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The Anti-Danish Trade Boycott: Can it be Challenged under the World Trade Organization?

Bashar Hikmat Malkawi*

ملخص

قامت صحيفة دانماركية بنشر رسوم كاريكاتورية للرسول الكريم محمد صلى الله عليه وسلم عدّت مهينة للعالم الإسلامي. وفي ضوء هذا الفعل تمت مقاطعة تجارية للبضائع الدانماركية على المستوى الرسمي والشعبي في بعض الدول العربية. وبالمقابل هدد الاتحاد الأوروبي برفع قضية ضد هذه الدول أمام منظمة التجارة العالمية. يهدف البحث إلى تحليل المسائل التي تحيط بالقضية والدفوع التي يمكن للأطراف استخدامها. ويخلص البحث إلى أن كل من الدول العربية والاتحاد الأوروبي يملك ادعاءات وجيهة، إلا أنه يفضل حل الخلاف ودياً.

الكلمات الدالة: مقاطعة تجارية، الدول العربية، الاتحاد الأوروبي، منظمة التجارة العالمية، التجارة الحرة

Abstract

A trade boycott against Danish goods ensued from the publication of cartoons in a Danish newspaper that were considered insulting to the Muslim world. The European Union (EU) threatened to initiate a case at the World Trade Organization (WTO) against some Arab countries. The purpose of this article is to examine the issues which could arise out of the EU action. The article will examine if the EU has a valid complaint against Arab countries under the WTO agreements, and if so, under what provisions. This article also discusses the various defenses available to Arab countries. The article concludes that both Arab countries and the EU have valid claims, but argues that Arab countries stand to win the case.

* كلية الاقتصاد والعلوم الإدارية، الجامعة الهاشمية، الأردن.

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A dispute between the European Union (EU) and Muslim nations arose from anger in the Islamic world against the publication of cartoons in a Danish newspaper considered insulting to the Muslim faith. A trade boycott against Danish goods, which similar the Arab boycott of Israel, ensued from the cartoon controversy. European Trade Commissioner Peter Mandelson warned that any boycott against Danish goods was unacceptable and that the EU could initiate World Trade Organization (WTO) dispute proceedings against Arab countries, including Saudi Arabia, on Denmark's behalf.

Against that background the article examines whether the Arab boycott of Denmark is legitimate or not, and if so, whether the boycott could be subject to a dispute settlement case before the WTO. This article argues that both the EU and Arab countries have valid claims. However, Arab countries stand to win a dispute resolution proceeding. Section I of this article traces the history and development of the WTO from its predecessors, the General Agreement on Tariffs and Trade (GATT). Moreover, it explains the most-favored-nation and national treatment principles and provides a brief overview of the structure and operation of the WTO dispute settlement mechanism. Section II explores Arab countries and trade boycotts by looking at the Arab League boycott of Israel and focusing on the recent boycott of Denmark. Section III compares and analyzes the arguments and counterarguments that the EU and Arab countries, specifically Saudi Arabia, can raise on the issue of the legality of the boycott. Finally, the article provides conclusions and proposes amicable resolution of the dispute in an attempt to reconcile the concerns of the EU and Arab countries.

I. History of the WTO

Free trade resides on the notion of "comparative advantage," a theory promulgated by Adam Smith and advanced by David Ricardo.[1] Countries that produce certain products more efficiently than other countries have a comparative advantage and can provide those products to the needy countries in exchange for a different set of products that the needy country has a comparative advantage for producing.[2] This system of exchange of products is designed to increase prosperity in each

of the trading nations, raise trading nations' standards of living by infusing them with goods, increase the supply of unavailable products, and to increase competition.

World War II economically devastated many countries. Goods and services were scarce. Liberalization and regulation of trade were the obvious answers to the global economic catastrophe. In 1944, the Bretton Woods Conference was held in order to address the economic needs of countries suffering the loss of goods, services, and capital as a result of the world war.[3] As a result of Bretton Woods, the International Monetary Fund (IMF) and the World Bank were created.

Countries meeting at the Bretton Woods Conference understood that an international trade organization was needed to regulate global trade. The GATT was born on October 30, 1947, after an aborted attempt at creating the International Trade Organization.[4] The GATT 1947 was the principal multilateral agreement regulating trade among nations by the reduction of tariffs and barriers to trade.[5] The GATT 1947 was an agreement, a treaty under international law, not a statute or an organization.[6]

The WTO was established in 1995 as a result of the Uruguay Round of multilateral trade negotiations. Unlike the GATT 1947, the WTO is recognized as an organization.[7] In addition, unlike the GATT 1947 which covered trade in goods only, the WTO covers trade in services and intellectual property.[8] The WTO secures the smooth flow of trade among nations, settles trade disputes among governments, and organizes trade rounds.[9] The WTO/GATT encompasses the rule of "non-discrimination."

