Saudi Arabia, the WTO, and American Trade Law and Policy

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I. Is American Trade Law Toward the Kingdom Constructive?

"In fact, I would say that the World Trade Organization (WTO), which prides itself as a rules-based system, does not have rules on accession. For example, despite the fact that existing WTO members, including many major trading countries, have not bound tariffs on all industrial items, acceding countries are required to do so. Furthermore, despite the fact that some WTO agreements are plurilateral agreements and some are initiatives which have

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In Riyadh and Dahran, Saudi Arabia, in December 2003, I presented an earlier version of this article. I thank Mr. Saud Al-Ammari, Esq., and Mr. Ramsey Taylor, Esq., both of the Legal Department, Saudi Aramco for organizing an extraordinary visit to the Kingdom, and affording me the opportunity to learn new perspectives through lectures, round table discussions, and meetings in government and private sector settings. Their professional guidance, coupled with their friendship, is nothing short of a blessing. I have incorporated into this article several of the perspectives I learned while in the Kingdom. However, I protect the confidentiality of the individual officials, and their organizations, involved by citing to "Discussions with senior Saudi officials."

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I dedicate this article to my friend and colleague at the University of Kansas School of Law, Professor John Head. Our International and Comparative Law Program owes much to his energy, selflessness, and vision.

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been subscribed to by only a few WTO members, acceding countries are again required to accept these."

Osama Jafar Al-Faqih, former Minister of Commerce, Kingdom of Saudi Arabia.¹

A. THE THESIS AND THREE SUPPORTING ARGUMENTS

This article will consider whether American trade law toward the Kingdom of Saudi Arabia (Kingdom) is “constructive.”² This author rejects the proposition that American trade law toward the Kingdom has no merits. However, the thesis offered is that this law, on balance, may not be constructive. Moreover, one wonders whether the law is a foundation for even greater resentment against the United States.

Law, in this context, means legal policy, particularly with respect to the Kingdom’s accession to and participation in the World Trade Organization (WTO). By “constructive,” the question is whether that law forges an enduring (that is, long-term) and robust (that is, high and increasing values and volumes) two-way trade relationship between the United States and the Kingdom, and more generally the Arab and Muslim Worlds.³ Perhaps most fundamentally, “constructive,” means a trusting relationship. In September 2003, 72 percent of Americans polled by Time magazine and CNN said they could not trust the Kingdom as an ally. In November 2003, the Financial Times of London quoted a senior Saudi official as saying: “The Saudi public doesn’t like America and vice versa. It makes it more difficult

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² Some background historical and legal points about the Kingdom are worth noting.
³ The Kingdom of Saudi Arabia was proclaimed an independent nation on September 23, 1932, following a successful thirty-year campaign to unify the Arabian Peninsula led by King ‘Abd al-‘Aziz ibn Sa‘ūd (1880–1953) that began with his 1902 conquest of Riyadh and its fort.
⁴ The area is slightly larger than one-fifth of the United States.
⁵ The governmental structure is a monarchy in which the King (King Fahd bin ‘Abd al-‘Aziz ibn Sa‘ūd since June 13, 1982) acts both as the Chief of State and the Head of the Government.
⁶ The legislative branch is comprised of a 120 member council and a chairman, all appointed by the King. This consultative council is called the Shura, or formally, the Majlis As-Shura.
⁷ There is an “independent” judicial branch known as the Supreme Council of Justice, all members of which are appointed by the King.
⁸ The legal system is the Shari‘a, i.e., Islamic Law, with the Constitution being the Holy Qur’an.
⁹ In 1992, the King implemented a number of Constitutional reforms, within the context of the Qur’ān and Sunnah of the Prophet Muhammad (Peace Be Unto Him). The resulting “new” system is known as the “Basic Law,” which might be loosely analogized to a foundational statute or code. Commercial disputes are handled by special committees (though it is not always evident to outsiders how the committee members are appointed).


