abdul-Aziz City for Science and Technology (KACST).

<sup>30</sup> King Abdul-Aziz City for Science and Technology is an independent scientific organisation, which aims to develop the national policy in many areas, to enable greater diversity of national income with increased use of advanced technology, available at <<http://www.kacst.edu.sa/en/Pages/default.aspx>> accessed 1 June 2014.

<sup>31</sup> This was a TV interview on a famous official economic Arabian channel (CNBC Arabic TV), available at <<http://www.youtube.com/watch?v=lZmk49du3LU>> accessed 1 June 2014.

<sup>32</sup> Saudi Arabian government owns 70% of the total capital of SABIC, available at <[www.sabic.com](http://www.sabic.com)> accessed 1 June 2014.

<sup>33</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14.

<sup>34</sup> See report by Reuters Arabic news, available at <<http://ara.reuters.com/article/businessNews/idARACAE9B2FFP20131110>> accessed 1 June 2014.

subsidising programme with regard to fuel, electricity, duty-free goods and finally long-term loans without interest. Moreover, the form of subsidising programmes can directly affect the prices of exported petrochemicals products. The Saudi government must offer access to subsidy programmes directly to those who need them, rather than using them to reduce the price of products domestically, which then affects export prices. For example, it is more acceptable to assist people on a low income directly, e.g. in terms of fuel provision. The WTO Trade Policy Review mentioned earlier refers to "...gradually reforming domestic energy pricing to create a more energy-efficient economy",<sup>35</sup> which can be understood as meaning that Saudi Arabia must make some changes to its energy pricing by reforming its subsidising programme. In this way, it would ensure subsidy programmes would not have an effect on market price, and would then be deemed acceptable under the WTO provisions.

However, other options can be considered akin to subsidies. On the one hand, the management of the petrochemicals sector in Saudi Arabia is run in reality by the government, because the Saudi government owns 70% of this sector.<sup>36</sup> On the other, there are no foreign investors in this sector in Saudi Arabia, as will be discussed later in this chapter. SABIC receives assistance from the government to successfully export its products abroad.

Another important issue concerns the raw materials produced by the petrochemical's sector. The problem with this sector is that the Saudi Arabian government owns the majority of available shares. This has an effect on the strategies employed, with a direct effect on competition in this product area. Moreover, the raw materials for SABIC products can be obtained at very low cost,

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<sup>35</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, vii.

<sup>36</sup> See the SABIC, available at <<http://www.sabic.com/>> accessed 1 June 2014.

[was] based on costs and export price. However, in these countries, which [provide] the basic raw materials used in the production of MEG, “Ethane” is only produced by state-owned companies and the price of the supply/demand conditions are identified and announced by the authorities.<sup>37</sup>

Saudi Arabia has many sources of oil, gas and hydrocarbons, which are crucial to petrochemicals production.<sup>38</sup> As a result, the Saudi government, through Saudi Aramco, which is owned completely by the Saudi government<sup>39</sup>, supplies SABIC, and the other petrochemicals companies owned by SABIC with raw materials at a very low price; there is no reason to resort to global pricing.<sup>40</sup> This is why the price of Saudi petrochemicals products is usually lower than that of products produced elsewhere in the world; explaining the root cause of the AD cases brought against them.

To resolve this issue, the government might think about applying taxes on petrochemicals product when they are exported abroad, in order to continue supporting programmes that require petrochemicals prices to conform to the price principle, as in China. The Chinese government formerly applied a tax on Urea products,<sup>41</sup> which raised pricing to a level equivalent to the international market. However, this would not be an applicable solution in the case of Saudi Arabia for a number of reasons. First, the Saudi government has undertaken not to apply any direct taxes, as mentioned in the WTO report,<sup>42</sup> although this strategy could be changed. Second, an effect on pricing will remain because of the supportive

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<sup>37</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 4.

<sup>38</sup> The Saudi Ministry of Petroleum and Minerals. available at < <http://www.mopm.gov.sa/>>, accessed 1 June 2014.

<sup>39</sup> Saudi Aramco, available at <<http://www.saudiaramco.com/>> accessed 1 June 2014.

<sup>40</sup> As mentioned in the Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 4.

<sup>41</sup> See the State Administration of Taxation in China, available at <<http://www.chinatax.gov.cn/>> accessed 1 June 2014.

<sup>42</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011

programmes mentioned previously; these would therefore have to be removed in every case.

In this regard, the government should supply the Saudi petrochemical industries with raw materials on a global scale, as this will help to open up the Saudi market to foreign investments, thereby enabling them to establish enterprises in this sector inside Saudi Arabia. This proposal will be developed in the following section of this thesis. The Saudi government could rationalise its subsidies programme so funds benefit only those in need of them, without any negative impact on the Saudi market or industries. This should then avoid the negative impact of AD cases.

### **5.2.3 Promote competition within the Saudi Arabian petrochemicals sector**

Saudi Arabia has established a good environment for foreign investment,<sup>43</sup> principally due to its regulatory situation. This can be seen following the establishment of the Saudi Arabian General Investment Authority (SAGIA),<sup>44</sup> to promote as many foreign investments as possible inside Saudi Arabia. The report by the WTO shows how much has changed concerning this point;

Saudi Arabia has become the eighth biggest recipient of foreign direct investment (FDI) in the world. Its annual inflow of FDI jumped from an annual average of US\$ 1.534 million during 1995-2005 to about US\$ 25,000 million over 2005-09.<sup>45</sup>

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<sup>43</sup> Saudi Arabia has issued Competition Law by a Royal Decree No. M/25 date 22 June 2004, in order to improve the competitive atmosphere inside the Saudi market. See the Competition Law on the Bureau of Experts at the Council of Ministries, available at <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=60&VersionID=73>> accessed 1 June 2014.

<sup>44</sup> A Royal Decree No. M/1 date 10 April 2000 has issued the Foreign Investment Law and established the General Investment Authority by the Primer Ministries decision No. 2 date 20 April 2000 in order to encourage foreign investors to establish more enterprises in Saudi Arabia. Since then, many foreigners have invested in Saudi Arabia, but their investments have missed the point, which is to encourage investments in order to create more jobs for people. The investors have not realised that their investments should be in the petrochemical industries sector, as most of them have focused on trade investment only, available at <<https://www.sagia.gov.sa/>> accessed 1 June 2014.

<sup>45</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, p.8.



Abundant regulations facilitate investment, as evidenced by these figures; however, the authorities have not devoted adequate attention toward local investors (Saudis and GCC citizens).

Moreover, the trade and investment authorities in Saudi Arabia have supported competition inside Saudi Arabia and are trying, as far as possible, to create an effective competitive atmosphere between products, whether local or foreign. However, these efforts do not establish foreign investment in the petrochemical industries in particular or in the industrial sector in general, as the majority of foreign investments target trade and other services.<sup>46</sup> The Saudi government has afforded its (70% government-owned) domestic petrochemical industries, special treatment in all areas.<sup>47</sup> This special treatment of the sector threatens investment by foreign or local investors, as in reality they are unlikely to receive the same attention from the government.

The Saudi government should also encourage local and foreign investors to establish more industries in general and in the petrochemicals sector in particular; it must treat them as equal to the Saudi industries, such as SABIC. This equivalent treatment would then help to increase the quantity of exports for petrochemicals products and thereby generate more jobs inside Saudi Arabia, and thereby an increase in national revenues. Moreover, this would facilitate genuine competition among all industrial parties in Saudi Arabia. Without this, equivalent and other legal processes, investment in this sector would not be a success.

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<sup>46</sup> As an example, in 2006, Saudi Arabia has registered 328 new foreigners' investment in the industry sector. In addition, it has registered 1094 new foreigners' investment in the services sector. However, it is not clear in the industrial sector, what type of industries and also it can be seen the huge difference in the number between these two types. See the website of Jeddah Economic Getaway, available at [http://jeg.org.sa/index.php?sec\\_code=eco\\_cat&sectorId=138](http://jeg.org.sa/index.php?sec_code=eco_cat&sectorId=138) accessed 1 June 2014.

<sup>47</sup> Even with the Saudi Competition Law, such Saudi companies might be given special treatment so that this law would be regarded as not being applicable to them. Article 3 of this law states that "*This Law will apply to all institutions which work in the Saudi markets except public institutions and companies wholly-owned by the government*". So this Article could be used in order to give SABIC special treatment in Saudi Arabia, which in fact it already has.

As an example, with regard to equivalence between investors, Saudi Airlines, which is 100% owned by the Saudi government,<sup>48</sup> has also been afforded special treatment by the government, in particular, inside Saudi Airports and in terms of fuelling and other related services.<sup>49</sup> However, when the Saudi government has encouraged competing airlines to enter the Saudi market, the new companies are unable to compete, as they are subject to different treatment. Consequently, they cannot continue to offer a service inside the Saudi market and have been liquidated.<sup>50</sup>

The Saudi government indisputably prioritises SABIC. However, article 6 of the Implementation of the Saudi Competition Law states:

1-Any “entity” of a dominant position in the market is prohibited from exploiting such a position to violate, limit or prevent competition, including the following: ..... B. committing any act that leads to hindering the entry of another “entity” into the “market”, forcing it out or exposing it to losses, including selling at a loss. C. Imposing unrealistic price for a “commodity” through the dominant entity’s hindering, limiting or refusing the sale or purchase of a “commodity” in any other manner.<sup>51</sup>

Thus, SABIC is in a position to block petrochemical enterprises from entering the Saudi market, which renders it liable to the penalties mentioned in Saudi Competition Law. However, it operates a legalised monopoly inside the market, as shown in this article and by government behaviour regarding SABIC, which is also considered in reference to WTO provisions.

As Saudi Arabia is a wealthy country with substantial oil and gas resources and the appropriate legal atmosphere it is able to attract huge international

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<sup>48</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, 46 .

<sup>49</sup> Article by Abdullah S. Alshamasi in Aleqtsadia Newspaper, available at <[http://www.aleqt.com/2011/07/09/article\\_557260.html](http://www.aleqt.com/2011/07/09/article_557260.html)> accessed 1 June 2014.

<sup>50</sup> See the article in Almadina Newspaper, available at <<http://www.al-madina.com/node/370828>> accessed 1 June 2014.

<sup>51</sup> The Implementation of the Saudi Competition Law issued by a Royal Decree No. M/1 date 10 April 2000, article 6 paragraph b and c. See this law in the Bureau of Experts at the Council of Ministries, available at <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=60&VersionID=73>> accessed 1 June 2014.

investment inside Saudi Arabia, rather than establishing ownership or control over the sector by the government. This enables greater liquidity to be pumped into Saudi Arabia through foreign investments, including long-term investments. Moreover, it facilitates job creation for Saudi citizens, which in turn generates more income for the government, who can apply direct taxes on this sector. The most important reason for increasing the presence of competitors is to attract more advanced technology into these industries, than would be possible with the government ownership model. With regard to this point, it is stated in a report issued by SAMBA, that foreign investment in this sector would facilitate the use of new technology:

The integration model will also open the door to further foreign direct investment into Saudi Arabia from established global energy and petrochemicals firms. These large joint ventures should allow considerable technology transfer, though their sheer size will also necessitate more diversified and imaginative financing solutions.<sup>52</sup>

This statement confirms that new technology can be transferred by means of foreign investment.

Furthermore, competition law requires that foreign and local investment should have the same legal facilities granted to them as the Saudi petrochemical industries, unless they start producing and exporting products. However, if there is any support for Saudi industries wishing to export products, this support should be immediately halted and the industries should seek to ensure implementation of the provisions of the WTO agreement on this point.<sup>53</sup>

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<sup>52</sup> Saudi American Bank in Saudi Arabia (SAMBA), Report Series August 2009, available at <<http://www.samba.com/>> accessed 1 June 2014.

<sup>53</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14.

#### 5.2.4 Privatisation of the Government's shares in the petrochemicals sector

The National Champion idea was introduced after the Second World War, when some EU countries began to support their industries in order to compete with other companies, whether inside or outside their own states. There are many ways for this idea to be applied in reality: "Governments may create national champions directly, by acquiring several private firms and merging them into a single government-owned company..."<sup>54</sup> This happened to the British government in 1967 "... the UK government did [this] for example in 1967 when it acquired the largest fourteen domestic steel companies so as to create the British Steel Corporation..."<sup>55</sup> The other reason for applying this approach is to assist state-owned companies to join with the private sector "...by having a government-owned company merge with a private firm..."<sup>56</sup> as is the case in France, where the GDF and Suez companies merged. Another approach is to extend direct support and subsidies to a preferred company in order to improve its ability to succeed in the market.

At present, the Saudi Arabian government prioritises oil products, and these are considered as a National Champions by the government. However, the WTO agreement, as will be seen in this research, protects oil products and continues this protection as agreed in the GATT. However, all the Saudi government activity with regard to the petrochemicals sector, and particularly SABIC, show the sector is considered in this light. The Saudi government relies on its petrochemicals products being the best in the world, and thus far this appears to be the case; despite the emergence of legal issues.

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<sup>54</sup> The Global Forum Competition OECD, *Policy Roundtables: Competition Policy, Industrial Policy and National Champions* (2009).

<sup>55</sup> The Global Forum Competition OECD, *Policy Roundtables: Competition Policy, Industrial Policy and National Champions* (2009).

<sup>56</sup> The Global Forum Competition OECD, *Policy Roundtables: Competition Policy, Industrial Policy and National Champions* (2009).

The Saudi government owns 70% of the shares in SABIC,<sup>57</sup> and SABIC in turn owns or has a high percentage ownership in the petrochemicals industries in Saudi Arabia. An early report by the King Abdul-Aziz City for Science and Technology states,

the great improvement of the petrochemical industry in the Saudi Arabia was by The Saudi Basic Industries Corporation (SABIC), which currently produces 95% of the petrochemicals products. Saudi Arabia is making an effort actively to reduce this ratio to 75% by 2010 in order to promote private investment in order to speed up the manufacturing of petrochemicals...<sup>58</sup>

It is possible to explain why these industries are owned by the Saudi government as follows:

1. It was difficult, toward late 1976, for the petrochemical industries to be established as private companies, whether Saudi or foreign investments, because Saudi Arabia had recently been founded and lacked the necessary infrastructure. The cost of establishing these industries was high and considered a long-term investment.
2. The majority of Saudi investors were focusing on other industrial sectors, which were essential to the Saudi market, such as foodstuffs and construction materials like cement and other materials; the majority of these were short-term investments. Investors were also focusing on service companies like banking and insurance, and took a special interest in real estate. These industries also have very high annual profits.
3. At that time, it was difficult to find investors with large sums of capital who would be prepared to attempt to establish petrochemical industries at

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<sup>57</sup> SABIC, available at <[www.sabic.com](http://www.sabic.com)> accessed 1 June 2014.

<sup>58</sup> Report issued by King Abdul-Aziz City for Science and Technology, available at <<http://www.kacst.edu.sa/en/Pages/default.aspx>> accessed 1 June 2014.

a similar level because of the running costs involved and the high risk proceeding from this type of long-term investment.

4. At that time, there was no legal environment to help and encourage investors to invest in petrochemicals by offering incentives and guarantees on investments.

However, SABIC now holds majority shares in this sector in Saudi Arabia and most of these factors are now irrelevant. Most investors, local or foreign, are looking to invest in this sector under equal conditions and according to a clear legal framework. Government shareholdings inhibit competition between petrochemicals products inside Saudi Arabia. However, to develop this sector, private investment must be supported in this type of investment. Thus, although there is a share between SABIC and the private sector through individuals, this ownership has not yet provided true competition in accordance with the WTO standard.