A. Non-Discrimination: Most Favored Nation Treatment and National Treatment

The GATT has the overriding principle of "non-discrimination," which is evidenced by the much sought-after Most Favored Nation Treatment (MFN) and national treatment. The MFN principle has been

referred to as the "golden rule" of the GATT.[10] The application of the MFN principle requires contracting parties who extend a benefit to one country to extend it to all contracting parties.[11] For example, the goal of universal MFN treatment is to assure that, with respect to any given member of the WTO (here, Country A), and with respect to any given product or service (here, Product X or Service Y), every other member of the WTO receives the benefit of the most advantageous terms of trade accorded by Country A to any other WTO member with respect to Product X or Service Y.

MFN is a favorable tariff rate given to all contracting partners of the GATT. MFN implies non-discrimination, the multilateral respect of obligations, and equal treatment for countries. The unconditional MFN acted as a trade accelerator, lowering tariffs in the world generally.

The national treatment principle of GATT, like the MFN principle, is a rule of non-discrimination. In the case of MFN, the principle prohibits discrimination as between the same goods from different exporting countries. The national treatment principle, in contrast, accords equal treatment to domestically produced goods and the same imported goods once the imported goods have crossed the border.[12] The goal of the national treatment principle is to limit the circumstances in which it is permissible for a country to provide treatment for domestic goods more favorable than that for imported goods. Any claim arises under the MFN and national treatment principles are handled through the WTO dispute settlement process.

B. Dispute Settlement in the WTO

All WTO Members endeavor to comply with almost all WTO rules almost all of the time. Inevitably disputes arise among WTO members about the precise nature of their obligations under the rules. The members of the WTO have established the WTO dispute settlement system so that they can resolve those inevitable disputes. The WTO dispute settlement system is unique because the WTO has compulsory jurisdiction. All WTO members have agreed in the WTO treaty to use the

WTO dispute settlement system exclusively to resolve all their treaty-related disputes with other WTO members.

Historically, the GATT dispute settlement system was based on diplomacy. Trade disputes were understood as technical matters best handled by trade diplomats in confidential proceedings.[13] Under this diplomatic approach officials sought to craft compromise results that all parties to the dispute could accept. The Uruguay Round agreements -- and particularly the Dispute Settlement Understanding -- heralded a shift to the rule of law.

The new WTO dispute settlement system, which encompasses a considerably more effective procedure for the adjudication of legal disputes compared to the former procedures under GATT, is based primarily on Annex 2 of the Agreement Establishing the World Trade Organization (WTO Agreement) entitled, "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU).[14] The rules of the DSU thoroughly codify and reform the previous dispute settlement system established by Article XXII of the GATT. Crucial reform was achieved in the stage of the procedure devoted to the adoption of panel reports. Now, panel reports are adopted automatically, unless the Dispute Settlement Body (DSB) unanimously decides otherwise.[15] Previously, the reports could have been adopted only by the unanimous decision of all the GATT members. Therefore, the losing party was able to block adoption of the report.

The duration of the dispute settlement procedure is now confined within precise time limits for all of its stages. It is envisaged that a panel will normally complete its work within six months or, in cases of urgency, within three months.[16] Panel reports may be considered by the DSB for adoption twenty days after they are issued to members. Within sixty days of their issuance, they will be adopted, unless the DSB decides by consensus not to adopt the report or one of the parties notifies the DSB of its intention to appeal. If an infringing party refuses to implement the recommendations, the DSB will, as a last resort, give the injured party the authorization to reciprocally suspend concessions towards the other party.[17]

The DSU institutionalized the appellate procedure. A discontented party may now lodge an appeal, which defers the adoption of the report and gives the authority to another body, the Appellate Body, to decide on the legality of the report.[18] An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel. Appellate proceedings shall not exceed sixty days from the date a party formally notifies the Appellate Body of its decision to appeal. The resulting report shall be adopted by the DSB and unconditionally accepted by the parties within thirty days following its issuance to members, unless the DSB decides by consensus against its adoption.

The WTO dispute settlement system has been in effect for nearly ten years. Over the span of that period, a total of ninety-two WTO members participated in dispute cases.[19] Through the end of 2005, Egypt has been the only Arab country that had been a respondent in a WTO case.[20] Arab countries decide to settle their disputes with other WTO countries through consultations because of the high fees charged by international law firms for representation in the litigation, fear of spillover effects on financial aid, or lack of expertise in complicated WTO law whereby complaints overlap with several WTO agreements simultaneously. Arab countries may consider a confrontational approach. Through litigation Arab countries would send a signal to other WTO members that negotiation is one option for resolving a trade dispute, but not the only option.

II. Arab Countries and Trade Boycotts

The Arab League trade boycott of Israel and boycott of Danish goods have profound impact on the relationship between Arab countries and the WTO. The current trade boycott of Danish goods by Arab countries resembles trade boycott of Israel in several aspects. Boycotts of individual companies occur regularly around the world. Most are organized by single-issue activists over issues like animal rights or sweatshops. However, in the case of Israel and Denmark, trade boycotts target entire countries. Any claims and defenses advanced in a potential WTO case against Arab boycott of Danish goods would squarely apply to

the trade boycott of Israel. Therefore, discussion of the League of Arab States and its trade boycott of Israel is merited.