³ By “Arab World,” I mean the twenty-one sovereign countries, plus Palestine, holding membership in the Arab League. They are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qata, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. See Roula Khalaf, Arab Nations Focus on Bolstering their Economic Ties, Fin. TIMES, Mar. 28, 2001, at 8 (reporting on Arab League plans to create a free trade area by 2005). By “Muslim World,” I mean all countries with an Islamic population of at least fifty percent. I mean no offense by focusing on such countries, and not on Arab or Muslim minority populations in other nations, but simply reflect the sovereign character of international trade negotiations and WTO affairs.

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for us publicly to cooperate with the U.S." These negative attitudes need to change. Trade
is one arena in which the countries involved may shift for the better.

American trade law is not to blame for every economic difficulty the Kingdom faces, not
the least of which are its unemployment rate of about 25 percent and increasingly large
population. Some comments by certain American officials amount to finger-pointing at
Riyadh. It is also true that there is no shortage in the United States of "doubters" of the
Kingdom. More seriously, there is the critique offered by the World Bank.

4. Guy Dinmore & Roula Khalaf, The U.S. National Interest is Caught Up with the Saudis in a Very Complex
Way. They Are More than a Gas Pump, FIN. TIMES, Nov. 19, 2003, at 13 (reporting on the poll results and
quoting the Saudi official).

5. Some background economic and demographic points about the Kingdom are worth noting:

- The GDP is US$240 billion (as of 2002, in purchasing power parity terms), and per capita GDP is $10,500.
- The population is approximately 24.3 million, of which about 3.6 million are non-nationals from many
countries.
- The labor force consists of about seven million Saudi nationals.
- The demographic structure is a pyramid, with 54.8 percent of the population between the ages of fifteen
and sixty-four (though about thirty-five percent of this cohort is comprised of non-nationals). Significantly,
42.3 percent of the population is between the ages of zero and fourteen, and only 2.9 percent is age sixty-
five and over.
- The median age in the Kingdom is eighteen (about twenty-one for males and seventeen for females).
- The population growth rate is 3.28 percent.

See CIA FACTBOOK, supra note 2. The pyramidal structure and low median age indicate the Kingdom faces a
challenge for the foreseeable future to provide gainful employment for its young people.

With respect to unemployment data, see CIA FACTBOOK, supra note 2 (mentioning unemployment statistics in
the Kingdom). Self-Doomed to Failure, ECONOMIST, Jul. 6, 2002, at 24, 25 [hereinafter Self-Doomed to Failure]
(reporting an unemployment rate in the Arab World of fifteen percent); Roula Khalaf, Arab Nations Focus on
Boosting their Economic Ties, FIN. TIMES, Mar. 28, 2001, at 8 (reporting an average fifteen percent unemploym-
ent rate among Arab League countries).

(BNA) 730 (Apr. 24, 2003) (Stating that, in April 2003, the United States Trade Representative himself but
lay blame on the Kingdom, characterizing it as "hot and cold" on the WTO," and giving it credit only for
"signs" of interest). Christopher S. Rugaber, Bush Administration Mulling Trade Strategy for Middle East, 20 Int'l

7. Did, and does, it sincerely seek to participate actively in the WTO as a full Member? The answer is "it
depends who is asked." There are many senior (and not-so-senior) officials resolve in their belief the Kingdom
should accede as quickly as possible, and it should do everything reasonable toward that end. There are others
who are said to be less enthusiastic about the WTO.

There are many political science-type commentaries in the United States on the Kingdom's government,
i.e., about which officials are pushing reform and liberalization, and which ones seem to be in no great hurry.
Michael Scott Doran, The Saudi Paradox, 83 FOREIGN AFF. 35–51 (Jan./Feb. 2004) (saying that "[t]he Saudi
state is a fragmented entity, divided between [sic] the fiends of the royal family," portraying the Kingdom as
"in the throes of a crisis," namely, "a profound cultural schizophrenia [that] prevents the elite from agreeing
on the specifics of reform," arguing the emboldenings of a reformist westernized elite and conservative Wabbah
religious establishment, respectively, are Crown Prince Abdullah and his half-brother, the Interior Minister,
Prince Nayef, and characterizing their opposing positions as based on two different Islamic doctrines, taqsrub,
which refers to rapprochement between Muslims and non-Muslims, and which is favored by the Crown Prince,
and sawabi, favored by Prince Nayef, which translates as "monotheism," and which is interpreted to suggest
Judaism and Christianity are not truly monotheistic and, therefore, pose a threat to Islam that must be resisted by
jihad, or struggle).