The Trade Policy Review by the World Trade Organisation has clarified some points regarding SABIC as a major producer of petrochemicals:

The government appoints the Chairman of the board, the CEO and three other Board members. Two other Board members represent the private sector and are nominated and selected by shareholders at a general meeting. The Government is represented on the Board, but does not play any role in setting company policy or in making operational decisions.<sup>59</sup>

The question that arises here, is how can the Saudi government appoint four out of six of the Board of Directors of SABIC and avoid playing an active role. At present SABIC reflects government strategy, and the votes and Board of Directors are largely intending to benefit and advantage the government, since 4 out of 6 are appointed by the government and the CEO is also from the government. Furthermore, the CEO is also head of the Director of the Royal Commission for

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<sup>59</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, page 70, section 93.

Jubail and Yanbu (RCJY), which is the government department responsible for industrial government strategy in two important industrial cities, where the petrochemicals industries dominate.<sup>60</sup> Therefore, it can be seen that SABIC is managed by the RCJY, it is not a separate company; this supports the idea of managing SABIC through the government.

It is essential that the Saudi government continue to relinquish its shares in these companies and privatise them, to create a truly competitive atmosphere, especially since the Council of Ministry has approved a privatisation programme for SABIC.<sup>61</sup> The first step should be to prevent any privileges afforded to this sector, to support competition on equal terms. The second step is to sell all or most of the Saudi government shares in these companies on the stock market and to allow them to function without interference from the Saudi government. This change would then also be reflected on the stock market, because the value of Saudi government shares in the sector at present would have direct effect and influence. Thus, the market would then be wholly independent from Saudi government influence. The next step after this could be to deal equally with all petrochemicals companies, whether owned by SABIC or by new investors, foreign or Saudi, with regard to establishing future privileges and the legal process. This could be achieved in two steps: first, by selling raw materials to the investors at a global price for all industries; and second, by taking the same amount of taxes, fees and any other payments due to the government from these companies.<sup>62</sup> These two steps would bring more benefit to the government than if they continued to run these industries, and, as a result, the issues related to AD would then gradually decrease.

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<sup>60</sup> See The Royal Commission for Jubail and Yanbu (RCJY), available at <<http://www.rcjy.gov.sa/>> accessed 1 June 2014.

<sup>61</sup> Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, 46-47.

<sup>62</sup> As when the Saudi Arabian government privatises the telecommunications companies.

The intention behind privatisation is to reduce the attention directed by the government toward enterprises. Chang states "...that government has grown to unmanageable proportions was premised on the need to reduce the constrictions to economic growth and to provide opportunities for the private sector within state".<sup>63</sup> Therefore, privatisation offers many advantages within national economic systems. It can help to introduce investment by offering a high rate for domestic funds. Since Chang considers that "... keeping interest rates for domestic funds higher than they would have been had the government ...".<sup>64</sup> It will also improve the efficiency for those sectors that have been privatised.<sup>65</sup> In addition, privatisation will create a competitive environment, impacting positively on products in the marketplace.<sup>66</sup> All these advantages will be beneficial in improving product quality, and achieving a fair market price, which will be to the advantage of consumers and national revenue.

Were the government to privatise the petrochemicals sector in Saudi Arabia, this would have many advantages for the petrochemicals sector. First, it would be one reason to reduce AD cases against the Saudi Arabian petrochemicals products abroad. Second, it would help to increase opportunities to build more industries. At present, most investors do not want to invest because the government controls the majority of the local petrochemical industries. Therefore, it has become difficult for anyone else to invest in the sector, as unequal competition makes the situation impossible. This means that, although all the regulations related to the competition

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<sup>63</sup> Claude V. Chang, *Privatisation and Development, Theory, policy and Evidence*, (1<sup>st</sup> Edition, Ashgate Publishing Limited, 2006) 79.

<sup>64</sup> Claude V. Chang, *Privatisation and Development, Theory, policy and Evidence*, (1<sup>st</sup> Edition, Ashgate Publishing Limited, 2006) 80.

<sup>65</sup> Claude V. Chang, *Privatisation and Development, Theory, policy and Evidence*, (1<sup>st</sup> Edition, Ashgate Publishing Limited, 2006) 82.

<sup>66</sup> Claude V. Chang, *Privatisation and Development, Theory, policy and Evidence*, (1<sup>st</sup> Edition, Ashgate Publishing Limited, 2006) 85.



are at the standard of the WTO provisions,<sup>67</sup> the sector remains government owned, which makes competition difficult. Third, this will improve petrochemicals production, which will help to create more jobs for Saudi people. Fourth, as more industries are built by foreign investors new technology from outside Saudi Arabia will be introduced. There will then be no costs associated with this to the Saudi government as the technology moves with new investors.

### **5.2.5 Developing Coordination and Cooperation among Saudi Governmental Departments**

With regard to the trade and export processes in Saudi Arabia, many government departments share the same responsibilities and duties. These departments require a very high level of cooperation and coordination to export products without an effect on the legal issues associated with dumping. This does not mean there is a lack of coordination among them at present. Nevertheless, such coordination has not yet achieved the level required to counter legal issues fully, whether in Saudi Arabia or abroad. If there were good coordination and cooperation, cases like the AD case against Saudi petrochemicals products would continue to emerge.<sup>68</sup> Were the Ministry of Industry and Commerce effectively coordinated with Saudi Customs, there would be better avoidance of conflict or overlap effecting Trade and Industry.<sup>69</sup> This will be discussed in greater depth toward the end of this section.

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<sup>67</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

<sup>68</sup> There were 34 anti-dumping cases against the Saudi products, accounting for 76.47% of the total anti-dumping initiations against Saudi petrochemicals products. See The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

<sup>69</sup> There are many overlaps between the Saudi government sectors; for example, between the General Investment Authority and the Ministry of Commerce and Industry. The trade mechanism needs

Coordination and cooperation should be put in place from the outset of the establishment of industries and trade, and should be encouraged. This would help to minimise cases against the Saudi petrochemicals products in relation to AD. Then government departments would filter out legal issues pursued against products, whether in Saudi Arabia or abroad.

At present, there are many conflicts between different government departments in Saudi Arabia, and such conflicts are anticipated to be likely to affect trade, industry, and production eventually. There is a conflict of responsibilities between the Ministry of Commerce and Industry and other departments such as the Saudi General Investment Authority, especially abroad. Both of these have their own offices outside Saudi Arabia, which attract foreign investment to Saudi Arabia. In addition, there is a conflict between, on the one side, the Saudi Industrial Property Authority and the Royal Commission for Jubail and Yanbu, and on the other side, new economic cities in Saudi Arabia, which are governed by the Saudi Investment Authority. The conflict between these parties is very clear and there is a need to reorganise them in order to achieve a higher standard of coordination and cooperation without conflict. Furthermore, this will help to achieve the aim of promoting diversity in terms of economic revenue streams and to improve the trade and industry sectors.

#### **5.2.6 Promoting legal awareness of the AD legal system**

Legal awareness has a direct impact on the kind of trade treatment imposed, as it targets people directly involved in exporting products abroad. It describes AD and anti-subsidy legislation and related processes, as well as other relevant regulations,

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extensive reorganisation in Saudi Arabia in order to reach the aims of the WTO as well as to benefit the Saudi market.

established to help those involved to attain a clear understanding of all the legal processes required to breach regulations. However, a country like Saudi Arabia has limited experience with such cases or legal dealings under the WTO provisions. Based on van den Bossche and Zdouc views “Many developing country Members do not have the specialised ‘in-house’ legal expertise to participate in the most effective manner in WTO dispute settlement”.<sup>70</sup> Thus, Saudi Arabia as a developing country requires additional legal skills in order to address cases under the WTO agreement. According to Papa,

Particularly developing countries. The system’s legalization or the increasing precision of rules and their binding effect has brought about the need for greater legal skills, expertise and sophistication in institutional engagement.<sup>71</sup>

Nonetheless, this description must include all other processes for a claim to be filed in relation to regulations, whether inside Saudi Arabia or abroad, and concerning exports in order to protect Saudi products. This should include all legal techniques in reference to AD and anti-subsidy cases, as these may lead to issues being face raised abroad. For example, Brazil has become a prominent member of the WTO agreement engaging in many steps, which have all been performed by the Saudi government as well; “Brazil’s aspirations for successful WTO participation led to the mobilisation of interest in WTO expertise, new institutes, courses and research groups, private sector engagement with the WTO and civil society engagement”.<sup>72</sup>

All government employees and lawyers involved in export and trade procedures inside Saudi Arabia are included in this description, and so will be ready

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<sup>70</sup> Peter van den Bossche & Werner Zdouc, *The Law And Policy of the World Trade Organization* (3rd edition, Cambridge University Press, 2013), 300.

<sup>71</sup> Mihaela Papa, ‘Emerging Power in International Dispute Settlement: From Legal Capacity Building to A Level Playing Field?’ 2012, *Journal of International Disputes Settlement*, 83, 85. (Footnote Omitted).

<sup>72</sup> Mihaela Papa, ‘Emerging Power in International Dispute Settlement: From Legal Capacity Building to A Level Playing Field?’ 2012, *Journal of International Disputes Settlement*, 83, 93.

to address any legal issues. They will be able to take preventative action before the export process starts, in order to avoid potential legal action being brought against Saudi products abroad, especially that targeting petrochemicals. For example, if customs in Saudi Arabia have sufficient legal knowledge and are in receipt of advice from their legal departments, they will be able to evaluate whether exported products are in danger of facing AD duty better. If so, then the legal department could make exporters and any implicated departments aware of this, to minimise the probability of legal action. Customs departments in Saudi Arabia should be regarded as the final line of defence for Saudi exported products. Certainly, government departments require a highly efficient and up-to-date database detailing the trade environment of importing countries; this means they also require good cooperation and coordination with other government departments, as mentioned above, to collate these databases. They might also employ a questionnaire to obtain a clear view of the exported products, in order to find a way to protect them from AD and anti-subsidy legal processes in importing countries.

It is necessary to train Saudi lawyers who are capable of handling these cases at any stage. This can be achieved through legal training and participation in conferences, highlighting the best methods for dealing with AD and anti-subsidy cases. In addition, Saudi lawyers should build strong relationships with well-known international law firms who specialise in AD cases; so that they can exchange experiences, and attain access to well-qualified local lawyers who can handle cases both within Saudi Arabia or abroad. An example of this approach applies to Brazil, which has pursued it thus:

Parallel to the use of foreign law firms, the government helped develop the domestic legal sector (e.g. through association of law firms Law Firm Study Centre/CESA's technical group on trade) and 53 young lawyers

from 38 Brazilian law firms 2003-07 went to Brazil's Mission in Geneva for training.<sup>73</sup>

It is true that many training programmes and conferences have been provided by the private sector, but there are still too few establishing in depth understanding of the legal requirements for all legal issues in order to deal with cases professionally inside or outside Saudi Arabia. The Saudi government needs to take a more emphatic approach to this issue as it has a direct effect on Saudi industries as well as on the entire Saudi domestic economy.

Moreover, Saudi Arabia must consider a potential role as a member in the Advisory Centre on WTO Law (ACWL),<sup>74</sup> which is an intergovernmental centre with a long history of handling WTO dispute settlements. As assured by van den Bossche and Zdouc: "Since its establishment, the ACWL has become a major player in WTO dispute settlement..."<sup>75</sup> which provides help free of charge to its members. Were Saudi Arabia to join the ACWL and support it financially it would have access to a broader understanding of dispute settlement practices under WTO provisions. The centre will also differ when taking advice from law firms, as it has a vast experience of dealing with WTO dispute settlement systems on the one hand, and aims to support its members on the other. In contrast, the aim of law firms is typically to make more money from clients; thereby limiting clients' understanding of how to use the WTO dispute settlement mechanism. Therefore, it would be

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<sup>73</sup> Mihaela Papa, 'Emerging Power in International Dispute Settlement: From Legal Capacity Building to A Level Playing Field?' 2012, *Journal of International Disputes Settlement*, 83, 94. (Footnote Omitted).

<sup>74</sup> ACWL is a non-profit organisation based in Geneva. It was established in 2001 and is an advisory centre for any legal issues relating to WTO provisions. It aims to help members of the WTO who have the ability to challenge legal matters under this agreement. This centre is focused on those WTO Members in developing countries, as they do not have much experience of such disputes and legal matters and may not have the financial ability to obtain legal consultations. For more information about this centre, available at <[http://www.acwl.ch/e/about/about\\_us.html](http://www.acwl.ch/e/about/about_us.html)> accessed 1 June 2014.

<sup>75</sup> Peter van den Bossche & Werner Zdouc, *The Law And Policy of the World Trade Organization* (3rd edition, Cambridge University Press, 2013), 301.

beneficial for Saudi Arabia to join this centre to improve its ability to handle WTO provisions in relation to dispute settlement. India exemplifies a country that has benefitted from such involvement, i.e.:

As a result, India first became one of the founders of the ACWL in 2001 and then one of its most frequent users. Even as India developed domestic in-house capacity, it would still occasionally seek legal opinion from the ACWL and also from outside law firms before initiation a WTO disputes.<sup>76</sup>

It is important for Saudi Arabia to participate in dispute settlements as a third party, as this will further understanding of the scope of the WTO agreement. Papa clarifies that “Being a third party allowed them to monitor the proceedings and express their views on the interpretation of WTO rules”.<sup>77</sup> It will also help Saudi Arabia acquire a larger knowledge base regarding the AD and anti-subsidy agreement,<sup>78</sup> and will keep Saudi Arabia up to date with new techniques to manage AD and anti-subsidy cases, which will be beneficial when seeking to defend Saudi petrochemicals products against such cases in future.

### **5.2.7 Reviewing the GCC AD law and related domestic regulations**

Saudi Arabia is tied to the GCC with regard to AD and anti-subsidy legislation and processes.<sup>79</sup> The GCC AD committee usually undertakes the entire process.

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<sup>76</sup> Mihaela Papa, ‘Emerging Power in International Dispute Settlement: From Legal Capacity Building to A Level Playing Field?’ 2012, *Journal of International Disputes Settlement*, 83, 95. (Footnote Omitted).

<sup>77</sup> Mihaela Papa, ‘Emerging Power in International Dispute Settlement: From Legal Capacity Building to A Level Playing Field?’ 2012, *Journal of International Disputes Settlement*, 83, 94.

<sup>78</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>79</sup> In the GCC Summit No. 31 in Abu Dhabi on 7 December 2010, anti-dumping and anti-subsidy measures were adopted for all the GCC countries. After which, Saudi Arabia was issued a Royal Decree to accept this law as part of its internal legal system, available at <[www.gcc-sg.org](http://www.gcc-sg.org)> accessed 1 June 2014.

However, AD legislation includes a defect, formulated in some articles of this legislation. For example, in Article 2 of the Union Legislation for AD and Countervailing Measures for GCC countries, which concerns definitions, the legislator has defined dumping as “exporting to any of the GCC members a product with an export price lower than the normal price in the normal trade”.<sup>80</sup> In this definition, there is no need to include the term “*normal trade*”, as normal price under the WTO does not distinguish between different trade circumstances. Thus, there is no concept of “normal trade” under the WTO. However, this definition does not tie this product to similar products from the exporting country. In the author’s view, the definition of dumping should therefore be: Exporting to any of the GCC members a product similar to GCC products with an export price lower than the normal price.