A. The League of Arab States and Boycott to Israel

The League of Arab States was formed as a part of a United Arabia project. It is a watered-down version of that project. On September 25, 1944, a Preparatory Committee composed of Arab states met in Alexandria to discuss proposals for the scheme.(21) On October 7, 1944, a protocol was signed by all members of the Preparatory Committee. The protocol provided for the establishment of the League of Arab States for independent Arab countries who desired to join the organization.(22) Based on the Alexandria protocol, a charter was drafted and approved by members of the Preparatory Committee in 1945.(23) Since then, the charter formed the constitution of the Arab League. Currently, the Arab League is made up of 22 countries where it provides a forum to promote economic, political, and cultural cooperation.

The League of Arab States boycott of Israel is based on the League resolution in 1954.(24) For decades the Arab League has boycotted Israeli goods. No Israeli goods may be imported into the Arab League states and no Israeli firms may do business with firms from Arabic countries. In addition, the Arab League has maintained a secondary boycott against companies from third countries that do business with Israel which contribute significantly to Israel's economic and military development. For example, a member state of the Arab League would not do business with a U.S. company that has a business relationship with Israel. A further prohibition is imposed on dealing with a company that deals with another company which in turn has a relationship with Israel. Foreign companies may be required to provide information about the names and nationalities of the companies' board of directors and officers.(25) Arab boycott blacklist included 1500 U.S. firms, among them Coca Cola, Ford, and Xerox.

In response to the Arab boycott of Israel, the U.S. introduced over time several measures designed to undercut it. For example, at first, the U.S. encouraged, under the Export Administration Act, voluntary

reporting by U.S. concerns of demands placed on them to comply with the Arab boycott on Israel.(26) Then, voluntary reporting turned into mandatory reporting. The U.S. Internal Revenue Code provides for reduction in several tax benefits such as foreign tax credit or domestic international sales corporation program for any firm that participates in the Arab boycott.(27) Moreover, the U.S. set up an Office of Antiboycott Compliance in the Commerce Department to follow up and interpret the anti-boycott regulations.(28) Any U.S. concern found in violation of anti-boycott rules could be slapped civil and/or criminal fines.(29) These measures are some of U.S. anti-boycott devices. Usually, the U.S. Department of Treasury issues a quarterly list of Arab countries that may require participation in or cooperation with the boycott on Israel.(30) The U.S. Executive is the only authority to enforce the Export Administration Act. There is no private right of action for damages.

The Arab League formal boycott has changed drastically after the launch of the peace process in the Middle East in the 1990s.(31) The Arab League boycott of Israel may be collapsing on its own weight or is a relic of the past as more and more Arab countries are ignoring it. For example, the Gulf Cooperation Council announced in 1994 that the secondary and tertiary boycott is no longer a threat for the Council members' interests for all practical reasons. Despite these trends, complete end of the boycott by all Arab countries has not been officially declared. A state of war in its different manifestations is a fact of life in that region. The Arab League boycott is linked to the political situation in the region. Therefore, any discussion of the Arab league's boycott of Israel has been and is important and not symbolic or historical as some would lead us to believe.

It has been the ritual for the United States Trade Representative (USTR) to issue a report periodically stating that the Arab boycott to Israel is an impediment to U.S. trade.(32) U.S. firms are being hurt, especially by the secondary and tertiary boycott, since the boycott distorts with whom they trade or source their inputs from. U.S. firms may be at a competitive disadvantage with other Asian or European firms whose countries do not have stringent anti-boycott laws and enforcement.

It is the secondary and tertiary Arab boycott that has extra-territorial application because it punishes U.S. companies. According to WTO rules, members will abide by their WTO commitment to provide nondiscriminatory treatment to all other WTO members, including Israel. Any claims made against Arab boycott of Israel goods would apply to the trade boycott of Danish products.

B. Trade Boycott of Danish Goods

The trade boycott of Danish goods came as the now-infamous cartoons of the Prophet Muhammad (Peace be Upon Him) published in Danish newspaper.[33] The trade boycott maintains economic pressure on the Danish government by discouraging trading in Danish goods. Several Muslim countries including Saudi Arabia imposed a boycott on Danish goods. Although total EU sales to Arab countries such as Saudi Arabia and the United Arab Emirates account for 1.6 percent of EU exports, the boycott has had an impact. For example, Denmark's Arla Foods, a dairy producer, lost sales and laid off worker.[34] Other Danish companies such as Lego Group and Carlsberg AS appear on a boycott list circulated across the Middle East. Pharmacies and hospitals in Saudi Arabia ordered Denmark-based Novo Nordisk AS, which makes diabetes-treatment products, to remove its products. Saudi companies have paid thousands of dollars for an ad thanking businesses that are snubbing Danish products.

The EU, in turn, exhibited resentment towards the boycott. The EU warned that it would initiate a WTO case regarding the boycott of Danish goods.[35] The EU also warned Iran and other Arab countries that attempts to boycott Danish goods or cancel trade contracts with European countries would lead to a further deterioration in relations. The trade boycott could also become a hurdle in the way of Turkey joining the EU.