Unfortunately, these "analyses" tend to crowd out the Saudi experts themselves, who point out favorably
that WTO accession negotiations are a tool for reform, and participation in the WTO is a mechanism to lock
in liberalization. See, e.g., Saud Al-Ammari, Recent Legal and Economic Reforms in Saudi Arabia, XLV MIDDLE E.

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In September 2003, the Bank warned that economic, social, and human development in the Middle East and North Africa (MENA) is handicapped by low-quality public governance. The "governance gap," it reported, is characterized by insufficient accountability (due in part to complacency caused by direct accrual of oil and natural gas revenues into public coffers), and the highest military spending of any region in the world (6 percent of Gross Domestic Product (GDP), which costs the region one percentage point in annual GDP growth. As imperfect a measure of development as GDP is, the statistics are disconcerting: the total GDP of the Arab World, $531 billion, is less than that of Spain, and although the Arab World has a higher per capita GDP than most other developing regions, it is below the level in 1980. The annual growth rate in per capita GDP, 0.5 percent, is slower than in any other region save sub-Saharan Africa, meaning that at the present trends, it will take 140 years for average Arab income to double.

Undoubtedly, many Arab intellectuals agree with the World Bank's critique. Indeed, some of them are among the leading commentators. Significantly, "them" includes women economists, historians, and social scientists. In the past, the region's intellectual life has been dominated by men. However, today, women are taking on new roles and responsibilities, and their voices are being heard. The Arab world is witnessing a change in the traditional gender roles and the gender dynamics in society. The role of women in society is no longer limited to the traditional domestic sphere, and women are actively participating in almost all aspects of life, including politics, business, and academia. This change is evident in the growing number of women holding high-ranking positions in government and civil society organizations, and in the increasing number of women pursuing higher education, particularly in STEM fields.
as well as men, and prominent officials from the Kingdom itself. Thus, one need not be an apologist for self-inflicted wounds in the MENA region. To put the point directly, this author has no doubt the Kingdom understands unemployment of its youth helps account for an increase in Islamic extremism.

However, assessment of the severity and implications of, and remedies for, self-inflicted wounds is best left to others. The present inquiry will relate squarely to trade, an issue that is given less attention than a matter seen as authentically global (such as jump-starting the

Program. The Report identifies “three deficits” in the Arab World as the reasons for poor economic performance in most Arab countries:

- First, a lack of freedom is evident from absolutist regimes, sham elections, favoritism and nepotism, an insufficiently independent judiciary and media, and weak non-governmental organizations. This dearth produces unresponsive, incompetent, and corrupt governmental institutions.
- Second, a lack of knowledge, evident from statistics like only 1.2 percent of Arabs having personal computers, and only 0.6 percent use the Internet, is acute in science, technology, and practical job skills. It also relates to a lack of creativity and intellectual stagnation in the arts (e.g., stunningly, since the time of the Caliph Manoun, 1,000 years ago, the number of books translated into Arabic equals the number of books Spain translates in one year).
- Third, a lack of womanpower is manifest in data from fourteen of twenty-two Arab countries showing both a trebling of women’s literacy rates in the last thirty years, and one in two women being unable to read or write. The effect is to neglect the productive potential of half the population.

Self-Deemed to Failure, supra note 5, at 24, 25 (summarizing these facets of the Report, and also faulting the Report for not differentiating among the heterogeneous Arab countries, and not weighing the effects of the Arab–Israeli conflict or role of religion).

Similarly, in 2003 Arab academics compiled a follow-up to the Arab Human Development Report 2002, also published by the United Nations Development Program. The second study highlighted human capital deficiencies (in science and technology, and in a lack of curiosity), and urged specific (but politically controversial) steps to encourage better performance and free inquiry. Know Thyself, Economist, Oct. 25, 2003, at 42 (summarizing the second study, and adding: “The patient knows he is sick. The physicians know the cure. The question is whether the would-be surgeons—Arab governments—have the skill or the will to perform the operation.”). Of course, as any development scholar familiar with sources of growth accounting knows, it is important not to rely on just one policy treatment—even if it is more education. In Egypt between 1970 and 1998, primary school enrollment rates increased to over ninety percent, secondary school rates from thirty-two to seventy-five percent, and university education rates doubled. Yet, during the same period, Egypt went from the forty-seventh poorest country in the world to the forty-eighth such country. Alison Wolf, Knowledge Economy Fails the Test, Fin. Times (Weekend), May 25–26, 2002, at II.