Moreover, GCC AD legislation considers dumping, subsidy and countervailing measures combined and identifiable as either temporary or final measures.<sup>81</sup> The AD and anti-subsidy regulations are expressed in a number of different articles and implementations under the WTO agreement,<sup>82</sup> and should be in separate pieces of legislation under the GCC. However, GCC legislation does not focus on the AD process, rather it refers to the AD committee under the GCC, discussing how it can cooperate with GCC government sectors. Nevertheless, the GCC has issued an implementation law to support AD legislation, which covers and amends most of these legal and technical issues.

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<sup>80</sup> GCC Common Law of Anti-dumping Countervailing Measures and Safeguards available at <<http://sites.gcc-sg.org/DLibrary/index-eng.php?action=ShowOne&BID=190>> accessed 1 June 2014.

<sup>81</sup> GCC Common Law of Anti-dumping Countervailing Measures and Safeguards available at <<http://sites.gcc-sg.org/DLibrary/index-eng.php?action=ShowOne&BID=190>> accessed 1 June 2014.

<sup>82</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

Conversely, Saudi Arabia has had to make a huge change to its legislation in relation to other industries and the trade sector. At present, it is still increasing subsidy programmes to these sectors, despite the GCC issuing union legislation regarding trade and industry, stating they are illegal and in breach of WTO provisions. This legislation needs further revision to make it compatible with the WTO. Furthermore, additional Saudi legislation requires updating in relation to these sectors, as some of the legislation is very old; meanwhile, other pieces of legislation, such as competition law, need to be activated.

An example of the above is the priority given in Saudi regulations to companies wholly owned by the Saudi government, by not applying competition law against them. Article 3 of the implementation of Saudi Competition Law states,

A. The provisions of the “Law” and the “Regulation” shall apply to all entities operating in the Saudi markets and various activities thereof. They shall also apply to any activity taking place abroad that leads to consequences contrary to fair competition within the Kingdom. B. The following shall be exempted from the provisions of Paragraph (a) above:  
1) any company or establishment fully owned by the state...<sup>83</sup>

The Saudi regulations give public institutions and government-controlled companies’ priority by not applying competition law against them, facilitating breaches of the WTO provisions. These regulations must therefore be re-regulated to insure compliance with the WTO provisions and to give the private sector priority to enter the Saudi market and compete without exception against companies who offer products inside the Saudi market.

Finally, Saudi Arabia must issue regulations to legalise the process of exporting from Saudi Arabia to abroad. A legal framework for these processes will

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<sup>83</sup> The Implementation of the Saudi Competition Law issued by a Royal Decree No. M/1 date 10 April 2000, article 3. See this law in the Bureau of Experts at the Council of Ministries, available at <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=60&VersionID=73>> accessed 1 June 2014.



enable reduction of the proportion of AD and anti-subsidy cases against Saudi petrochemicals products. Another legal framework that it is important to establish relates to organising Saudi investments abroad, in order to establish a link between Saudi industries and those abroad about prices, for example. It is anticipated that they might have less authority over investments abroad, as they fall outside Saudi jurisdiction. However, as the roots of these investments are inside Saudi Arabia, they will still have some influence, as is evident with regard to SABIC, which has investments outside Saudi Arabia.

### **5.2.8 Protecting Transparency in the Saudi Arabian Petrochemicals sector**

In the case of Saudi Arabia, in reference to the WTO, the Saudi government must do more if it is to fulfil all requirements to insure transparency, whether inside the country or outside when exporting products abroad. The Saudi Arabian government should make transparent all data about subsidising programmes associated with the petrochemicals sector

Regarding this principle of transparency, Saudi Arabia must work harder to achieve this. It is evident that there is limited transparency in relation to WTO provisions, especially concerning AD and subsidy agreements. For example, it has not been an easy process, for this researcher to obtain a copy of AD cases between Saudi Arabia and others, whereas it was easy to obtain such information from other countries.<sup>84</sup> There is still no clear understanding regarding why such matters must be confidential.

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<sup>84</sup> For example, there is now information about the anti-dumping cases between Saudi Arabia and India, Turkey and the EU countries. However, all the relevant documents for cases between Saudi Arabia and India are available to the public via the Indian Ministry of Commerce <<http://commerce.nic.in/>> accessed 1 June 2014. The same thing applies for other cases with Turkey and EU, as these are available to the public, who cannot find any such information about these cases in Saudi Arabia.

Saudi Arabia must present clear information about the relationship between the government and the petrochemicals sector. The government supports the sector financially, and the public should have access to data describing the precise scope of this support. This information will help to identify legal matters with regard to this sector to resolve problems. With regard to AD cases against the Saudi petrochemicals products,<sup>85</sup> and during AD investigations, Saudi petrochemicals industries were not given sufficiently clear information and did not critically observe the investigation.

It is emphasised here, that the Saudi Arabian government should stop any type of privilege to this sector, whether offering additional facilities, cheap power or raw materials. The Saudi Arabian AD authority must employ and present annual AD statistics for all sectors. It should endeavour to publish all details about AD cases, both inside Saudi Arabia and abroad. It is a requirement within the WTO agreement that there should be transparency in such cases, with all information made available to the public.

### **5.2.9 Saudi Arabia should work under the GCC in AD cases**

The GCC countries play a major role in the AD cases against Saudi Arabia and other GCC members. As the GCC is now responsible for handling these cases when brought against any GCC countries,<sup>86</sup> it has more power to push forward and end these cases quickly. As a result, this should have a positive effect on the Saudi petrochemical industries and on all the GCC countries as a group.

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<sup>85</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>86</sup> After the issuing of the GCC common anti-dumping law.

In cases brought abroad, the GCC countries have faced a number of issues; for example, when Saudi Arabia acted alone when negotiating its case with India<sup>87</sup> to bring about an end to AD duty levied against Saudi petrochemicals products.<sup>88</sup> However, Oman, another GCC country, was also involved, and its interests were not represented by either Saudi Arabia, or the GCC; this lack of coordination or cooperation between the GCC countries in the legal processes is a matter for concern.

In order to avoid the bringing of AD cases against GCC products in the future, a number of points must be agreed upon by the GCC countries before they unite to challenge AD cases:

1. The GCC countries must have a legal framework clarifying a range of AD cases and processes. The GCC should establish close coordination and cooperation by establishing a strong core. This will benefit GCC when working and moving together in cases brought against them abroad and when defending products inside their home countries against illegal action by the producers of similar competitive products.
2. The GCC countries must act as a GCC- *conglomerate* when negotiating with non-GCC countries to resolve AD disputes. This conglomerate must also be present to support exported products; for example, through including a label 'Made in GCC', which would help avoid illegal AD movement against them.
3. Where these products are exported by one conglomerate, all GCC countries would be considered when legal cases are brought against them on this issue.

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<sup>87</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014.

<sup>88</sup> It can be seen in Indian decision No. 14/5/2009-DGAD date 9 August 2012, that when the Indian anti-dumping authority withdrew anti-dumping duty on Saudi petrochemicals products and left the duty on Oman and Singapore, there were parties to this case.

For example, competition will exist between domestic products, as there are many companies in the GCC countries, all competing against one another.

This would involve a similar resolution to disputes as that pursued in EU countries. EU countries usually deal with cases as a single body, showing a united and strong presence.<sup>89</sup> This is clearly seen in the following statement by van den Bossche and Zdouc:

Measures by EU Members States can, and have been, challenged in dispute settlement proceedings brought: (1) against the EU Member States concerned; (2) against the European Union and the EU Member State(s) concerned; or (3) against the European Union alone. In all disputes involving measures of EU Member States, it was always the European Union which made the submissions and defended the EU Member State measure(s) concerned.<sup>90</sup>

This clearly shows that when resolving cases under WTO provisions, EU members act together and defend their products as a conglomerate not individually. This process gives EU member industries more strength and power in the international marketplace as well as affording them greater protection and legal support.

Such a conglomerate would be helpful in supporting all GCC countries when exporting petrochemicals products, especially when looking to resolve and reduce AD cases. Such a conglomerate could then be considered active in resolving cases against Saudi Arabia and against other GCC countries in the case of disputes related to AD provisions.

However, GCC members must also establish a clear legal framework with regard to the relationship between themselves and third parties in any legal treatment or disputes. All the GCC members are also in the WTO; therefore, agreements

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<sup>89</sup> See the European Commission, available at <[http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/index\\_en.htm](http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/index_en.htm)> accessed 1 June 2014.

<sup>90</sup> Peter van den Bossche & Werner Zdouc, *The Law And Policy of the World Trade Organization* (3rd edition, Cambridge University Press, 2013), 171 (Footnote Omitted).

between both the GCC and WTO must be clear and uniformly applied. This applies to NAFTA members, when they experience conflicts between themselves or with third parties. Article 2005 section two states:

Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify any third Party of its intention. If a third Party wishes to have recourse to dispute settlement procedures under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute normally shall be settled under this Agreement.<sup>91</sup>

Under this article, the relationship between the parties, third parties, NAFTA and finally the GATT is well organised, so that the parties have appropriate free trade movement between them and clear legislation pertaining to this.

Finally, the GCC acting as a conglomerate will insure a robust legal framework with which to defend petrochemicals products against future disputes, clarify the price inside the market, and smooth competition between domestic parties inside GCC countries. It will also provide a strong legal agency to represent GCC members when facing AD provisions abroad, and to protect them from dumping.

### **5.3 Conclusion**

Saudi Arabia needs to deal with contracting parties in the WTO in good faith, whether internally or internationally. In order to act in good faith, Saudi Arabia needs to consider changes to its internal economic and trade legal system, in particular to introduce a truly competitive investment atmosphere between all parties, whether Saudi or foreign, especially in the petrochemicals sector. A truly competitive atmosphere will help to create more jobs for Saudis and improve the

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<sup>91</sup> See Article 2005 of NAFTA available at, <https://www.nafta-sec-alena.org/>, accessed 1 June 2014.

economic capability of the country in the long term. It will also be of benefit by generating a greater national income for Saudi Arabia and encouraging new technology to produce products to improve Saudi economic diversity.

The measures discussed in this chapter would help to resolve and reduce AD cases against Saudi petrochemicals products in the future. Authentic competition between Saudi petrochemicals products can be achieved by privatising the sector and ending government involvement in it. Moreover, the Saudi government should treat all investors in petrochemicals, whether Saudi or foreign, equally. This can be achieved by selling the raw materials to the petrochemical industries at global prices. Although Saudi Arabia has proportionally more resources in terms of raw materials than elsewhere, it must treat all industries equally under the law. It should not subsidise any sector, unless this type of subsidising is legally acceptable under the WTO provisions.<sup>92</sup> Meanwhile, Saudi Arabia should end its current plans for additional subsidies of this sector, to avoid facing AD cases against the petrochemicals products it exports abroad.

The major issue regarding the Saudi petrochemical industries is the government's share in these sectors and SABIC's ownership of the other petrochemical industries inside Saudi Arabia. Saudi Arabia needs to address this issue seriously to privatise the entire petrochemicals sector and open the door to foreign investment. Such precautionary measures can protect the Saudi petrochemicals products from AD cases, and help to increase the quantity of exports without breach of the WTO provisions.

Finally, exporting products under the umbrella of the GCC would help to avoid cases being brought against them. Exporting products under the GCC will

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<sup>92</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14.

create an environment of domestic competition, as exports will be treated as if from a single nation. However, the relationship between these countries, third parties and the WTO must be clarified, as all are members of the WTO. A framework of dispute resolution between GCC members must be introduced to resolve any legal issues to avoid the need to consult the WTO to manage legal issues between them.

## CHAPTER 6: TOWARDS A MORE EFFECTIVE RESOLUTION OF AD AND ANTI-SUBSIDY DISPUTES: ALTERNATIVE DISPUTE RESOLUTION AND THE NEED FOR AN ITC

### 6.1 Introduction

This chapter examines the Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU)<sup>1</sup> to demonstrate the effectiveness and weaknesses of these procedures in practice. It will also include additional proposals that could be applied to resolve legal disputes between parties in cases of AD and anti-subsidy.

The DSU is described and legislated for in the WTO agreement,<sup>2</sup> which has many articles relating to the procedures for dispute resolution in cases of international trade conflicts between contracting parties or companies. van den Bossche and Zdouc discuss “The WTO has a remarkable system to settle disputes between WTO Members concerning their rights and obligations under the WTO agreement”.<sup>3</sup> There are several options available for resolving legal disputes between parties under the WTO.<sup>4</sup> Yet, the dispute settlement mechanism has not yet been utilised successfully to resolve conflicts in a straightforward manner, affording advantages to all parties; indeed, article 3.7 of the DSU mandates that “the aim of the dispute settlement mechanisms is to secure a positive solution to a dispute”.<sup>5</sup>

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<sup>1</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

<sup>2</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

<sup>3</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 157.

<sup>4</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 161-162.

<sup>5</sup> Yuval Shany, *Assessing the Effectiveness of International Courts*, (1<sup>st</sup> edition, Oxford University Press, 2014), 196. (Footnote Omitted).



It can also be seen that the majority of contracting parties prefer to resolve legal matters relating to the WTO by initiating judicial processes at the national level, as seen in Chapter 3,<sup>6</sup> resulting in a high number of cases between its contracting parties in relation to AD.<sup>7</sup> However, the DSU prefers to resolve legal matters between the contracting parties out of court:

...the DSU prefers parties not to go to court, but to settle their dispute amicably out of court. Accordingly, each dispute settlement process must start with consultations (or an attempt to have consultations) between the parties to the dispute.<sup>8</sup>

The chief factors involved in these alternative dispute resolutions will be discussed in this chapter. Introducing alternative methods to resolve disputes could have a directly positive effect on all parties, enabling them to resolve legal conflicts involving international trade relations between nations quickly and smoothly.

This chapter will address the topics of dispute resolution relative to AD and anti-subsidy under the WTO agreement, as it is essential to effect dispute resolution swiftly when legal matters arise between parties. It will consider the weaknesses present in current dispute resolution mechanisms to avoid these weaknesses in future, and support development. The next stage will be to introduce alternative means of dispute resolution, offering a full explanation of all relevant articles and explaining why contracting parties currently avoid using dispute resolution

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<sup>6</sup> Example the cases against Saudi Arabian Petrochemicals Products in India, Turkey and EU. Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>7</sup> As mentioned in chapter 3 and according to two sources: 1- World Trade Organisation's website, figures for anti-dumping measures, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)>, accessed 1 June 2014 and, 2- The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

<sup>8</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 183. (Footnote Omitted).

mechanisms. It will also discuss the advantages and disadvantages of employing alternative resolutions and ways of developing legislation in order to utilise these articles more effectively, rather than using traditional judicial approaches to resolve WTO conflicts between parties. Such approaches also offer new ideas for resolving disputes between parties, establishing new centres for dispute resolution under the WTO DRC and an International Trade Court (ITC) to gain more control and further reduce incidents leading to disputes.

## **6.2 AD and anti-subsidy dispute resolution under the WTO agreement**

This section addresses the dispute resolution mechanisms under the DSU,<sup>9</sup> to support the reader's understanding of the mechanisms informing the rules. This section will be divided in two subsections; the first will provide an overview of dispute settlement mechanisms under the WTO agreement, particularly regarding AD and anti-subsidy legal matters. The second will address the weaknesses of these dispute resolution mechanisms.