The anti-Danish trade boycott resembles the Arab League boycott of Israel with respect that both boycotts target entire countries. However, there are differences between the two trade boycotts. The Arab League boycott of Israel creates primary, secondary, and tertiary boycott. On the other hand, the anti-Danish boycott is primary boycott not a secondary

boycott because it does not prohibit trade with countries that trade with Denmark.

III. Potential European Union Action before the WTO

The EU may argue that the boycott of Danish goods violates WTO rules as well as its general objectives. However, Arab countries may also find counter-arguments in WTO rules. The following is analysis of the claims and defenses available for both parites.

A. Arguments Available to the EU that Anti-Danish Boycott Violates the WTO

A boycott of Danish goods is by definition a boycott of European goods. The EU Commission has exclusive competence to negotiate and settle disputes regarding world trade issues.[36] Thus, the EU Commission could initiate WTO dispute proceedings against Arab countries on Denmark's behalf. The proposed means for the EU to legally challenge the validity of the anti-Danish boycott under the WTO is by a dispute-resolution panel convened under the agreement.

The EU could allege that the trade boycott violates GATT articles I, III, V, and XI. Article I of GATT 1994 sets out MFN treatment.[37] This means that if Arab countries provide entry for Australian products, Arab countries would then be required to apply the more favorable rules with Australians to products from Denmark and Germany. Therefore, the anti-Danish boycott clearly violates WTO rules. Arab countries are not treating all foreign products consistently with the way it treats its Danish goods.

The EU can challenge that anti-Danish boycott violates the national treatment principle in article III of GATT 1994. Under the national treatment principle, WTO members are not permitted to levy different treatment on imported products than on domestic ones, so as to "afford protection to domestic production." In the context of anti-Danish boycott, Arab countries treat Danish goods not in the same way domestic goods are treated.

Article V of GATT, on freedom of transit, requires Arab countries to permit goods to transit through their territories, to or from the territory of other contracting parties, without regard to the place of origin of the goods, or other place of departure. The anti-Danish boycott prevents entry of goods of Danish origin. This restriction would violate GATT Article V. Moreover, article XI of GATT prohibits either the creation or maintenance of prohibitions or restrictions on the importation of the products of contracting parties, other than monetary import duties. The anti-Danish boycott provides a restriction on the importation of Danish goods.

The EU may argue that anti-Danish boycott is violative of the WTO's general objectives found in the preamble. The preamble of the WTO Charter sets out the main objectives of the WTO which are, among others, to "substantially reducing tariffs and other barriers to trade" and to "eliminate discriminatory treatment in international trade relations."(38) Finally, the anti-Danish boycott violates the WTO objective of seeking to "develop an integrated, more viable and durable multilateral trading system."(39) Arab countries are obliged to uphold the WTO's objectives and provisions. As such, a boycott like anti-Danish boycott which defeats the WTO objectives may not be enforced by Arab countries in accordance with the WTO. However, Arab countries could forward several arguments to address the EU claims.

B. Arab Countries Counter-Arguments

From a legal viewpoint, the Arab boycott on its face may be illegal. GATT articles I and III, among others, ban discriminatory treatment among like products of WTO members and between imported and domestically produced products. The Arab boycott singles out Danish products compared with other trading nations. However, there are several arguments that Arab countries can advance to defeat the EU claims.

On jurisdictional basis, Arab countries can assert that the WTO lacks jurisdiction over such a dispute. The Arab-EU dispute encompasses primarily political and national issues. The dispute involves only peripheral trade concerns. In other words, the issues involved in the dispute transcend matters of trade. From that perspective, it can be

argued that the EU sought to bring an action before a body that did not have subject-matter jurisdiction. The EU, however, can suggest that the WTO does have jurisdiction over disputes containing both trade matters and other issues. To reject jurisdiction would create a loophole that could seriously weaken the strength of the multilateral commitments made under the WTO. If a WTO panel dismisses the claim of Arab countries because the WTO lacks authority for such a case, Arab countries can raise other arguments.

Arab countries may argue that anti-Danish boycott is consistent with their obligations under the WTO by claiming that the background of the boycott is political, not commercial. The purpose of the boycott is not to protect the domestic industry of Arab countries.(40) Rather, the anti-Danish boycott is grounded on foreign policy reasons. Therefore, there is no violation of the non-discriminatory articles I and III of GATT.

A precedent exists when the boycott of Israel was considered a political decision and not trade-related. Because it was a political decision, the Israeli boycott was not considered to contravene the obligations under GATT.(41) This action by GATT would suggest that violations of GATT depend more upon the underlying purpose of the boycott whether political or trade-related. In other words, the GATT parties are able to make distinctions based on motivation. They can recognize a political decision with economic consequences which is not considered to violate GATT obligations.