13. For instance, consider the comments of Princess Noura Bint Mohammed Bin Sa'ud Al-Sa'ud, founder of the Philanthropic Society of the South, Abha, Kingdom of Saudi Arabia:

“Why do some shy away from the influence of globalization? We should not forget that our very own Islamic civilization . . . existed alongside the Roman and Persian civilizations. They learned from us and we learned from them. . . . We will achieve more as a society if we do not isolate ourselves from the rest of [the] world and we should map out an aim to achieve future goals.”

Intisar Al-Yamani, Globalization A Model for Improvement, Saudi Gazette (Jeddah), Dec. 6, 2003, at 4. See also id. (quoting the views of two women in the Kingdom involved in charities to help the underprivileged, Princess Noura, and Rana Al-Miraei, on the potentially positive effects of globalization on women in the Kingdom).

14. See Arabs to Blame for their “Situation”—Prince, Saudi Gazette (Jeddah), Dec. 6, 2003, at 2 (reporting on the opening address to a conference in Beirut of the Arab Thought Foundation, attended by roughly 1,000 Arab intellectuals, on “The Future Economic and Political Challenges Facing the Arab World,” in which the Saudi Ambassador to the United Kingdom, Prince Khaled Al-Faisal, not only said Arabs were to blame for their current global “situation,” but also indicated they did not understand the significance of holding a ruler accountable through elected or appointed bodies).

Doha Round of multilateral negotiations), or as close to home (the Central American Free Trade Area (CAFTA)). To the extent the question is considered at all, it is treated uncritically; that is, it is more or less taken for granted that American trade law toward the Kingdom, and indeed the Arab and Muslim Worlds more generally, is constructive.

Both insufficiencies, of attention and analysis should be challenged, but not for the sake of being a carping academic. This interest is, at a minimum, economic. Thus, I explain in Part II why Kansas, my home state, cares about American trade law with respect to the Kingdom. Kansans have known hardship. The state motto is Ad Astra Per Aspera—to the stars through difficulties. Put in Kansan terms, the question is whether American trade law inflicts too much difficulty on the Kingdom, so that neither the Kingdom nor one of its trading partners like Kansas can reach the stars. This author suspects much of the American Heartland has a similar pragmatic concern, albeit one expressed through different mottoes and metaphors.

As for the thesis itself, three arguments are offered in its support in Parts III, IV, and V, respectively. First, and most importantly, the United States may have pressed the Kingdom too hard on key terms by which the Kingdom is acceding to the WTO. Ever-increasing American demands (chronicled in Part III) since accession negotiations commenced in earnest in 1996 meant the price paid by the Kingdom for a WTO admission ticket rose. China’s dramatic concessions in its accession odyssey, particularly in its November 1999 bilateral accord with the United States, may well have contributed to the price hike. However, the Desert Kingdom is not the Middle Kingdom, so whether the American pressure on Saudi Arabia can be justified by the deal with China is dubious.

Second, it seems the United States may not have treated three Islamic law issues associated with the Kingdom’s accession with sufficient care. These Shari’ah topics (treated in Part IV) pertain to forbidden products (namely, alcohol, pork, and pork products), the zakāt tax (one of the essential Islamic obligations), and problematic services (specifically, certain banking and insurance products). These observations are not meant to suggest the United States has been insensitive to Saudi positions, but does lead one to wonder whether the United States


I should point out a previous WTO Director-General, Mike Moore, personally took a strong interest in the accession of the Kingdom and, more generally, the participation of the Arab World in the multilateral trading system. Speech by Mike Moore, Director-General, World Trade Organization, The WTO and the Arab World: Preparations for Doha, Geneva, Switzerland, June 20–21, 2001, available at http://www.wto.org. (last visited Sept. 16, 2004) (declaring “[t]he Arab world is as important for [the] WTO as the WTO is for the Arab world”).