### **6.2.1 Overview**

This section, addresses the formal processes of Consultation, Panels and the Appellate Body under the DSU. This overview will help to clarify the mechanisms available for resolving disputes, and help introduce the associated weaknesses referenced in the following section.

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<sup>9</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

### 6.2.1.1 Consultation

Conflicting parties in any legal dispute related to the WTO can resolve legal issues through consultation. Jackson analyses “The hope is that the parties will resolve their dispute without having to invoke the formal dispute settlement procedures”.<sup>10</sup> It is the responsibility of the disputants to determine which level the consultation requires: “The manner in which the consultation is conducted is up to the disputing parties”.<sup>11</sup> Once the conflicting parties are engaged in consultation the first stage is for each to gain a clearer understanding of the facts “During the consultation both parties try to learn more about the facts and about the legal arguments of the other party”.<sup>12</sup> The conflicting party must reply to the DSU within 10 days of receiving the consultation request, and has must enter the consultation process within 30 days.<sup>13</sup> Conflicting parties must enter the consultation process acting in a good faith;<sup>14</sup> i.e. “The DSU only requires that consultations... are to be entered into a good faith...”<sup>15</sup> However, the consultation must end within sixty days of the request being made; if this requirement is not met, the parties may request a panel to be established to resolve the dispute.<sup>16</sup> A consultation often fails to reach conciliation within the sixty

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<sup>10</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 152.

<sup>11</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 152.

<sup>12</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 152.

<sup>13</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 4.3.

<sup>14</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 4.3.

<sup>15</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 152.

<sup>16</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 4.7.

day time limit, and there is an option to extend the consultation rather than calling for a panel; Jackson notes, “In fact, consultations often go on for more than sixty days”.<sup>17</sup>

Typically, consultation has a positive effect in terms of resolving the disputes between parties; up “until the end of 2011, almost 42% of the 427 consultation requests were resolved at the consultation stage”.<sup>18</sup> However, these numbers have since reduced. As stated by Ahn, Lee and Park “...the role of consultation in settling the disputes has been significantly weakened in recent years”.<sup>19</sup> Moreover, it can be seen that the terms of consultation are not always clear to members: “In fact, what substantive requirements are in terms of consultation is not clear”.<sup>20</sup> In addition, it can be seen that conflicting parties often prefer action under judicial systems, such as panels or the Appellate Body, in order to resolve conflicts.

#### **6.2.1.2 Panels**

Under the DSU, instructions for the establishment of panels are set out in several articles in detail.<sup>21</sup> All articles afford panels an important role in the termination of disputes between conflicting parties.

In order to establish a panel, the desire to do so must be presented in writing at the relevant Dispute Settlement Body (DSB) meeting.<sup>22</sup> This written request

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<sup>17</sup> John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 153.

<sup>18</sup> Dukgeun Ahn & Jihong Lee & Jee- Hyeong Park, *Understanding Non-litigated Disputes in the WTO Dispute Settlement System*, (Journal of World Trade, 2013), 991.

<sup>19</sup> Dukgeun Ahn & Jihong Lee & Jee- Hyeong Park, *Understanding Non-litigated Disputes in the WTO Dispute Settlement System*, (Journal of World Trade, 2013), 991.

<sup>20</sup> Dukgeun Ahn & Jihong Lee & Jee- Hyeong Park, *Understanding Non-litigated Disputes in the WTO Dispute Settlement System*, (Journal of World Trade, 2013), 992.

<sup>21</sup> These are Articles 6 to 20 of the DSU. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

should include information regarding whether consultations have been held, the scope of the legal issue, and any other relevant details. There is a period related to preparation of the terms of reference made by such a panel, unless the parties to the dispute agree otherwise, within 20 days of the panel's establishment.<sup>23</sup> The panel must be composed of:

well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.<sup>24</sup>

The members of panels must be independent; in particular referring to their opinion and output; and must not be affected by any other factors, such as their citizenship.<sup>25</sup>

However, if there is no agreement between members of the panel within 20 days of its establishment, the Director-General, the Chairman of the DSB and the Chairman of related Councils or Committees shall determine the composition of the panel by appointing it applying a selection process.<sup>26</sup> Regardless of the means of its establishment, the panel should include at least one member from a developing

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<sup>22</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 6.2.

<sup>23</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 7.1

<sup>24</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 8.1.

<sup>25</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 8.1.

<sup>26</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 8.7.

country, if a developing country requests this, in a case where the conflict is between a developing and developed country.<sup>27</sup>

Once established, these panels take on two roles: supervision and legislative. Regarding the supervisory role, this can be clearly illustrated by referring to an AD case considered by a panel. In a case between the United States and Japan, there was specific mention of the panel's supervisory role. "[t]he Panel recommended that the Dispute Settlement Body (DSB) request that the United States bring its measures into conformity with the AD Agreement".<sup>28</sup>

In this case, it was recommended by the panel that the United States change its regulations to make them compatible with the AD Agreement, making the panel's role legislative. The panel's findings and conclusions were:

[t]he Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Panel Report [...], to be inconsistent with the AD Agreement and the [WTO Agreement], into conformity with its obligations under those Agreements.<sup>29</sup>

In this section, it can be seen that the panel's mechanisms under DSU rules can resolve conflict between parties. However, there are some weak points that will be addressed in this research after the overview section.

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<sup>27</sup> Article 8.10: 'When a dispute is between a developing country Member and a developed country Member, the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member.' DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

<sup>28</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001.

<sup>29</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, Part 241.

### 6.2.1.3 *The Appellate Body*

The Appellate Body is a unique system, referred to for the resolution of disputes between parties; “Thus was born another one of the extraordinary and unique features of the WTO DS process, namely the appeal procedure”.<sup>30</sup> It is the highest level to which disputing parties can take a case; it is similar to a *supreme court*, and considers the issue of law only; i.e. “An appeal shall be limited to issue of law covered in the panel report and legal interpretations developed by the panel”.<sup>31</sup> The Appellate Body differs different from panels and consultations with regard to processes by which its rules have been developed. John argues, “The Appellate Body, unlike panels, is explicitly given the authority to develop (in consultation) its own rules, and this can be an important power”.<sup>32</sup> However, third parties are not permitted to join at the Appellate Body level; it is stated, “Only parties to the dispute, not third parties, may appeal a panel...”.<sup>33</sup> However, the Appellate Body is usually composed of seven persons who are engaged to serve in the Appellate Body for a period of four years.<sup>34</sup>

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<sup>30</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 156.

<sup>31</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 17.6.

<sup>32</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 157.

<sup>33</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 17.4.

<sup>34</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 17.1 and 17.2 .

As mentioned in article 17.5 of the DSU,<sup>35</sup> the Appellate Body is expected to consider legal matters within 60 days: As defined by Jackson:

the appeal process is designed to be very speedy, so the normal timetable calls for a final report within sixty days of the appeal; although, this is sometimes extended to ninety days or more. This imposes enormous pressure on the Appellate Body members, so very heavy work weeks (including working in the evenings and at weekends) are not unknown.<sup>36</sup>

## **6.2.2 Weaknesses within the DSU**

This section considers those weaknesses in the DSU that require more consideration from contracting parties. There are many points to be discussed in this section; for example, the absence of an ability to resolve disputes using alternative measures, the failure to assist developing countries, transparency, political effects and errors in drafting. However, primarily it will concentrate on the rights of the private sector concerning the dispute settlement.

### ***6.2.2.1 The failure to resolve disputes using alternative measures***

Evidence shows no serious movement with regard to resolving the disputes between contracting parties under the WTO using alternative approaches, such as negotiations, mediations or arbitration. Thus, consultation is not progressing in a direction that will reduce the high number of cases between conflicting parties. As illustrated by Ahn, Lee and Park “In fact, consultation is supposed to serve conflicting roles: bilateral settlement oriented process on the one hand and a

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<sup>35</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

<sup>36</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 157.



mandatory pre-litigation procedure on the other hand”.<sup>37</sup> Contracting parties are less likely to resolve legal matters about the WTO in consultation. In addition, they state, “...the WTO members bring less consultation requests but at the same time they are less likely to settle by consultation”.<sup>38</sup>

Such an example offers no means to resolve legal matters in relation to AD legislation using alternative measures: Bourgeois explains “The WTO AD code does no longer provide for a mandatory conciliation stage, which is also absent under the DSU”.<sup>39</sup> Contracting parties to the WTO agreement must seek to resolve legal concerns under the WTO using alternative means if they are to halt the increase in the number of legal issues between them under the DSU. There should be greater engorgement for conflicting parties under the WTO agreement, to resolve disputes by applying alternative dispute resolution tactics.

#### ***6.2.2.2 Lack of assistance for developing countries***

Although some articles under the DSU extend support to developing countries, these countries require more attention and assistance from developed countries and the WTO itself. It is unfair for developing countries to attend dispute resolution proceedings without first being given access to full knowledge and understanding of the legal techniques applied under the DSU and the WTO agreement. Many developing countries require greater legal assistance on how to resolve disputes under the WTO, and to reduce the number of claims brought against them. At present, Papa states, “there is no WTO-like centre offering assistance to developing

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<sup>37</sup> Dukgeun Ahn & Jihong Lee & Jee- Hyeong Park, *Understanding Non-litigated Disputes in the WTO Dispute Settlement System*, (Journal of World Trade, 2013), 989. (Footnote Omitted).

<sup>38</sup> Dukgeun Ahn & Jihong Lee & Jee- Hyeong Park, *Understanding Non-litigated Disputes in the WTO Dispute Settlement System* (Journal of World Trade, 2013), 991.

<sup>39</sup> Facquer H. F. Bourgeois, “WTO Dispute Settlement in the Field of Anti-dumping Law”, 1998, *Journal of International Economic Law* 1, 266.

countries despite the increasing number of claims against them”.<sup>40</sup> Were one instituted, a centre might still be unable to offer adequate support to countries with a low understanding of the terms of the WTO agreement. Fairness between developing and developed countries with regard to legal skills and ability to deal with legal matters remains something that must be achieved.

### **6.2.2.3 Transparency**

The level of transparency is not adequate, especially with regard to panels. Panel data is not available to the public; Jackson explains, “As at September 2005 all proceedings have been closed to the public, and indeed portions are closed even to WTO members that are not parties”.<sup>41</sup> Transparency will demonstrate to the public that procedures are being conducted properly and legally.

In addition, transparency can prevent the corruption of the dispute process between conflicting parties. However, transparency should not affect judicial procedures, or breach confidentiality.

### **6.2.2.4 The political effect**

There is a political effect on governments proceeding from dispute resolution policies. There is pressure in such cases between countries, whether from Panels or Appellate Body members, and even within the conflicting countries, to resolve legal matters between them: Jackson observes,

Any such proposal would reintroduce a fundamental weakness that was present in the GATT DS producers, politicizing the DS process and encouraging diplomatic and their governments to divert their attention away from the reasoned argumentation and process of a juridical

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<sup>40</sup> Mihaela Papa, *Emerging Power in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?* (Journal of International Dispute Settlement, 2013), 87.

<sup>41</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 155.

procedure towards lobbying and diplomatic bargaining that would lead to the ultimate decision in a particular case.<sup>42</sup>

However, political and diplomatic pressure can have a negative impact on the dispute settlement process. However, it is acceptable to engage in political negotiations between conflicting parties, in order to resolve legal matters without burdening one or other party in a more emphatic way, particularly if that party is a developing country.

There have been some criticisms that the Appellate Body has been overreaching its mandate as set out under the DSU: “Others have criticized the Appellate Body as “overreaching its mandate” and engaging in “judicial activism” outside its competence and transgressing the allocated powers of the diplomatic process”.<sup>43</sup> This occurs when the DSU’s aim to resolve disputes between parties, extends beyond that acceptable under regulations. Some legal scholars have mentioned that the GATT is a legal system that is separate from international law, and which can support the notion of differences between international law and international commercial law. Shany considers,

some advocates supported the view that GATT was a separate regime, and therefore had a totally stand-alone jurisprudence and legal structure. Many others, including this author, opposed that view, and there are relatively numerous examples throughout the history of GATT that would oppose the “separate regime” theory.<sup>44</sup>

There is combining of the rules of international law and political treatment and the international commercial law. Nevertheless, the style of diplomatic and political

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<sup>42</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 201.

<sup>43</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 200.

<sup>44</sup> Yuval Shany, *Assessing the Effectiveness of International Courts*, (1<sup>st</sup> edition, Oxford University Press, 2014), 165.

pressure used under the DSU to resolve legal matters between parties does not apply at this stage.

The political pressure resulting from international law is evident when parties seek to agreed or amend rules under the WTO agreement regarding DSU. International Law differs in the treatment of parties when compared to International Commercial Law. Practitioners in the field of dispute settlement need avoid confusing these two types of regulations when resolving disputes between conflicting parties.

#### ***6.2.2.5 Faults in the drafting of DSU***

Faults are present in the draft of the DSU; Jackson observes, “A well- known fault in the drafting of the DSU has been perplexing”,<sup>45</sup> this can be seen in article 21 (5). This fault refers to promulgation of a DSU report to challenge whether the "losing" party is sufficiently implementing the obligations that the report noted as formerly neglected. Conversely, provision of Article 22 presents "the wining" party with a short period in which to propose near-automatically approved relationship measures, which are termed "compensatory". DSU Article 22 (6) provides procedures to challenge these measures. However, both sets of procedures are practically impossible to combine within the timeframes of the other procedures set out. This has been termed a "sequencing" difficulty; and it would seem more sensible to introduce a third-party panel to determine the appropriateness of the proposed measures prior to adoption. Several disputing parties have agreed in particular cases to an ad hoc understanding of how to resolve this problem by instituting changes to the rules of the DSU for specific cases only. Others contend

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<sup>45</sup> John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006) 203.

that no additional reform is necessary. Meanwhile, others have noted that the instability of ad hoc measures, and risk when one party might find some advantage to refusing to agree to a sensible understanding. Furthermore, some suggest that the procedures of ad hoc agreements can raise additional diplomatic considerations or bargaining processes which are not transparent, because the DSU rules are misleading. Most observers consider that this situation is an example of consensus paralysis, as the method to resolve the matter through changes in the DSU language is apparent.

#### ***6.2.2.6 Private sector involvement in dispute settlement***

The Vienna Convention<sup>46</sup> includes reference to at the level at which the WTO can be considered to comprise part of International Law. Jackson states “Consequently, it is still not easy to judge how the customary international law principle of treaty interpretation related to preparatory work will be utilised in the WTO jurisprudential system”.<sup>47</sup> As the WTO agreement is an agreement made between states, the private sector in general is not implicated in it; “From the very first case, the appellate Body has made it quite clear the WTO is part of the general international legal landscape for world affairs”.<sup>48</sup> Consequently, private sector representatives cannot attend alternative dispute resolution unless they do so as a third party under the auspices of

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<sup>46</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679.

<sup>47</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 166.

<sup>48</sup> The World Trade Organization, *The future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General, Supachai Panitchpakdi 2004, 52.

their governments. This idea relates to a principle in public international law,<sup>49</sup> which positions the WTO as a component in international law.