Arab countries may argue that the boycott of Danish products throughout the region is grassroots boycott. In other words, there is an informal boycott on the part of Arab consumers who decide to punish Danish goods regardless of whether a formal boycott is maintained or not. Consumer boycott is not the subject of WTO dispute settlement proceedings. The WTO regulates government-to-government trade relationships.(42) If consumers of country A decide on their own not to purchase products of country B, the WTO cannot force those consumers to purchase those products. However, if the government of country A imposes a formal boycott by enacting law against products of country B,

then the boycott becomes the subject of WTO dispute settlement proceedings.

Moreover, Arab countries can rely on safeguard clauses contained in GATT that allow exceptions to its rules in certain circumstances, including those presenting a threat to important interests of a certain country. Arab countries can rely, in particular, on article XXI of the GATT, which concerns issues of national interest, in making their case. The strongest argument available to Arab countries that anti-Danish boycott does not violate trade rules lies in Article XXI of GATT, which provides three sets of situations of permissible "security exceptions." Article XXI of GATT recognizes that no contracting party is prevented from taking any action which it considers necessary for the protection of its essential security interests.(43) Moreover, article XXI relates to exceptions in war or other emergencies in international relations. Article XXI requires that the party shows that the action advances its security interests.(44) However, Arab countries cannot justify their boycott on the basis of article XXI.c of GATT 1994. Article XXI.c allows a member to take any action in pursuance of its obligations under the U.N charter for the maintenance of peace and security. The U.N did not authorize the Arab economic boycott of Denmark.

Arab countries may argue that anti-Danish boycott constitutes an Article XXI.b.iii measure taken in time of an emergency in international relations and is necessary to protect essential Arab interests. Although there is no direct war between Denmark and Arab countries, an emergency situation the region is experiencing. After all, anti-Danish boycott was initiated in response to the Danish newspaper attack, which can be construed as an emergency in international relations. This argument is viable because the national security exception is self-judging in nature. Article XXI.b.iii of GATT permits a member to take any action which "it" considers necessary for the protection of its essential security interests in time of war or emergency in international relations. The use of the word "it" clearly states that it is for every country to judge on the question of what it is related to its own essential security interests.(45) Therefore, "self-judging in nature" means that Arab countries acting to promote their national interests determine what measures are necessary to

achieve those ends.[46] As a result, Arab countries are entitled to make the determination of whether or not anti-Danish boycott is necessary for the promotion of Arab national interests.

On the other hand, the EU may argue that Arab countries have not exercised their judgment in good faith and has thus violated the international customary principle of pacta sunt servanda which requires Arab countries to exercise their treaty rights and obligations under the WTO in good faith.[47] However, the anti-Danish boycott is tenable. Arab countries had invoked the boycott in good faith to respond to an international relations emergency. The absence of the Danish cartoons would not have led to trade boycott. The anti-Danish boycott is an attempt to deal with an international emergency, but not an attempt to protect domestic industries of Arab countries from foreign competition. Consequently, an argument that the anti-Danish boycott is a measure protecting Arab national interests would be persuasive.

The success of Arab countries' argument regarding Article XXI of GATT will depend upon the interpretation of the terms "it considers" and "emergency in international relations." The WTO does not define these critical terms. Because the WTO dispute settlement bodies have a more adjudicative role, they have more power to interpret substantive law, including these critical terms. Since article XXI seemingly reinforces that its apparent permissiveness, a WTO panel could interpret the question of "essential interests" as one of balance: to use a provision for security exceptions in a manner that is neither too tight nor too broad.

It would still be possible for the EU to claim relief under GATT Article XXIII by arguing that even though the anti-Danish boycott does not violate trade rules, it still nullifies and impairs the EU benefits under the WTO.[48] There are, however, three conclusions derived from previous cases which indicate that a successful EU claim under article XXIII is unlikely. First, previous cases are few and not usually successful. There have been approximately 20 non-violation "nullification and impairment" cases but only four have been successful.[49] Second, analysis of such a claim would be linked to a panel analysis of the "reasonable expectations" of the parties. To prevail, the EU must prove that a reasonably expected benefit, accruing to it directly or indirectly, has been nullified or impaired by unforeseen trade measures not inconsistent with GATT. What constitutes a "reasonable expectation" for article XIII:1 (b) purposes is not clear. Establishing non-foreseeability may be also a problem. Arab can argue that while the EU may have expected a benefit, the claimed expectation was unreasonable. Third,

under article XXIII, it will be difficult to determine that the motivations of the anti-Danish boycott which are said to arise out of national concerns, instead out of trade-distorting motivations.[50] Those motivations are more likely to be considered political than economic.

Conclusion

The goal of the WTO is to liberalize trade. The centerpieces to achieve this goal are the MFN principle and national treatment. These principles prohibit discriminatory treatment for products of WTO members. In other words, non-discriminatory describes the prevention of denial of equal competitive opportunities to like products originating in different countries. Non-discrimination in WTO law means equality. Consequently, the WTO ensures equal access for the same products of WTO members.

A simmering row between the EU and Muslim nations arose from anger in the Islamic world against the publication of cartoons in a Danish newspaper considered insulting to the Muslim faith. A trade boycott against Danish goods, which similar the Arab boycott of Israel, ensued from the cartoon controversy. European Trade Commissioner Peter Mandelson warned that any boycott against Danish goods was unacceptable and that the EU could initiate WTO dispute proceedings against Arab countries on Denmark's behalf.