17. Lest there be any doubt the American trade law approach of putting pressure on the Kingdom through WTO accession negotiations is accepted conventional wisdom, the Council on Foreign Relations—hardly an anti-establishment organization—sponsored a report advocating exactly this strategy toward the Middle East. See Bernard Hoekman & Patrick Messerlin, Harnessing Trade for Development and Growth (2002). See Amity Shlaes, Tales from the Heart of the Arab Economies, Fin. Times, Feb. 12, 2002, at 15 (summarizing the report).

has advanced the goal of long-term, friendly trade relations with the Kingdom, not to mention the Muslim World by, accommodating the uniqueness of the Kingdom’s position on these matters.

Third, in the interests of a constructive trade law with the Kingdom, there are questions whether the United States has consistently respected the economic law of comparative advantage. The Kingdom’s existing comparative advantages lie in the oil and natural gas sectors (discussed in Part V, Sections A-B). That is evident to energy industry experts, who have never set foot near the Kingdom, and to those (like me) who lack specialty knowledge in this industry who had the privilege to learn from time spent (in December 2003) at institutions like the Ministry of Petroleum in Riyadh and Saudi Aramco in Dhahran. In short, American trade law, operating in the WTO environment, may be aimed at containing, and even cutting back on, these advantages (or at least having these untoward effects). The Kingdom could well have a budding comparative advantage in certain agricultural products (as my visit to the remarkable Al-Safi Dairy, discussed in Part V.C, suggests). American trade law hardly seems interested in seeing the Kingdom develop these kinds of strengths.

In our security-conscious, if not obsessed, post-9/11 atmosphere, an obvious response to these arguments is “so what?” Trade is about security, and this response bespeaks a monstrous failure to see the connection.19 The consequence of American trade policy toward the Desert Kingdom in its WTO accession odyssey may be—ironically and dangerously—to subject the Kingdom to extremely difficult adjustment costs in the early years of its participation in the WTO as a full Member. By exerting so much pressure on the Kingdom in accession negotiations, by not easily accommodating the Kingdom on critical Shari‘a issues, and by not supporting its endeavors to retain, and add to, its comparative advantages, the United States has taken a giant gamble.

The gamble is that the Kingdom can suffer though short-term economic dislocations associated with the globalization of the Saudi economy, because the Saudi people will appreciate that in the long-term, the benefits of openness experienced by many countries in the post-Second World War era will redound to them too. In discussing the delayed Doha Round of multilateral trade negotiations, the Financial Times not only commented that “[t]he WTO is in a mess,” partly because of the “loss of leadership” from the United States, but also rightly observed “[b]ig trade negotiations are a politically counter-intuitive activity that requires a willingness to take short-term pain at home in the hope of long-term gains that are thinly spread, slow to materialize, and hard to prove.”20 Even in the narrower


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context of WTO accession negotiations for an individual country, that observation is applicable. The gamble that the United States has taken with the Kingdom had better pay off, for the Kingdom—not to mention Kansas—will suffer if it does not.

If this risk does not yield the anticipated return, then the result could be ironic. Perhaps because of all the negative media attention during the oil crises of 1973 and 1978–79, the ad nauseam repetition on twenty-four hour news networks that fifteen of the nineteen September 11th terrorists were Saudi citizens, the publication of books with titillating titles about what the Central Intelligence Agency knew or did not know,21 and the half-comical stories about seizures of Barbie dolls by the mutawwain (the religious police, whose official title is the “Commission for the Protection of Virtue and the Prevention of Vice”) in local souks (markets),22 many aspects of the Kingdom remain a mystery to outsiders.23 As summarized in Part VI, the mystery is yet deeper with respect to how American pressure in trade negotiations is perceived within the Kingdom, and the implications of the Kingdom’s concessions in response to those demands. The irony could be that the United States prides itself on its post-9/11 efforts to understand the Muslim World, especially the Arab World. Worse yet, if the American gamble does not pay off, then the result could be dangerous. The danger could be worse anti-American sentiments that are deleterious to the interests of all well-intentioned traders, whether Saudi or Kansan—a backlash catalyzed by American trade law.