The limitations on the attendance of private sector representatives at dispute settlement proceedings under the DSU can be seen as one of its weakness; i.e. it requires the involvement of governments to resolve legal issues: Peter states

Companies, industry associations or NGOs cannot have recourse to WTO dispute settlement, nor can they join consultations or be a third party or third participant in panel or Appellate proceedings. Yet it would be incorrect to state that companies, industry associations and NGOs are not ‘involved’ in WTO dispute settlement.<sup>50</sup>

The limitations affecting the private sector in such disputes under the DSU arise because the agreement itself does not support methods to resolve disputes in the private sector at the international level. Even though, trade disputes between the private sector usually relate to trade agreements without any involvement from WTO members. The DSU in article two mentioned that only certain parties are allowed to attend the disputes mechanism under the DSU:

...With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term “Member” as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decision or actions taken by the DSB with respect to that dispute...<sup>51</sup>

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<sup>49</sup> Under this principle, in the agreement between states, no parties can become involved in a particular case except the states concerned. In this situation and under the WTO, only the state can become involved in any cases related to the WTO provisions.

<sup>50</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 177.

<sup>51</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal

It is seen as a problem that disputes between private sector companies must be handled by governments, as those who are affected are often not well-represented by their governments, who have no interest in the legal matters affecting them. This provision requires reformulation, to allow private sector companies to resolve legal issues related to the WTO agreement under the umbrella of the WTO, without government involvement.

This governmental involvement in the WTO conflicts at the DSU level can be summarised by two points:

1. It is necessary for the government to become involved in the conflict, because of the types of cases that arise between parties. To clarify; a conflict between parties might relate to the implementation of any of the WTO provisions, where the other party to the conflict has suffered as a result of the implementation of the provisions(s) and disagreement exists over the understanding of the WTO agreement, as was the case between the USA and Japan.<sup>52</sup> In this particular case, the government was involved in the conflict as well as other companies, as they will be the first to be affected by the results of the resolution processes. Another example is that when the government is involved in the case itself, problems are introduced, as in the anti-subsidy cases between Saudi Arabia and others.<sup>53</sup> In anti-subsidy cases, the government subsidises the industries, and therefore it is by definition involved in the case.

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Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 2.

<sup>52</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001.

<sup>53</sup> Cases mentioned in chapter 3 between Saudi Arabia and India, Turkey and EU. Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)>, accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

2. Cases take place between private sector companies themselves, and so there may be no reason for the government to become involved. In this situation, the private sector can become involved in the DSU autonomously without the involvement of government, unless it is necessarily for the case to proceed.

AD cases affecting Saudi Arabia, typically related to Saudi products that have been sold at less than the normal price. Producers of these products are responsible for defending their pricing to the domestic authorities as well as at the DSU level. Therefore, it would be preferable for private sector individuals to have the option to defend their products without involvement from governments, especially when there has been no government involvement in the production, development or exporting of the product.

Those countries, which have signed the WTO agreement, have expressed an interest in communicating trade discussions among themselves. Shany argues,

Although WTO agreement are negotiated and signed by governments, their objection is not only to sustain governments' international cooperation efforts, but also to help "economic operators"- that is, producers, importers, and exporters- to conduct their business.<sup>54</sup>

However, their interests should also be compatible with the interests of the private sector. This is why the WTO agreement is to be applied to the private sector and why there is no need for governments to become involved and participate in dispute settlement concerning products from the private sector.

Because of this, contracting parties under the WTO must consider affording more access to the private sector, allowing them to apply their cases under the DSU directly and without cover from governments. The majority of the private sector companies involved in disputes tends to be major players in a globalised field, and

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<sup>54</sup> Yuval Shany, *Assessing the Effectiveness of International Courts*, (1<sup>st</sup> edition, Oxford University Press, 2014), 191. (Footnote Omitted).



not under the guardianship of their governments. In truth, some of these companies have as much access to wealth as some developing countries, and consequently are well equipped to represent their own interests in legal matters related to DSU.

An additional issue of concern is that foreign investors, operating within the state under investigation, may own a majority share in the companies involved in the disputes. In this case, the question arises: how would the government represent such investors in a dispute with another country in the DSU? Typically, the illegal processes of the trading parties damage the private sector. Although the government might suffer in some cases, private sector companies are those most affected, therefore it is reasonable that they receive the right to self-representation.

At present, representation is only granted on appeal to their domestic legal systems. Because private sector companies operate within member states, they are responsible for conducting their business disputes first within the domestic legal framework and in accordance WTO provisions. AD, for example, has a direct effect on the private sector and industries and can therefore affect national economic systems in the long term. However, in such cases, the private sector and industry must apply to achieve a dispute settlement through their governments; even though, Bourgeois argues “AD relates to conduct of parties rather than conduct of countries”.<sup>55</sup> As argued in this section, the contracting parties should adopt an option for the private sector to have access to the DSU to resolve disputes and take advantage of AD and anti-subsidy rules.

However, under the DSU it will now be impossible for the private sector to attend to disputes, as in article 2 the DSU limited the raising of cases under this agreement to members. For that reason, there is a need to amend the DSU agreement

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<sup>55</sup> Facquer H. F. Bourgeois, “WTO Dispute Settlement in the Field of Anti-dumping Law”, 1998, *Journal of International Economic Law* 1, 269.

to give the private sector “their right” to go through the DSU mechanism and defend their international trade interests under the WTO agreement in the future.

### **6.3 Alternative dispute resolution in cases of AD and anti-subsidy**

This section concerns DSU rules from different angles in order to identify *non-conventional* ways to resolve AD and anti-subsidy cases in particular, and conflicts related to the WTO agreement in general. Resolutions should be afforded more attention from contracting parties to avoid a lengthy legal process to resolve AD and anti-subsidy cases. This will reduce the time spent on pursuing cases, and reduce costs to the disputing parties. Collins states, “Furthermore, ADR [alternative dispute resolution] processes are likely to be less expensive than domestic courts and international arbitration...”.<sup>56</sup> Moreover, dispute resolution steps will help to terminate the conflict between the parties satisfactorily: van den Bossche and Zdouc explain:

Between 1 January 1995 and 31 December 2012, a total of 454 disputes [were] brought to the WTO, [...] the parties were able to reach an amicable solution through consultations, or the dispute was otherwise resolved without recourse to adjudication...<sup>57</sup>

This statement shows that a great number of disputes were being brought to panels because they could not be resolved elsewhere. Thereby demonstrating how important it is for contracting parties to use alternative means to resolve conflicts between them, to insure disputes can be resolved simply.

However, a question arises here as to the meaning of the phrase ‘alternative dispute resolution’. Use of the word ‘alternative’, distinguishes proposals from the

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<sup>56</sup> David Collins, “Alternative Dispute Resolution for Stakeholders in International Investment law”, 2012, *Journal of International Economic Law* 15 (1), (673-700) 676.

<sup>57</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 157.

‘traditional’. Nonetheless, some argue over the accuracy of using the word. Alternative in this section is understood to describe the methods applied when resolving disputes between parties. Ackerman explains,

The word ‘alternative’ suggests a deviation from methods of resolving disputes outside the courtroom. Thus, some have suggested that the term ‘appropriate dispute resolution’ better describes the array of devices available for the resolution of conflict.<sup>58</sup>

Arguably, there may not be much difference in terminology when deciding to use ‘alternative’ or ‘appropriate’ to describe dispute resolution between parties. However, the best way to describe this is by using the expression ‘different methods of dispute resolution’, as these methods can be applied at any time in the process even when parties are engaged in judicial action. Although ‘alternative dispute resolution’ is one option, it might accurately describe this method of dispute resolution.

Alternative dispute resolution is required between contracting parties to develop an ability to address issues like AD and anti-subsidy. Taking such steps will help to avoid government involvement in such cases “...there has to be a certain level of government involvement in the private action...”,<sup>59</sup> and this could potentially reduce the large number of cases between contracting parties.<sup>60</sup> However, involvement is considerable in each case “Each case will have to be examined on its facts to determine whether the level of government involvement in the actions of

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<sup>58</sup> Robert M. Ackerman, “Introduction: ADR: An appropriate alternative?” 1997, *Willamette Law Review* 33. 498.

<sup>59</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 164.

<sup>60</sup> Chapter 4 discussed the statistics related to the anti-dumping conflict, which is growing rapidly and requires more attention in order for the number of these cases to be reduced. See these two sources: 1- World Trade Organisation’s website, figures for anti-dumping measures, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)>, accessed 1 June 2014 and, 2- The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

private parties is such that these actions can be properly attributed to a Member”.<sup>61</sup> Moreover, it will help to accelerate trade exchange between nations without encountering obstacles, such as legal issues or processes; as such cases have increased considerably since the 1980s, threatening free trade between nations.

Some means of resolution were mentioned in the DSU, while others suggested a more logical way of dealing with issues by developing legal methods.

Peter analyses that,

Of these methods, arbitration under article 25 and good offices, conciliation and mediation under article 5 have only played a marginal role; in almost all WTO disputes, Members had recourse to consultations, and, if those were unsuccessfully, adjudication.<sup>62</sup>

These methods need to be applied more with regard to AD and anti-subsidy cases, in order to reduce the large number of disputes affecting these types of cases. Nonetheless, WTO AD provisions do not compel parties to resolve disputes using alternative actions, such as mediation and arbitration.

However, article 5 of the DSU<sup>63</sup> states that conflicting parties can undertake the procedures of good office, conciliation and mediation voluntarily. On this point, it can be seen that the agreement itself gives conflicting parties the option to either pursue alternative options, or abide by the judicial process. Moreover, these articles do not encourage contracting parties to resolve and terminate conflicts by using alternative methods, but instead compel conflicting parties to embark on a period of

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<sup>61</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 164.

<sup>62</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 306.

<sup>63</sup> This article of the dispute settlement agreement organises these methods to resolve the legal issues between contracting parties. However, it is a brief article, and cannot reflect the importance of these methods. It needs to include more detail if it is to encourage contracting parties to use this method over alternatives. See DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 5.

mediation or conciliation. In reference to this point, contracting parties do not prioritise alternative approaches, but instead prefer traditional methods for ending conflicts under the DSU.

The positive significant effect of alternative methods of dispute resolution mentioned by the DSU (i.e. good offices, conciliation, mediation and arbitration) should be analysed here. Encouraging contracting parties to resolve any legal issues by promoting alternative dispute resolution in the agreement itself as a way of starting the process of AD and anti-subsidy will help in a number of different ways:

1. It will lower the cost of continuing a claim between the conflicting parties by: reducing the cost to the government sector, the need to prepare qualified people (i.e. lawyers and economists) to follow up on cases and undertake investigations, interviews, and other elements of the process. Beginning with a negotiation could help reduce the cost cases, which cause expense to all parties.
2. It will save time for anyone dealing with cases when they are involved in the judicial process, and will allow them to focus on the most serious cases. Moreover, the time required for processing issues will be shortened if they can be resolved without recourse to litigation.
3. It will limit the total number of cases, because many would be resolved without recourse to the AD authorities. Perhaps the process might need to come under the supervision of domestic AD and anti-subsidy authorities, for alternative approaches to meet WTO agreement standards and avoid illegalities arising. Any decrease in the number of cases would enable authorities to concentrate on other cases and collect information for a database that would be useful to authorities in the future.

4. It would help to avoid a reduction in the quantities of exported products and limits export until completion of negotiations or location of strong evidence of serious damage to either or both the domestic industries concerned. By regulating these processes, it will be easy to acquire a definition of AD and anti-subsidy techniques and terms in practice, so that such processes become better regulated between the contracting and conflicting parties.
5. It will help to increase the export and exchange of goods between contracting parties in general, without raising new legal issues or barriers, which might otherwise affect the process of exporting.

### **6.3.1 Good offices, conciliation and mediation**

Article 5 of the DSU refers to good offices, conciliation and mediation in relation to the termination of conflict between contracting parties,<sup>64</sup> whether it is an AD and anti-subsidy conflict or another international trade-related conflict. It is true that good offices, conciliation and mediation differ entirely from negotiation. Negotiation can be considered a part of good offices; however, conciliation and mediation are unlike negotiation, because a third party often handles them. Mediation involves a third party in the dispute, in order to resolve the dispute between the parties. Malkawi considers “Mediation is the process by which a neutral third party assists dispute parties in reaching a voluntary resolution of their disputes”.<sup>65</sup>

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<sup>64</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 5.

<sup>65</sup> Bashar H. Malkawi, “The feasibility of alternative dispute resolution to resolve intellectual property disputes in Jordan”, *Journal of Intellectual Property Law and Practice*, 2013, (146-153), 147. (Footnote Omitted).

Article 5 does not include these approaches to ending conflicts as part of the legal processes involved in disputes under the WTO, in order to avoid any negative impact resulting from the misapplication of regulations. It only mentions the process as it affects this way of ending the conflict, as it is an optional method for conflicting parties to choose. Jackson states “The DSU also provides for voluntary mediation at any time (an option which is rarely used)...”.<sup>66</sup> Article 5 requires conflicting parties to *agree* to perform good offices, conciliation and mediation.<sup>67</sup>

The DSU needs to be reformed to encourage conflicting parties to follow procedures set out before embarking on a judicial process. This is similar to most domestic judicial systems, where one party files a case against another, especially in a trade conflict; the court gives the parties time to try to resolve legal issues between them without taking any further action. Encouraging conflicting parties to resolve issues by allowing a period in which to utilise this article in conflicts between parties would therefore help to reduce the number of cases related to WTO provisions (especially AD and anti-subsidy cases). Conversely, it would also reduce costs and save time for all involved.

However, the most important benefit of alternative methods is the limitation placed on government involvement in international trade cases related to the WTO agreement, as well as a reduction in the number of cases. The cases related to the WTO agreement, especially AD and anti-subsidy, are increasing in number rapidly, which might hitherto become an obstacle to trade movement and exchange.

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<sup>66</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 152. (Footnote Omitted).

<sup>67</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 5.

### 6.3.2 Arbitration

Arbitration is one of the possible processes mentioned in Article 25 of the DSU,<sup>68</sup> as appropriate for assisting in the resolution of a trade dispute between contracting parties in relation to free trade and the movement of products between parties. However, in reality, it is not utilised well in most conflicts, Jackson clarifies “...and for alternative procedure of arbitration, also rarely used”.<sup>69</sup> Contracting parties generally prefer to apply the judicial process to legal issues relating to the WTO, particularly in AD and anti-subsidy cases. Using this method to resolve legal issues would, however, hastens the process. Malkawi elucidates, “Arbitration and other ADR mechanisms tend to provide speedier resolutions of disputes than going through litigation in courts”.<sup>70</sup> Arbitration would also prevent interference by the government. Moreover, it is helpful for reducing the cost of the settlement between parties, as noted by Malkawi, “Arbitration and other ADR mechanisms can significantly reduce the cost of settlement”.<sup>71</sup> However, more clarification is needed with regard to AD duty in cases where arbitration decisions permit AD duty to be applied to any of the disputants.

Article 25 of the DSU emphasises that for arbitration to succeed, the issue itself has to be clear; it should be “clearly defined by both parties”,<sup>72</sup> and understood

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<sup>68</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 25.

<sup>69</sup> John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (1st edition, Cambridge University Press, 2006), 152. (Footnote Omitted).

<sup>70</sup> Bashar H. Malkawi, “The feasibility of alternative dispute resolution to resolve intellectual property disputes in Jordan”, *Journal of Intellectual Property Law and Practice*, 2013, 148. (Footnote Omitted).

<sup>71</sup> Bashar H. Malkawi, “The feasibility of alternative dispute resolution to resolve intellectual property disputes in Jordan”, *Journal of Intellectual Property Law and Practice*, 2013, 148.