The question this article tried to answer is whether the Arab boycott of Denmark is legitimate or not, and if so, whether it could be subject to a dispute settlement case before the WTO. The EU can have a valid claim that the boycott violate WTO rules of non-discriminatory treatment, articles I and III of GATT. Moreover, the EU can argue that the boycott violate the general objectives of the WTO. The anti-Danish boycott might constitute a "non-violation nullification or impairment of benefits" under GATT article XXIII, but that would depend on the EU being able to prove that Arab countries motivations were to distort trade, or that "reasonable expectations" of the WTO members related to trade concessions were violated. The EU cannot prove the first, and proof of the second seems unlikely.

Arab countries, however, stand to win a dispute resolution proceeding on the issue of whether anti-Danish boycott violates the WTO. On a jurisdictional basis, Arab countries can argue that the WTO lack

jurisdiction because the issues involved in the dispute transcend matters of trade. Assuming that a WTO panel dismisses the claim of Arab countries, they can argue that the boycott is motivated by political reasons, not commercial ones. The purpose of the boycott is not to protect domestic industries, but rather to protest the cartoon controversy. Arab countries can also claim that the boycott is consumer, informal boycott without direction from the governments of Arab countries. As such, a WTO panel cannot examine the case of consumer behavior.

Arab countries can assert Article XXI defense. Arab trade restrictions are actions taken in time of emergency in international relations. They are considered necessary for the protection of Arab countries and essential to Arab national interests. National security is an elastic and highly contextual concept - a concept whose flexibility allows it to serve a range of different purposes. Article XXI created ambiguity in several key terms such "it considers"- an ambiguity necessitated by the need to allow countries the ability to respond to legitimate concerns. Sovereign nations can decide what their national interests are. The trade boycott can be consistent with Arab countries' obligations under the WTO. Although, national security defense may be available, it would have to be carefully argued.

Any move by the EU to take action at the WTO would be counterproductive in defusing the row with Arab countries. The dispute raises serious and difficult questions. It is recommended that the EU abstains from initiating a WTO case. The EU should exercise prudence. The situation between Arab countries and the EU is very delicate. Therefore, it is suggested that every diplomatic effort should be made to defuse the row. Diplomatic resolutions allow flexibilities. The WTO judicial review of such dispute raises concerns over the unanticipated loss of sovereignty. It is worrisome to have the WTO, a trade institution, addressing a sensitive issue with political ramifications. As a result, the EU should resort to the bargaining table. The EU should seek amicable means, in cooperation with the international community, to settle its case with Arab countries.

Note

(1) See Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations (2002).

(2) See David Ricardo, The Principles of Political Economy and Taxation 1911 (1965) (discussing the maximization of the real national income through perfect competition by allowing industries within a state to produce that for which they are best suited).

(3) See Thomas J. Dillon, Jr., The World Trade Organization: A New Legal Order for World Trade?, 16 Mich. J. Intl L. 349, 356-57 (1995).

(4) The ITO was not established because the U.S. refused to join the organization due to perceived threats to national sovereignty and the danger of too much ITO intervention in markets. The U.S. Congress feared that the ITO would be too much supranational. See George Bronz, An International Trade Organization: The Second Attempt, 69 Harv. L. Rev. 440, 447-449, 473-476 (1956).

(5) See Jalil Kasto, The Function and Future of the World Trade Organization: International Trade Law between GATT and WTO 4 (1996).

(6) For more on the GATT see John H. Jackson, World Trade and The Law of GATT (1969).

(7) The WTO consists of primary and subsidiary organs. The four primary organs are the Ministerial Conference, the General Council, the Secretariat, and the Director General. The Subsidiary Organs of the WTO are the Council for Trade in Goods, the Council for Trade in Services, the Council for TRIPS, the Committee on Trade and Development, and the Committee on Budget, Finance, and Administration.

(8) See Asif H. Quaeshi, The World Trade Organization 5 (1996).

(9) The WTO agreement contained in approximately twenty-three thousand pages of agreements that incorporate by reference the

GATT 1947, amendments to the GATT made in 1994 (GATT 1994), seventeen multilateral agreements, four plurilateral agreements, Ministerial Decisions and Declarations. The WTO agreements regulate tariffs on trade in manufactured goods and agriculture, services, intellectual property, food, customs, dispute settlement system, and government procurement. Special provisions for developing nations include longer time periods for implementing agreements and commitments, special measures to increase trading opportunities for these countries, provisions requiring all WTO members to safeguard the trade interests of developing countries, and technical assistance and support to help developing countries build their infrastructure. See General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

(10) See Report by the Consultative Board to the Director-General, The Future of the WTO 58 (Dec. 2004), available at <http://www.wto.org/english/thewto e/10anniv e/10anniv_e.htm>.