B. Why Focus on the Kingdom?

Aside from the confines of space, why “limit” oneself to Saudi Arabia? Surely, this thesis could be reinforced by arguing the Bush Administration’s May 2003 proposal for a “Middle East Free Trade Area” (MEFTA) is likely rhetorical, maybe disingenuous, and perhaps both. True, though that would be dreadfully easy.24 It should be evident to any reasonably im-

23. As an illustration, how many westerners appreciate the significance of the vote-face of Sheikh Ali al-Khodeir? (An excellent account, on which I draw, of this remarkable event is in WHO GAINS?, ECONOMIST, Nov. 22, 2003, at 45.) This Sheikh had extolled the virtues of suicide attacks as religiously acceptable acts of jihād, characterized as a religious duty the chasing of Jews from the Arabian Peninsula, branded Muslims infidels if they aided infidels, and issued a fatwas prohibiting Saudis from helping law enforcement authorities find terrorists responsible for bombing in Riyadh. In November 2003, on Saudi television, the Sheikh renounced completely his pedagogy on jihād. He explained an attack on a non-Muslim who is not directly involved in a war against Islam is wrong (and, in any event, needs approval from a legitimate Muslim ruler), and demanded Al-Qaeda and its sympathizers not only shed their weapons, but also remember the inevitable Day of Final Judgment, when they must account for the unjustified bloodshed they caused.
24. This Administration does not allow any and all Arab countries into the MEFTA fold immediately, which if it did would suggest a dramatic effort to stimulate trade with and among them, and more generally a profound interest in their economic development. James Drummond & Roula Khalaf, Trade Reform to Dominate Agenda in Jordan, FIN. TIMES, June 21–22, 2003, at 5 (discussing the pre-condition of WTO accession and the large, important Arab countries that are only observers, or lack even that status). For additional information on MEFTA, Edward Alden & Roula Khalaf, Middle East Trade Plan a Leap of Faith for Bush, FIN. TIMES, May 10–11, 2003, at 3; James Harding & Edward Alden, Bush to Call for Trade Pact with Middle East, FIN. TIMES, May 9, 2003, at 1.

Of the twenty-two countries in the Arab League, only Jordan has run this gauntlet although Bahrain and Morocco may be nearing completion of passage through it as well. The Kingdom aside, commercially signifi-
partial observer that, in reality, the United States puts countries in the Middle East into categories of "good" and "evil," and agrees to commercially insignificant bilateral trade deals, making few compromises itself. Bahrain, Jordan, and Morocco are "good guys," Iran and Syria remain "bad guys," and Libya may be switching camps.

Economic significance, specifically oil, is one reason for focusing on the Kingdom. Oil accounts for 40 percent of global energy consumption, and this share is not likely to decline during the next two decades. Over 60 percent of proven world oil reserves are in the Persian Gulf, and the Kingdom has 25 percent of these deposits—roughly double the next highest depository (Iraq, with 11 percent), and roughly triple the third rung of depositories (Iran, Kuwait, and the United Arab Emirates, with 9 percent each). The Kingdom itself produces approximately 40 percent of the world's petroleum. Projections for 2010–2020 indicate all major increases in oil production will come from the Persian Gulf, and only the Kingdom (which has spare production capacity Russia lacks) will have the ability to affect spikes in prices and production by boosting or cutting its output. The United States obtains roughly half of its oil from abroad, and 15 percent of its oil from the Kingdom, but just 2.3 percent from Russia and the Caspian States.

These facts not only adduce the significance of the Kingdom, but also implicate the credibility of the WTO. While China stood in queue for accession, it was said that the "W" in the acronym was nearly meaningless. This author would suggest that the "W" is a small letter until the Kingdom is an active participant, as a full Member, of the WTO. The accessions of Jordan in 2000 and Oman in 2001 were positive developments, and raised the number of Arab WTO Members to eleven. But, there are twenty-two countries in the Arab League, so half of the League—including Algeria, Lebanon, Libya, Syria, Sudan, and Yemen—has yet to be admitted (even though all of these countries have applied). More

cant Arab countries like Egypt are far from completion, as are two key non-Arab Middle Eastern countries, Iran and Turkey. Surely, the fact is not lost on the Arab World that the Administration has yet to push Israel (the first country to have an FTA with the United States) to join in a MEFTA with Jordan.