<sup>72</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 25.



by both. Moreover, the conflicting parties, who might or might not agree, should determine the standard of clarity. In this research, the clarity referred to in this article could be specified more broadly, so that it can be applied to all parties, whether they are in arbitration or not. At present, an issue might be clear to one party, but without agreement, arbitration is not possible. Were this definition removed, the article could be broadly applied, thereby eliminating one obstacle to the contracting parties choosing arbitration to resolve conflicts.

Moreover, regarding AD and anti-subsidy regulations, the government should not intervene in these cases, unless *all* alternative means of resolving them legally have failed. This will limit state intervention in legal issues, and the process will cost less money and save time.

Article 25 of the DSU mentioned arbitration as one way to resolve the legal issues between contracting parties. However, in general, the implementation of AD and anti-subsidy measures has not been mentioned as a way to resolve disputes; nor does it encourage contracting parties to use it in conflicts related to them. Therefore, the only way of resolving legal matters, as mentioned in implementations related to AD and anti-subsidy is by filing legal cases through the judicial process.<sup>73</sup> This article clarifies arbitration by referring all processes to articles 21 and 22.<sup>74</sup> These articles are, however, poorly organised regarding arbitration; especially as regards the matter of applying duties or charges. They deal with arbitration as a government panel and do not mention the results of that arbitration, or how it will affect the involved parties.

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<sup>73</sup> That can be done by applying an investigation through the governmental anti-dumping sectors at the national level. Moreover, the processes under the DSU through consultation, panels and the Dispute Settlement Body.

<sup>74</sup> Article 21 refers to the Dispute Settlement Body and the implementation of this DSB, while Article 22 is concerned with compensation in the dispute settlement between parties. Thus, it can be seen clearly that these articles have not addressed sufficient attention to Arbitration as an alternative form of dispute settlement between parties in relation to the WTO.

The normal rules of arbitration cannot be applied in AD and anti-subsidy conflicts because there is generally no agreement between exporting and importing countries on AD and anti-subsidy rules. It is only when conflicts arise, that the need to establish agreements emerges. Thus, a slight change in the requirement in article 25 (i.e. that “[the parties] shall agree on procedures to be followed”<sup>75</sup>) is needed in this area. The arbitration here should be recognised as based, not on the agreement between the parties, but on the dispute settlement agreement as a method of resolving these issues.

The assumption of this research is that arbitration would take place between conflicting parties in relation to AD and anti-subsidy legal issues; those industries that have been injured or threatened by a dumped imported similar product should first send a letter informing the export company of this issue. The exporting industry should take advantage of the opportunity for negotiation and initiate this immediately. However, a copy of the letter, which is sent to the exporting industry, should also be sent to the exporting and importing countries, as well as the WTO, in order to make them aware of the conflict. After a limited period is allowed for negotiation, both parties should enter arbitration, rather than filing a case and involving their governments. The arbitration decision should conclude the conflict, and copies of the decision made should be sent to both countries concerned, as well as to the WTO: “Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto”.<sup>76</sup> With regard to the duty applied by this arbitration, it should be

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<sup>75</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 25.

<sup>76</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal

paid to the domestic industries as compensation not to the governments, as noted in the preceding chapters of this thesis.

It is recommended that arbitration decisions should be retained in a database to be accessible to all contracting parties, for use resolving any future legal issues swiftly. Furthermore, this will help to identify any legal issues in the agreement itself and outline the legal process to support changes to faulty legislation to develop them. Arbitration has a proven history in resolving conflicts affecting international commercial relationships; it has been used in this context for some time. The contracting parties to the WTO agreement should reconsider using it as an important means to resolve issues related to this agreement, as it will assist in ending conflict without interference from state parties.

As an example of use of arbitration as a method to resolve legal issues related to AD law, a case between the United States and the European Community (the EC, now the EU) will be analysed.<sup>77</sup> The EC initially requested consultations regarding the calculation of dumping margins known as ‘zeroing’. After many countries joined this consultation, the EU decided to request the establishment of a panel because there were additional determinations regarding the US obligation under the WTO.<sup>78</sup> Many non-EU countries joined as third parties and after many communications between parties concerning this issue, the DSB agreed to refer to arbitration, as both parties to the case requested arbitration. Arbitration brought a satisfactory resolution to the matter, and both conflicting parties accepted the decision made under arbitration.

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Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 25.

<sup>77</sup> Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006.

<sup>78</sup> Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006.

However, there may be cases where one of the conflicting parties chooses not to accept the decision made under arbitration; this then leads to the question of how the issue will then be resolved. The principle of arbitration is that there should be agreement regarding the judgment between conflicting parties, in order for a decision to be accepted and not appealed. However, any decision can also be reviewed by the ITC, the role of which will be discussed later in this chapter. This is the Supreme Court overseeing all global international trade judgments.

### **6.3.3 The role of AD committees as alternative means of resolving cases**

Under Article 16 of the Implementation of Article VI of the GATT, there is a committee established to deal with legal issues associated with AD.<sup>79</sup> A report must be made to this committee outlining any preliminary and final AD actions, as well as presenting a bi-annual report about AD actions taken by members. The committee should be notified of all domestic procedures central to the initiation and investigation of any action.

However, a question arises here regarding whether or not this committee should intervene in illegal processes or actions affecting AD cases at the domestic level. As mentioned in article 16,<sup>80</sup> the committee only requires that it be informed of AD actions or investigations; therefore, it has no power to deal with overflow caused by AD performed by the domestic authorities. Article 16 does not mention other related functions to this committee.

However, as has been seen, contracting parties can complain to the committee about any AD action that they consider illegal. The committee should

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<sup>79</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201. Article 16.

<sup>80</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201. Article 16.

play a major role at the international level in relation to AD to prevent an increase in such cases, as they could become an obstacle to the free movement of international goods between nations. When cases arise, contracting parties should submit a copy of each initial AD case or related decisions to the committee, to enable it to play a more active role, by checking on whether every individual AD initiation or decision and process and implementation of AD regulations is compatible with the AD Agreement or not. This process would help to reduce the numbers of this type of case and lead to amendment of the necessary articles through recommendations for a legal change.

#### **6.3.4 The role of more research into the DSU**

Research can be an effective way to develop new ideas and approaches in any field; this is especially true in connection with laws and regulations. Governments normally use the best researchers from universities and centres (relevant to certain topics) to guide them in making necessary reforms. These researchers typically examine laws or regulations theoretically and analyse all the ideas related to them.

However, contracting parties should be encouraged to direct more attention toward research related to AD and anti-subsidy measures to develop former policies, to address price discrimination better. The first AD regulation was established in 1904 in Canada;<sup>81</sup> it was further developed to become part of the WTO Agreement.<sup>82</sup> However, this regulation requires reform to deal with the relevant issues effectively, as noted in the previous chapters.

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<sup>81</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (3<sup>rd</sup> edition, Routledge 2005) 232.

<sup>82</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

Research typically requires considerable time to prove new ideas or develop them. However, it is not an easy process to conduct reform of the WTO agreement, as it differs from other international agreements in relation to the number of WTO members, making it the largest and most complicated international organisation.

A great deal of research has been conducted regarding the WTO agreement in general, and AD and anti-subsidy in particular. However, changes from the roots upwards have not yet been fully realised as free trade between contracting parties. One of the most important ideas thus far, has been to establish a research centre to deal with AD and anti-subsidy issues more actively; in particular, producing additional regulations, so that positive changes can result from cases brought. The body of research relating to the WTO, and AD and anti-subsidy in particular require greater consideration by the WTO and contracting parties, including extending values to assist them in developing to the agreement.

#### **6.4 The need for a DRC**

The WTO should create a centre for dispute resolution to act as a channel for all disputes related to international trade around the world under the WTO. There are many reasons for establishing a centre as follows:

1. To minimise the high number of disputes related to the WTO agreement, particularly AD and anti-subsidy disputes.
2. To understand the practical application of the WTO and the difficulties arising from the WTO agreement; this will help the contracting parties to make the required changes to the WTO agreement.
3. To reduce the time needed to resolve disputes between parties.
4. To reduce the interference by the government in disputes.

5. To be run by the WTO to insure complete neutrality when settling disputes.
6. To reduce the cost of the dispute resolution between parties; it will be paid for by fees paid by disputants and so be financially independent.
7. To run the dispute process in line with the WTO agreement, even in cases of alternative dispute resolutions, so that the parties do not have to deal with different departments or panels to resolve legal issues.

The centre would offer considerable benefit to contracting parties in general and conflicting parties in particular. All disputes under the WTO would be sent immediately to the centre and it would then seek a way to resolve disputes, using the methods mentioned in the previous sections, such as arbitration, mediation etc. The centre may also work on cases, creating committees to oversee each kind of dispute. These committees would be concentrating mainly on strategies related to the WTO, such as trying to reduce the number of conflicts and the WTO mechanism. However, as mentioned above regarding the AD committee, such committees can become involved with this centre to resolve legal issues between; that role can be undertaken before or after the involvement of such a centre in a conflict. This would help to resolve issues more smoothly and at a lower financial cost to parties.

The centre would have other benefits too; for instance, insuring government involvement in international trade cases is limited. Moreover, the centre would bring in modest revenue for the WTO, as the conflicting parties would be required to pay fees directly to it. This would support engagement in more activities related to international trade in general.

Another positive point when establishing a centre of this kind is to resolve the legal conflicts related to international trade between those parties who are not

members of the WTO, and who are in the process of becoming members under this agreement. Such a centre would, on the one hand, help parties to reform their domestic regulations in order for them to conform to the WTO, and on the other, give them a clearer breadth of understanding of the WTO and its dispute settlement procedures. Moreover, such a centre would be able to establish a section for resolving disputes between parties who are not members of the WTO and who have not applied for membership. However, there would be no legal obligation placed on these parties to attend the centre, although if they agree to resolve a dispute through it, this would mean they accept the WTO dispute settlement mechanism as the method for attaining a resolution. This could facilitate international trade, even for parties who are not members, by making agreements align more closely with WTO principles, to improve the mechanisms required for the globalisation of trade between states.

There are already similar centres, which have been established, and function well worldwide to resolve disputes between parties, for instance, the International Court of Arbitration and the International Chamber of Commerce (ICC),<sup>83</sup> as well as the London Court of International Arbitration (LCIA).<sup>84</sup> There is also the International Centre for Settlement of Investment Disputes (ICSID).<sup>85</sup> These centres all serve to resolve the disputes between parties, and the WTO could establish a similar centre to handle disputes related specifically to the WTO and international trade.

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<sup>83</sup> This is a centre for resolving disputes between conflicting parties in relation to international trade, and was established under the International Chamber of Commerce, available at <[www.iccwbo.org](http://www.iccwbo.org)> accessed 1 June 2014.

<sup>84</sup> This is a centre for resolving disputes between conflicting parties in relation to international trade, and was established under the International Chamber of Commerce, available at <[www.iccwbo.org](http://www.iccwbo.org)> accessed 1 June 2014.

<sup>85</sup> This centre has around 158 members, who benefit from it, in relation to resolving international investment disputes. It was established under the World Bank, available at <<https://icsid.worldbank.org/>> accessed 1 June 2014.



At present, a centre exists to assist in dispute settlement between members. This centre is the Advisory Centre on WTO Law (ACWL); it is an independent organisation established under the WTO,<sup>86</sup> which provides some services to developing countries to understand how they can resolve disputes brought under the WTO. The centre could be merged with the proposed centre and work within it. The suggested centre would then provide a complete service, resolving disputes between parties, and advising disputants on procedures, or means to resolve disputes, by applying WTO guidelines.

However, contracting parties may not believe there is a need for such a centre, as there are other methods for resolving legal matters. However, it is argued here that the centre would assist in the smoother resolution of legal matters between parties. It could provide valuable support to all parties, thereby shortening conflict durations and reducing costs. Were the proposal for such a centre adopted, it would be a place for resolving all WTO-related conflicts between parties, offer information on how legal issues can be resolved, and develop up-to-date WTO articles to meet the needs of contemporary trade. Thus, it is a valid and reasonable proposal, with many attendant advantages, for contracting parties to consider.

## **6.5 The need for an ITC**

An ITC, under the control of the WTO, would be another beneficial innovation, based on the research findings reported in this thesis. At present, there are no controls in place to assist in ending trade conflicts and supervising trade courts worldwide. Therefore, this proposed international court would both help to terminate and reduce international trade conflict under the WTO agreement simultaneously.

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<sup>86</sup> The official website of the Advisory Centre on WTO Law, available at <<http://www.acwl.ch/e/index.html>> accessed 1 June 2014.

Meanwhile, it would be able to supervise all international legal trade issues or misinterpretations of the WTO agreement worldwide (overseeing national trade courts); thereby, functioning as the Supreme Court for International Trade. The court will have many advantages for the international trade mechanism under the WTO agreement, but it will require a change to the current WTO and DSU agreements.<sup>87</sup> In addition, it will not be an easy step to convince contracting parties, as a long period of negotiation between them will be required to reach an agreement for the establishment of an ITC. Yet, the contracting parties must work towards a successful International Trade Agreement by preventing any governmental interference that affects the efficacy of the WTO, and giving full rights to international companies to enable them to deal with their international trade matters themselves. This can be done, by providing a fully separate jurisdictional process at the international level to confirm independence in international trade legal conflict between international business entities, such as would be achieved with the creation of an ITC.

### **6.5.1 Why the establishing of this court is important and the advantage?**

The establishment of an ITC must be based on logic and a strong argument. It would not be an easy step to take as there may be many disagreements regarding its efficacy and the necessity for it. Reasons for establishing an ITC are given in the following subsections:

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<sup>87</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

### ***6.5.1.1 Protecting enterprise and the world economy***

The idea of establishing this court is clearly based on major international trade issues between international companies having an effect on the international economic market. International trade cases brought by such companies involve complicated legal issues, and action can cost billions of dollars, and so necessitate speedy and independent resolutions. At present, companies typically resolve their legal differences by resorting to the domestic judicial system of one of the parties.

Many international companies have investments and assets worth billions of dollars, and are engaged in trade with other public or government sectors involving similar sums. Thus, the court's judgment has to be very careful and clear. This care relates to the effect of judgments against companies, as such judgment can immediately affect them, the countries where those companies have their head offices, and potentially also the international marketplace. International trade at the time when the WTO and DSU Agreements were established differed considerably from the current context. There has been a huge change in the extent of international trade and the regularity of movement of products worldwide. With this change in international trade, a change to the WTO agreement and the DSU mechanism is also required in order to achieve dispute resolution.

The current DSU agreement does not apply in cases of international trade between international companies who protect themselves independently. However, these international companies remain under the guardianship of their governments, and so can access the DSU mechanism under the WTO.

Therefore, the establishment of an ITC could be considered similar to the International Criminal Court, which was established to deal with cases and crimes

affecting the entire international community.<sup>88</sup> The ITC would deal with important cases that affect companies with a negative impact on the international community. Often the initial consequences of disputes are job losses, which affect domestic economies worldwide. By avoiding the negative consequences of prolonged action, the court will offer strong protection to both individual enterprises and the entire global economy.

#### ***6.5.1.2 The ITC will be stronger than the Appellate Body***

The Appellate Body is run under the auspices of politicians and diplomats, as shown in this research. The procedures undertaken by the Appellate Body blend International Law and International Trade Law, thereby making a sound decision, but one of those procedures is not necessarily. The ITC, proposed in this research would make sound judicial decisions without the need for political or diplomatic input from either party. This ITC would therefore be stronger in terms of independence, power, effectiveness and influence over contracting parties.