(11) The MFN treatment requires that any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the "like product" originating in or destined for the territories of all other contracting parties. See General Agreement on Tariffs and Trade, supra note 14, art. I. The MFN principle raises definitional issues such as the definition of "like products". The term "like product" can be interpreted broadly so as to strike down discriminatory measures wherever possible. See GATT Panel Report, Japan-Tariff on Import of Spruce-Pine-Fir (SPF) Dimension Lumber, 36th Supp. BISD 167 (1990).

(12) See General Agreement on Tariffs and Trade, supra note 14, art. III. See also GATT Panel Report, Italian Discrimination against Imported Agricultural Machinery, 7th Supp. BISD 60 (1959).

(13) See Roger B. Porter, Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium 264 (2001).

(14) See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

(15) Id. art. 16.

(16) Id. Appendix 3.

(17) Id. art. 22.1.

(18) The Appellate Body is composed of seven members, three of whom will serve on any one case. See Understanding on Rules and Procedures Governing the Settlement of Disputes, supra note 20, art. 17.

(19) See Dispute Settlement Body, Overview of State of Play of WTO Disputes, Nov. 18, 2002, WTO Doc. No. WT/DSB/W/209/Add.1.

(20) See Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey, Aug. 8, 2002, WTO Doc. No. WT/DS211/R.).

(21) For more on the Arab League see Majid Khadduri, The Arab League as a Regional Arrangement, 40 Am. J. Intl. L. 756, 763 (1946) (tracing the history of the Arab League to the pan-Arabism movement that revolted against the Turkish domination. The debate among members of the Preparatory Committee focused on the nature of Arab unity scheme as whether they shall opt for a full union or federal union).

(22) The Arab League would be governed by the Council of the League whose membership is based on sovereign equality of member states with one nation, one vote. The Arab League is also composed of the General Secretariat and various committees to address social and economics concerns. Id. 765.

(23) One of the conditions for membership in the League was full independence. Therefore, the original signatories were Egypt, Transjordan, Syria, Lebanon, Iraq, Saudi Arabia, and Yemen. Id. 766-768.

(24) See Preston L. Greene, Jr., The Arab Economic Boycott of Israel: The International Law Perspective, 11 Vand. J. Transnatl. L. 77, 79 (1978) (the resolution is a direct response for what the Arabs perceive as the wrongful expropriation of their land for the creation of the state of Israel. The most potent enforcement tool of the boycott is blacklisting).

(25) A blacklist of companies that violated the boycott's guidelines such as failing to comply with certification procedures or to complete a questionnaire is maintained at the boycott office headquarters, a specialized agency for the Arab League. Each Arab Country maintains a national boycott office in certain ministries such as foreign affairs, commerce, or finance ministry. Id. 78. Currently, the well-staffed Central Boycott Office of the Arab League, which is headed by a Commissioner General, is located in Syria. The Central Boycott Office meets twice a year to update its blacklist. In recent years, some Arab countries had declined to attend the biannual meeting of the Office.

(26) See Roy M. Mersky & Michael L. Richmond, Legal Implications of the Arab Economic Boycott of the State of Israel: A Research Guide, 71 L. Libr. J. 68 (1978).

(27) Id. 69.

(28) The Office of Antiboycott Compliance depends on U.S. companies' self-declaration audits as well as selected auditors that would help it in discovering any violation and fraud.

(29) * For example a $5,000 fine was imposed on an attorney, in the course of assisting a client, violated the anti-boycott provisions of the Export Administration Act by completing and submitting a form to Saudi Arabia for trademark registration in which the applicant declared that he had no relations with Israel that would violate the Saudi Arabia boycott. The attorney did not inform the Commerce Department of the boycott declaration which is prohibited under U.S. law. See U.S v. Meyer, 864 F.2d 214, 218 (1st Cir. 1988).

(30) For example, the list of Arab countries includes: Bahrain, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, and Republic of Yemen. See also List of Countries Requiring Cooperation with an International Boycott, 69 Fed. Reg. 75, 604-01 (Dec. 17, 2004).

(31) See Robert A. Diamond, U.S. Antiboycott Law and Regulations, 830 P.L.I./COMM. 721, 730-731 (2001) (the number of boycott requests reported to Office of Antiboycott Compliance by U.S. firms fell during the years 1990 to 1996 from 11,026 in 1990 to 2,493 in 1996. Prohibited requests fell during the same period from 2,812 to 1,025. Total boycott requests from all countries for 1997 and 1998 were 1,666 and 1,780 respectively, with prohibited requests at 532 and 526 for the two years. In 1999, there was a decline in total requests to 1,358 with prohibited requests down to 402. In 2000, there was a further decline to 1,271 total requests and 355 prohibited requests).

(32) See USTR, National Trade Estimate Report on Foreign Trade Barriers 2005, available at

http://www.ustr.gov/reports/nte/2004/arableague.pdf (accessed Dec. 15, 2005). The National Trade Estimate Report is mandated by the 1974 Trade Act. Barriers identified in the report are intended to form the basis for trade negotiations and sanctions. The International Trade Commission study, requested by USTR, showed that U.S. companies lost more than $410 million in potential sales during 1993 as a direct result of the Arab boycott. The cost of U.S. companies for compliance with U.S. antiboycott laws estimated to be an additional $160 million. The effects of the boycott included delays in concluding transactions. See U.S.I.T.C, Effects of the Arab League Boycott of Israel on U.S. Businesses, USITC Inv. No. 332-349 (Nov. 1994).