The ITC would be stronger than the current Appellate Body, as it would not be involved in any type of political process, or influence such a process. In addition, government interference in international trade conflicts will be minimised. The current mechanism under the DSU does not give the full legal rights to primary conflict parties, private companies, to obtain their rights and go through the dispute process without any interference from their governments. As a result, the influence of the current DSU agreement mechanism from political and governmental interference is evident; under this will be reduced and removed. This court will be protected from the power of politicians or governments, as they will not have any access to decision

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<sup>88</sup> For more information about the International Criminal Court, available at <<http://www.icc-cpi.int/>> accessed 1 June 2014.

making concerning choice of judges, or giving private entities their rights to a full process in court without government interference.

### **6.5.1.3 Neutrality**

When contracting parties experience conflicts under the WTO agreement, they typically begin proceedings at the national level. Resorting to the domestic legal systems of conflicting parties does not offer disputants the necessary neutrality, prescribed in International law.

To clarify this, we can consider the case of Apple and Samsung as retailers of smart phones, dealing in billions of dollars.<sup>89</sup> Apple filed a case against Samsung in the United States regarding certain legal issues related to Intellectual Property code and other legal matters.<sup>90</sup> As a result, Samsung was required to pay huge damages to Apple and was prohibited from selling Samsung smart phones in the United States for a specified period.<sup>91</sup> This judgment had a direct negative impact on Samsung itself, as well as on competitiveness in the marketplace in the United States. Meanwhile, Apple benefitted greatly, because of the reduced competition.

This was a very complicated case, especially given the reputation of both companies as top manufacturers of smart phones. However, although the judgment affected the companies themselves, consumers in the United States felt the greatest effects, as the judgment risked creating a monopoly. Therefore, in such cases, involving complex international trade legal matters and compensation running into billions of dollars a high level of neutrality is essential to proving a legal guarantee

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<sup>89</sup> Annual Report of the Securities Exchange of Apple for 2012 available at <<http://www.sec.gov/Archives/edgar/data/320193/000119312512444068/d411355d10k.htm>> accessed 1 June 2014. For Samsung, available at <<http://www.samsung.co.kr/samsung/outcome/performance.do>> accessed 1 June 2014.

<sup>90</sup> See BBC, available at <<http://www.bbc.co.uk/news/technology-19425051>> accessed 1 June 2014.

<sup>91</sup> See BBC, available at <<http://www.bbc.co.uk/news/technology-19425051>> accessed 1 June 2014.

to all interested parties. The outcomes of such cases can have a huge effect on the national revenue of countries and the international economic system itself.

Thus far, the allowances made for resolving disputes do not support the principle of neutrality sufficiently, and the issue of which law should be applied to support neutrality could be better addressed by establishing an independent ITC with highly qualified staff focused on managing legal matters affecting international trade.

#### ***6.5.1.4 The advantages of an ITC to International Trade***

The ITC is expected to have many advantages over the International trade mechanism. The most important one being to minimise government interference in the international trade conflicts between parties. Minimisation can be achieved by giving the right to private companies and other conflicting parties to access the DUS regulation and go through the dispute process without any interference from their governments. It can be seen that interference from government does not hasten conflict resolution, as political issues interfere. No political dimensions or pressures will apply under the structure of the ITC to save time and limit costs.

The main idea aim of the new structure is to reduce the level of international trade conflict between parties. The ITC will have the ability to guide other jurisdictions worldwide, placing them on the right path toward understanding the world trade agreement and the DSU. It will be such a supreme court, and will improve access to interoperate WTO and DSU agreements in a practical way, as it will be considered the highest international trade court in the world.

### **6.5.2 The relationship between the ITC, enterprises and contracting parties**

As mentioned previously, individuals and private sectors have no access directly to the WTO disputes resolution system. As clarified by van den Bossche and Zdouc, “Individuals, companies, industry associations, labour unions, international organisations and NGOs have no direct access to the WTO dispute settlement system...”.<sup>92</sup> As also discussed above, even if they are the party directly affected, when involved in disputes under the WTO private sector actors must be represented by governments and panels. In this researcher’s view, it is essential that companies who are influential within the global economy, should be able to file their cases directly with the WTO without any interference from governments; that is, they should not be seen as a third party.

The ITC would be set up to extend this right to private sector actors, to allow them to apply directly to the court, after exhausting all other methods for resolving legal issues, and without any interference from government. However, as the ITC will be a supreme court (overseeing trade matters related to the WTO), it should also honour the contracting parties (the countries themselves) as part of its obligation to the WTO responsible for its establishment.

As the contracting parties to the WTO are responsible for insuring their domestic trade legal system is compatible with WTO agreements, there is also a legal obligation form contracting parties to participate in such an agreement. Moreover, the legal obligation regarding this ITC will be the same as the WTO obligation, which is ultimately an obligation to the international community to support good international relations between all the states in the world.

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<sup>92</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 263.

### **6.5.3 The relationship between ITC and ADRC**

The relationship between the ITC and ADRC will be strong; they would be complementary bodies, and there would not be any type of conflict in the duties of each. The ADRC and its methods will aim to reduce the number of cases and issues related to the WTO between conflicting parties. However, the ITC will give more power to the ADRC to resolve conflicts between parties without any interference from their governments; which will help to resolve issues more quickly and easily. Conflict between parties will be resolved under the ADRC using ADR methods, by trying these methods with conflicting parties and pushing them to find middle ground to resolve issues between them. Conflicting parties will have the support of the ITC in order to ensure quicker resolution of issues in less time. This would also reduce the number of international trade conflicts between parties without any interference from governments.

### **6.5.4 The relationship between the ITC and the Current Appellate Body**

There is a similar arrangement to this suggested court, under the WTO, and the Appellate Body. Ehlermann, who used to work there as a judge, referred to it as the “World Trade Court”,<sup>93</sup> Article 17 of the Dispute Settlement sets out the work of this Appellate Body.<sup>94</sup>

However, it is arguable that this body does not have much effect on resolving conflicts between parties, and so there remains a need to establish an ITC. The

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<sup>93</sup> Claus-Dieter Ehlermann, “Experiences from the WTO Appellate Body”, *Texas International Law Journal*, 2003, 38, 469.

<sup>94</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 17.



Appellate Body considers the cases referred from panels only as stated in article 17, section 1 “...The Appellate Body shall hear appeals from panel cases...”.<sup>95</sup> This means that no cases can be brought directly by a conflicting party to the Appellate Body for consideration, as cases have to be filtered before going to a higher level, in order to resolve the legal matters between parties. Another point to consider regarding the Appellate Body relates to who can appeal to it.

The only parties who can do so are those stated in article 17, section 4 “Only parties to the dispute, not third parties, may appeal a panel report...”.<sup>96</sup> Nonetheless, a third party who has an interest in the cases heard by the Appellate Body, may be allowed to submit a written opinion and may be heard by this body. As discussed by van den Bossche and Zdouc,

Third Parties which [have] notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of article 10 may make a written submission to, and be given an opportunity to be heard by, the Appellate Body.<sup>97</sup>

If this court could be established, there would be no reason to continue resolving legal matters through the Appellate Body, and its functions could all be transferred immediately to the newly established court. The Appellate Body would merge with the new court, requiring a changing in the DSU and the WTO agreement itself as detailed in the next section.

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<sup>95</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 17, section 1.

<sup>96</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). Article 17, section 4.

<sup>97</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 157.

### **6.5.5 Is there a need to amend the DSU and WTO to establish the ITC?**

The ITC would be run by the WTO agreement, and judges with high qualifications would be selected by the contracting parties to insure the highest standard of dealing with these trade-related legal issues. This could then support a higher level of judgment, which would offer a greater legal guarantee to the conflicting parties. The court would also help to apply many of the WTO articles with greater neutrality than can be guaranteed through other avenues of resolution. As mentioned above, the Appellate Body could then be merged with the ITC, requiring amendment to the WTO agreement and DSU, to establish the court quickly. The new ITC would support the globalisation of trade and be the only option for a final judicial step to resolve trade conflict worldwide.

## **6.6 Conclusion**

Significant effects on time, costs and the smooth movement of goods internationally would be the most important elements for encouraging conflicting parties to resolve disputes through alternative resolution. These alternative dispute resolutions include good offices, mediation and arbitration.

By enacting these resolutions, conflict can easily be terminated via the suggested dispute resolution centre. While dispute resolution has been defined under the WTO agreement, there remains a need to incorporate more inclusive and thorough articles to encourage contracting parties to resolve conflicts efficiently.

The dispute settlement process needs to be reformed, even though it is already working well, as the Consultative Board to the Director-General states,

First, while there are some grounds for criticism and reform of the dispute settlement system, on the whole, there exists much satisfaction with its practices and performance. Second, in appraising ideas for

reform or improvement, the most important principle is to ‘do no harm’. Caution and experience are needed before any dramatic changes are undertaken.<sup>98</sup>

Nonetheless, these changes to the WTO will require consensus from all the members: “Thus, amendment of the DSU will be needed, and this requires consensus, which can be blocked by any WTO Member”,<sup>99</sup> and this might be not easy to achieve.

However, this research recommends that it is important to establish both a DRC and the ITC. Through the suggested steps and models, disputes could then be resolved through the Centre as an initial step. The centre would handle a number of different methods for achieving a legal resolution. However, when the centre would be unsuccessful, the dispute could then be transferred immediately to the ITC to make a final decision.

These changes would represent dramatic improvements under the WTO agreement regarding international trade between parties; helping to unify the regulations of international trade, to support globalisation, to unify laws at the domestic and international levels, and to hasten the resolution of disputes in a manner that provides justice to the companies and stakeholders involved.

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<sup>98</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 49.

<sup>99</sup> Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization*, (3rd edition, Cambridge University Press, 2013), 58.

## CHAPTER 7: CONCLUSION

### 7.1 Main findings and conclusion

The previous chapters have explained the importance of the petrochemicals sector and its products globally in general, and in Saudi Arabia in particular. Many countries worldwide consider this sector as comprising key industries, which create employment opportunities and generate profits, thereby increasing national revenue through taxation. The contracting parties to the WTO need to consider this sector more carefully, in view of the increasing numbers of AD cases brought against it worldwide.<sup>1</sup> More focused attention would assist international producers to increase the quantity of exports, while also decreasing the number of AD cases brought against them. Each state must also be encouraged to take additional action to open its domestic market to fair competition among petrochemicals companies.

In Saudi Arabia, the petrochemicals sector is one of the most crucial sources of national revenue, after the oil industry. It is critical in supporting the Saudi government's plans to diversify the national economy to reduce reliance on the petroleum sector. Saudi Arabia has strong and ambitious strategic plans for the future of its industries, especially the petrochemicals sector.<sup>2</sup> Despite its recognition of the importance of the success of this sector, the Saudi government is currently endangering it by failing to direct adequate legal and economic resources to compliance with WTO, resulting in difficulties associated with AD.

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<sup>1</sup> As mentioned in chapter 3 and according to two sources: 1- World Trade Organisation's website, figures for anti-dumping measures, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)>, accessed 1 June 2014 and, 2- The Global Anti-dumping Database under the World Bank, available at <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574930~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>> accessed 1 June 2014.

<sup>2</sup> The National Industrial Strategic 2020. See the Saudi Industrial Development Funds website, <http://www.sidf.gov.sa/>, accessed 1 June 2014.

Through the analysis of AD cases brought against Saudi petrochemicals products by India, Turkey and EU countries,<sup>3</sup> a number of legal problems have been identified. Saudi Arabia needs to examine the factors that have caused cases to be brought in the past, to fill in the legal gaps in its legal processes and avoid cases threatening future exports. Resolution of these issues, will improve the level of success experienced by the Saudi Strategic Plan for Industry.<sup>4</sup>

This thesis has considered the ramifications of Saudi Arabia's application of Islamic Law in its domestic legal system, to identify any potential conflict with WTO law. In fact, no essential differences were founded between the provisions of AD and anti-subsidy law under the WTO agreement<sup>5</sup> and Islamic law. Islamic law encourages competition between products, and has similar rules to the rest of the international community, regarding AD and anti-subsidy law. Therefore, it is determined here, that there is adequate compatibility between Islamic law and AD and anti-subsidy law under the WTO agreement.

The most important concern raised is the direct subsidising by the Saudi government of the petrochemicals sector. The Saudi government has stated that it plans to contribute around 24 billion UK Pounds into this sector in order to develop it.<sup>6</sup> However, the WTO provisions classify this as a prohibited subsidy. In fact, Saudi Arabia is a developing country and the Saudi government employs multiple

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<sup>3</sup> Indian case: 14/5/2009-DGAD, *India v Oman, Saudi Arabia and Singapore* [2009], available at <[www.commerce.nic.in](http://www.commerce.nic.in)> accessed 1 June 2014. Turkish case: 2008/40 and 2010/11, *Turkey v Saudi Arabia, Kuwait and Bulgaria* [2008] Turkish Gazette 27 092 – 27 569. EU case: 2011/c 49/10, *EU v Oman and Saudi Arabia* [2011], Official Journal of European Union c 49/16.

<sup>4</sup> The National Industrial Strategic 2020. See the Saudi Industrial Development Funds website, <http://www.sidf.gov.sa/>, accessed 1 June 2014.

<sup>5</sup> The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S., 201.

<sup>6</sup> This was a TV interview on a famous official economic Arabian channel (CNBC Arabic TV), available at <<http://www.youtube.com/watch?v=Izmk49du3LU>> accessed 1 June 2014.

subsidising programmes, including those for fuel, gas and electricity.<sup>7</sup> All subsidising at the domestic level has a direct effect on prices, leading to dumping, when products are exported for sale in international markets. Saudi Arabia's subsidising programmes, are not in themselves a problem, the problem arises from the failure to control pricing when they are sold on the international market in competition with other countries' products.<sup>8</sup> It is how subsidies effect the pricing of petrochemicals products when exported abroad, which leads them to be classified as prohibited under the WTO provisions.

In addition to subsidy, the Saudi government supplies SABIC with low-priced raw materials for manufacturing petrochemicals products.<sup>9</sup> Thus, the price to SABIC of raw materials does not match global market prices,<sup>10</sup> ultimately resulting in differences in the pricing of the products from those of other nations when exported. Saudi Arabia could resolve this issue by supplying SABIC with raw materials at prices in line with global pricing.

An additional concern is raised in reference to the level of government shares in the petrochemicals sector. Saudi Arabia dominates petrochemical industries through its holdings in SABIC and other petrochemicals companies. The Saudi government shareholdings total 70% of SABIC's shares,<sup>11</sup> which makes it difficult for other investors to enter this industry and compete.

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<sup>7</sup> See report by Reuters Arabic news, available at <<http://ara.reuters.com/article/businessNews/idARACAE9B2FFP20131110>> accessed 1 June 2014, Also see the Trade Policy Review, prepared by the Secretariat of the World Trade Organization, Report no. WT/TPR/256, 21 December 2011, vii.

<sup>8</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 4.

<sup>9</sup> The Turkish Anti-dumping case against Saudi Arabia: 2008/40 and 2010/11, Turkey v Saudi Arabia, Kuwait and Bulgaria [2008] Turkish Gazette 27 092 – 27 569, 4.

<sup>10</sup> See the Saudi American Bank report (SAMBA), Report Series August 2009, available at <<http://www.samba.com/>>, accessed on 1 June 2014.

<sup>11</sup> SABIC, available at <<http://www.sabic.com/>> accessed 1 June 2014.

Through analysis of AD cases brought against Saudi Arabian petrochemicals products, the impact of such cases has been found to be discussed in the following section.

### **7.1.1 The impact of these cases on Saudi Arabia**

The impact of the AD cases against Saudi petrochemicals products can be divided into three categories, to clarify the relevance of this problem long term; i.e. legal, economic and political impact.

#### ***7.1.1.1 Legal impact***

An increasing number of AD cases around the world, whether against Saudi petrochemicals products or other products, will have a negative impact on the use of AD legislation. According to WTO statistics regarding AD cases,<sup>12</sup> there were just 879 AD initiations out of 4358 cases on products from chemical and allied industries;<sup>13</sup> this represents 20.16% of total AD initiations. Moreover, some AD cases could be deemed false allegations, as they themselves negatively affected the legislation, enabling domestic producers to increase their prices of similar products, as mentioned in chapter four. The purpose of AD legislation is to ensure avoidance of unfair competition between domestic and the international products. However, the frequency of false allegations with regard to regulations could also result in unfair competition, which is considered as a negative legal impact of the AD regulation. The function of AD regulations is to prevent injury by the imported product to domestic industry; however, the frequent use or misuse of regulations has

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<sup>12</sup> These cases arose between 1 January 1995 and 30 June 2013.

<sup>13</sup> The Anti-dumping Initiations by the sector, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 1 June 2014.

established additional barriers against imported products, ultimately creating unfair competition.

However, there is a legal impact on Saudi Arabia from AD cases against its petrochemicals products. The Saudi Arabian government first became involved in such a case in order to protect its petrochemicals products from the AD duty. One of the Saudi Royal family members led a negotiation team regarding these cases, in order to give more strength to the negotiations to find a solution to AD cases brought against petrochemicals products. However, Saudi Arabia has issued a new amendment to AD duty, which has been approved by the Saudi government and shows the level of legal knowledge of the Saudi government reached concerning AD cases, both internally and externally.

#### ***7.1.1.2 Economic impact***

The economic impact of AD allegations on Saudi petrochemicals products will be separated into five points as follows:

##### ***7.1.1.2.1 Price and profit***

As seen in the SABIC figures presented between 2008 and 2009<sup>14</sup>, it has appeared that the decrease of income could be correlated with AD cases. However, after termination of the cases, following negotiations by a Saudi committee, profits increased in subsequent years. This reveals a relationship between the AD cases against SABIC products and decreases and increases in profits and income. Without the Saudi government's intervention in the termination of cases, these products

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<sup>14</sup> SABIC official website, available at <<http://www.sabic.com/>> accessed 1 June 2014.



would still suffer from AD duty, which might mean lower profits with higher product pricing in the international market.

#### *7.1.1.2.2 Competition*

If AD duty were to continue to be applied against the Saudi petrochemicals products, it would affect Saudi's petrochemicals ability to compete with other similar products in the international market. The loss of the ability to compete would be reflected in a loss of consumers, which would then mean that Saudi products would need more time to recover its consumer base, which could be costly.

#### *7.1.1.2.3 Sales quantities*

The effects already mentioned in terms of profit and price and ability to compete directly affect the sales volume of Saudi petrochemicals products. Following cases, sales were measurably lower in the overseas markets, due to the AD duty imposed against Saudi petrochemicals products.

#### *7.1.1.2.4 Development of the petrochemicals sector and products*

There is no evidence that AD cases have affected the development of this sector and products until now. However, if the imposition of AD duty were to continue, it would be expected to affect the sector and products in the long term. Nonetheless, the development of this sector in Saudi Arabia has not yet stopped and new industries are being established in Saudi Arabia and other countries, as companies' annual reports show. The reason for this is that the Saudi government has been subsidising the sector, both directly and indirectly. Moreover, the period of time over

which AD duty was imposed in previous cases has been short, thus the effects were minimal.

#### *7.1.1.2.5 Employment*

The figures<sup>15</sup> did not report any job losses during the periods in which actions were taken. However, one of the known side effects of both dumping actions and AD duty is job losses for both affected parties. Due to the situations tested in this study, the period of time during which AD duty was applied was not sufficiently long to judge whether it was a factor in job losses. This is why it is unclear whether AD had any impact on job losses related to AD duty against Saudi petrochemicals products.

#### *7.1.1.3 Political impact*

AD cases could result in negative political consequences for parties, if action prompted other issues to be raised. The cases that took place were addressed negatively in the Saudi media, which was one of reasons prompting this research. However, Saudi Arabia was extraordinary in its application of political pressure to terminate cases against Saudi petrochemicals products. This political influence can be seen as significant in ending disputes, even after the AD measures have been applied against its products. It is difficult to know what the negotiations included, as evidence was not available to the researcher, but diplomatic actions by the Saudi government were involved. Thus, the positive effect of political pressure on the AD cases is apparent.

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<sup>15</sup> The Saudi Ministry of Labour and Central Department of Statistics and information, reveals no such losses in jobs in the Saudi's petrochemicals sector. Moreover, it is difficult under Saudi labour law for employees to lose their jobs unless the company becomes bankrupt. Check Saudi Labour law on the official website of the Ministry of Labour, available at <<https://www.mol.gov.sa/>> accessed 31 December 2014. Also, see the official website of the Saudi Central Department of Statistics and information<<http://www.cdsi.gov.sa/>> accessed 31 December 2014.

## **7.2 Recommendations**

Having conducted this research, recommendations have been prepared and can be divided into four categories: recommendations for the Saudi Arabian's economic system; recommendations for amendments to the AD and anti-subsidy provisions under the WTO; recommendations for the dispute resolutions mechanism under the DSU; and finally new models for the petrochemicals sector globally beyond the WTO framework.

### **7.2.1 Recommendations for the Saudi Arabian economic system**

Saudi Arabia could employ the following to avoid the frequent AD cases brought against its petrochemicals products:

1. Saudi Arabia should stop direct subsidising of its petrochemicals sector, such as subsidising the development of the petrochemicals sector, as mentioned in the research. The petrochemicals sector should be left to develop independently without any intervention from government.
2. Saudi Arabia should sell raw materials to its petrochemicals sector at the global price, to avoid negative effects on pricing when the end product is exported. This would avoid the majority of the AD cases brought against the Saudi petrochemicals sector.
3. The Saudi government departments that deal with export, trade and industrial sectors should be given more capability to monitor domestic prices, in order to protect the industries inside the country. By monitoring pricing, government departments are able to build a large volume of data about pricing, both inside and outside the country, which can be applied to the relevant products, in order to protect them from AD actions.

4. The Saudi Arabian government has to reconsider its programme subsidising fuel and electricity. This programme has a direct impact on product pricing, whether in the domestic market or when exported abroad. The Saudi government should redirect its subsidising programme toward people who need it, by directing subsidy programmes to them.
5. The Saudi government has to create fair competition between petrochemicals products domestically; ideally, by selling its shareholdings in the private sector. Moreover, it will also help the private sector to become involved in investment in the petrochemicals sector, as it is hard to manage government shares in this sector.
6. The Saudi government has to encourage foreign and local investors to invest in the petrochemicals industries in Saudi Arabia. This will promote genuine competition inside the Saudi domestic market between different producers, which will then reduce the AD allegations against Saudi petrochemicals products abroad. Moreover, it will help to develop this sector and the Saudi petrochemicals products in general, in order to compete domestically and internationally.
7. Saudi Arabia and the GCC countries must consider the export of all types of goods in general and petrochemicals products in particular under the GCC umbrella, rather than exporting their products individually. *Made in the GCC* will be function as a stronger and more competitive mark, also reducing AD allegations, because of the authentic competition inside the GCC market.
8. GCC members should ideally face AD allegations against their petrochemicals products together. One body could address legal issues

against all these countries. This would require a very high level of cooperation and coordination.

9. The Saudi government must play a greater role in protecting its products by developing a greater awareness of the legal issues, their effects and how actions can be avoided. This will also help to implement a national strategy concerning the entire industrial sector.

### **7.2.2 Recommendations for amendments to the AD and anti-subsidy's provisions under the WTO**

Throughout this research, it has been evident that there are many weaknesses associated with AD and anti-subsidy provisions and their implementation. This section therefore focuses on these weaknesses, and on changes that might need to be made to develop and improve the WTO agreement so that it becomes more flexible and enables the smooth and free movement of trade between nations. Thus, there are five important points that require careful consideration by the contracting parties as follows:

1. AD duty decisions include only the imposition of this duty on exported products, proven to have caused an injury to the domestic similar products. However, these decisions should include a fixed amount of compensation to the domestic industries injured by this action in order for them to recover from that injury. Yet, the formula of this change must be worded very carefully to avoid encouraging the bringing of more cases to generate more income from the imported products, especially if some articles regarding AD remain unclear.

2. At present, there is no legal guarantee for parties under the AD provisions. As discussed in this research, most contracting parties use the same methods for applying AD processes. It is common for authorities working under the same domestic legal system to perform all legal processes of before imposing AD duties. Yet this should not be the case. The authorities should collect all the required information, complete all investigations and then transfer all cases to the commercial court in the domestic legal system. This would enable all parties to impose a legal guarantee and apply these regulations equitably.
3. In this research, the AD regulation was found to be outdated, and in need of replacement by a competition law. This law would then cover all aspects of trade and apply the principle of fair competition between products, whether domestically or internationally. Fairness can be applied through circumstances inside the national market only, without checking other markets, in order to apply duty as in AD processes. This would be one way to reduce the high number of AD cases around the world.
4. The idea of subsidy has to be reconsidered by all contracting parties, especially since the developed countries pumped billions of US dollars into their markets following the recent economic crisis. However, developing countries still need more time and regulations that are more flexible in order to support their industries, so that they can attain equality with the developed countries and have the ability to compete. This would enable developing countries to become more stable in terms of quality of life, and therefore discourage people from immigrating to developed countries to find a better life. Furthermore, it would provide fair treatment between all contracting

parties, as developed countries require time to develop products and already had capacity to compete in the international marketplace, even before the WTO agreement.

5. The final point concerns the ability of the private sector to enter disputes directly without any support from governments. This is a very important allowance to consider, as it would make it easier for conflicting parties to resolve any legal issues and would provide greater and immediate justice to injured companies. The legal arguments in favour of this have been discussed in this research, and can be applied together with additional changes suggested later in this chapter in reference to the generation of new models under the WTO.

### **7.2.3 Recommendations for Dispute Resolution Mechanism under DSU**

In this section, the recommendations will be divided into two subsections. The first discusses the importance of alternative dispute resolution mechanisms to resolve conflicts related to the WTO agreement between parties. The second section illustrates the new models under the WTO provisions, to ensure disputes resolutions between parties are easier and better organised.

#### ***7.2.3.1 Alternative dispute resolutions***

With regard to the WTO agreement, there has been no emphasis placed by contracting parties on activating alternative ways to solve the AD and anti-subsidy disputes. Consequently, investigation is considered, and then duty applied by the AD or anti-subsidy authorities, which is legal. However, as the number of cases is

increasing, the parties need to consider other ways to make the process easier and faster at lower cost and without any obstacles to trade movement and exchange.

The contracting parties should activate and employ other means, such as arbitration, mediation and good offices to resolve cases. By using these methods, the cost of cases will reduce, and the number of cases will decrease, especially those brought against petrochemicals products. As shown in this research, more than 20% of AD cases involve petrochemicals products,<sup>16</sup> and therefore the contracting parties should apply alternative methods to reduce these cases.

### ***7.2.3.2 New models under the WTO provisions***

There are two models that will help to reduce AD and anti-subsidy cases globally, as well as any other disputes under the WTO agreement. These two models are the establishment of a DRC and an ITC.

The DRC, would help the private sector to directly access decisions made by any of the contracting parties. It is strongly recommended, that this centre should be established under the WTO umbrella, to bring together all cases in a single centre to address international commercial and legal issues there, rather than matters brought elsewhere in the world.

Moreover, an ITC would act as a Supreme Trade Court to cover all the cases around the world. Furthermore, this could be an important step towards establishing judgments between parties in circumstances crucial to the functioning of the global market and the economy. The court would control excesses by domestic authorities and courts in order to apply the spirit of the WTO agreement.

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<sup>16</sup> The Anti-dumping Initiations by the sector, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 1 June 2014. The Anti-dumping Initiations by measures, World Trade Organisation, available at <[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)> accessed 1 June 2014.



#### **7.2.4 New models for the petrochemicals sector globally beyond the WTO framework**

As seen in this research, many AD cases are brought against petrochemicals products globally. Thus, it is important for the contracting parties to consider protection mechanisms for these products. The parties should establish an agreement regarding petrochemicals products, similar to that applied to agriculture, in order to reduce the large number of disputes against these products. Reducing the number of such cases would help the world to recover economically from financial crisis, in particular by bringing stability to the pricing of petrochemicals products, of which there are thousands being produced around the world. Moreover, it would help this sector to make greater improvements to products, rather than having to expend energy resolving legal disputes.

Furthermore, the establishment of an international petrochemicals organisation would emphasise the importance of this sector in supporting the development of industry. It would bring about more stability in the pricing of petrochemicals worldwide and the pricing mechanism could be conducted formally through this organisation after coordination with all parties, whether producers or consumers. The prices would be determined in the same way as oil pricing, under the control of this organisation and reflecting the international stock markets. In this way, all issues related to AD and anti-subsidy would end, as all parties would be able to agree on prices and production processes.

### **7.3 The future of the WTO**

The increases in AD cases threaten the future of the WTO agreement. This increase affects the entire mechanism by which the WTO agreement functions. The

increasing number of cases not only affects free trade between contracting parties, but also has the potential to result in economic warfare. Moreover, although dispute resolution is an important component of the WTO agreement, intentions to improve it might limit worldwide trade.

By implementing the changes to the WTO agreement, proposed here, trade between nations would benefit and AD actions between contracting parties would reduce, positively affecting the petrochemicals sector in all countries. The improved trade in petrochemicals products would reflect positively on the world economy, supporting recovery from crisis.

## APPENDIX: PUBLICATIONS ARISING FROM THIS THESIS



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April 25, 2014

Brunel Law School,  
Brunel University London,  
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England

**Dear Abdullah M. Mattar,**

Thanks for your submission of paper to *International Law Research*.

We have the pleasure to inform you that your manuscript has been accepted for publication. It will be published on the Vol. 3, No. 1, in November 2014.

**Title: Legal Analyses of the Compatibility of Anti-Dumping under the WTO in contrast with Islamic Law and Saudi Arabia's Domestic Law**

**Author(s): Abdullah M. Mattar**

If you have any questions, please do not hesitate to contact with us.

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June 16, 2014

Brunel Law School  
Brunel University London  
Uxbridge, England

**Dear Dr. Abdullah M. Mattar,**

Thanks for your submission of paper to *Journal of Politics and Law*.

We have the pleasure to inform you that your manuscript has been accepted for publication. It will be published on the Vol. 7, No. 3, in September 2014.

Title: Towards a More Effective Resolution of Anti-Dumping and Anti-Subsidy Disputes: Alternative Dispute Resolution and the Need for an International Trade Court

Authors: Abdullah M. Mattar

If you have any questions, please do not hesitate to contact with us.

Sincerely,

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**June 24, 2014**

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**Title: MEASURES SAUDI ARABIA SHOULD IMPLEMENT IN ORDER TO PREVENT THE IMPOSITION OF ANTI-DUMPING DUTY ON ITS PETROCHEMICAL PRODUCTS**

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