(33) See Marc Champion, Muslim Outrage Mounts Over Cartoons in EU, Wall St. J. A6 (Feb. 3, 2006) (12 cartoons first published in a leading Danish newspaper, Jyllands-Posten, on September 30, 2005. one image depicted the Prophet Muhammad with a turban shaped like a bomb. Newspapers in Germany, France, and Norway had republished the images in defense of free speech).

(34) The boycott resulted in lost sales of $1.5 million a day for Arla. Arla Foods laid off 125 workers for the duration of the boycott. The Middle East accounts for 8% of sales for the company. Arla has been operating for nearly 40 years in the Middle East, its most important market outside of Europe. Id.

(35) See Frances Schwartzkopff, Arla Bears the Brunt of Boycott Across Mideast, Wall. St. J. (Feb. 1, 2006) (on January 30, 2006, European Union Trade Commissioner Peter Mandelson said that the EU would take World Trade Organization action).

(36) See Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty I-05267 (Nov. 15, 1994).

(37) See MFN treatment, supra note 17.

(38) See Preamble, Results of the Uruguay Round of Multilateral Trade Negotiations, supra note 20.

(39) Id.

(40) Article III, the "national treatment" provision, prohibits discriminating against imported goods in favor of domestically produced goods, so as to "afford protection to domestic production."

(41) The boycott was justified as a reasonable measure considering the political character boycott. See Working Party Report: Accession of the United Arab Republic, GATT doc. L/3362, adopted on Feb. 27, 1970, 17S/33, 39, para. 22.

(42) See Raj Bhala, International Trade Law: Cases and Materials 124 (1996) (the WTO provides institutional framework for the conduct of trade relations among governments).

(43) Article XXI recognizes that no contracting party is:

(a) required to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) prevented from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; or

(iii) taken in time of war or other emergency in international relations. . .. See General Agreement on Tariffs and Trade, supra note 14, art. XXI.

(44) See Decision Concerning Article XXI of the General Agreement, GATT BISD, 29th Supp. 23, 24 (1983).

(45) All legal analysis in the WTO begins with the text of the WTO agreements. The WTO Appellate Body stated: "The proper interpretation of WTO rules is, first of all, a textual interpretation." See Japan-Taxes on Alcoholic Beverages, WTO Doc. AB-1996-2, WT/DS1/AB/R, WT/DS10/AB/R/, WT/DS22/AB/4, at 19 (Nov. 1, 1996). Other international tribunals have considered the interpretation of the "it considers" clause. In 1986, the International Court of Justice considered claims brought by Nicaragua against the U.S for violations of a 1956 treaty. The treaty permitted either signatory to take action "necessary to protect its essential security interests." The International Court of Justice decided that this clause did not preclude it from evaluating U.S. attempts to invoke the national security exception to the treaty. It noted that, unlike GATT Article XXI, the 1956 treaty mandated an objective standard of review, (the national security measure must be "necessary") instead of the subjective standard implied by the GATT (the country may take measures "it considers necessary"). See Military and Paramilitary Activities (Nicar. vs. U.S.), 1986 I.C.J. 14, 116-117 (June 27, 1986).

(46) In one precedent involving Nicaragua's complaint against the U.S embargo, the GATT panel decided that it was not permitted to

consider or decide the validity of the assertion of a national security defense. See Unadopted GATT Panel Report, U.S.-Trade Measures Affecting Nicaragua, Oct. 13, 1986, GATT Doc. L/6053.

(47) According to the customary principle of pacta sunt servanda, set forth in article 26 of the Vienna Convention on the Law of Treaties, "every treaty in force is binding upon the parties to it and must be performed by them in good faith." See Vienna Convention on the Law of Treaties, done May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980).

(48) See General Agreement on Tariffs and Trade, supra note 14, art. XXIII: 1(b).

(49) See Working Party Report, Australia-Subsidy on Ammonium Sulphate, adopted Apr. 3, 1950, BISD II/188; Panel Report, Germany-Imports of Sardines, adopted Oct. 31, 1952, BISD IS/53; Panel Report, Germany- Import Duties on Starch and Potato Flour, noted Feb. 16, 1955, BISD 3S/77; and Panel Report, European Communities- Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted Jan. 25, 1990, BISD 37S/86.

(50) The Panel Report on "United States-Trade Measures affecting Nicaragua" stated that nullification or impairment when no GATT violation had been found was a delicate issue, linked to the concept of "reasonable expectations". . . . Applying the concept of "reasonable expectations" to a case of trade sanctions motivated by national security considerations would be particularly perilous, since at a broader level those security considerations would nevertheless enter into expectations." See World Trade Organization, GATT Analytical Index: Guide to GATT Law and Practice 659 (6th ed. 1995).