In February 2004, the USTR announced the signature of Trade and Investment Framework Agreements with Kuwait and Yemen. See Offc. of the U.S. Trade Representative, Press Release, United States and Kuwait Sign Trade and Investment Framework Agreement (Feb. 6, 2004), available at http://www.usrt.gov. While Kuwait is a WTO Member, Yemen is in the process of accession (having applied in April 2000), thus suggesting some flexibility by the United States with respect to the order of the first two pre-conditions.


26. See id. (presenting these statistics and observing that by contrast, Russia has five percent of the world's proven oil reserves); Al-Ammari, supra note 7, at 1 (stating that "the Kingdom possesses one-fourth of the world's proven oil reserves"); Robin Allen, Saudis Blame "Unique Status" for Delays in Joining WTO, Fin. Times, June 14, 2000, at 8 [hereinafter Allen, Saudis Blame] (noting that the Kingdom has twenty-five percent of the world's proven oil reserves).

27. Allen, Saudis Blame, supra note 26, at 8 (mentioning this statistic).

28. See Telhami & Hill, supra note 25 (presenting these statistics).


importantly, without the consistent, active involvement of the Kingdom, the Arab World is not really "in" the Club.

A second reason for examining American trade policy toward the Kingdom connects the economic significance of the Persian Gulf with the national security interests of the United States. In the assessment of two Brookings Institution scholars, "[f]or half a century, the United States has made Persian Gulf oil a primary security interest, and this emphasis is unlikely to dissipate this decade." What is refreshing about their assessment is the first clause. It implies the folly of believing America's security interest in the Gulf increased on September 11th. The attacks sickeningly highlighted a long-standing interest.33

President Truman and his national security planners developed a policy of "denial," meaning they sought to safeguard oil flow from the Persian Gulf to the United States, but keep the oil supply out of the hands of hostile powers. A 1949 National Security Council directive (called "26/2," which was supplemented by other orders) articulated this policy. In coordination with Great Britain, but without the knowledge of Arab governments, the United States stored explosives near oil fields in the Gulf, to be used to blow up installations and refineries if they fell into the wrong hands (particularly those in the Kremlin). Following the Suez Crisis, in 1957, President Eisenhower enlarged the "denial" policy to include countries in the Middle East as potentially "hostile." In other words, a second answer is American trade policy toward the Kingdom matters because the Kingdom is preeminent in the Gulf, and oil from the Gulf has been, and continues to be, a preeminent national security concern.

However potent the economic and strategic logic, focus on the Kingdom may be justified on a third ground. The problem with the first two rationales is their ethnocentrism. The rationales look at the Kingdom from an American perspective, viewing it as a large gas pump.34 A possible answer to the question "Why focus on the Kingdom?" is the profound importance of the Saudi experience to every Arab, indeed, to every Muslim. Of course, not every Muslim is Sunni. Roughly 20 percent of the world's 1.3 billion Muslims believe the proper line of succession for the Islamic community passed through blood-related descendants of the Prophet Muhammad (Peace Be Unto Him), namely, the Prophet's cousin and son-in-law, 'Ali, and, therefore, are Shi'a. Even among the Sunnis, not every one follows the Hanbali School, with which Wahhābisn is prevalent in the Kingdom, but there are also followers of the Hanafi, Malaki, and Shafi'i Schools.

Regardless, the fact remains that no Muslim credibly proclaims total disinterest in Saudi Arabia. To do so would be to turn his back on the land in which the Prophet received his revelation that was, and is, the Qur'an, the first of the fundamental sources of the Shari'a (Islamic Law). The Hejaz region of the Arabian Peninsula is even more than where the

32. Telhami & Hill, supra note 25 (emphasis added).
33. For a discussion of this history, see Daniel Yergin, The Prize: The Epic Quest for Oil, Money & Power (Free Press 1991).
34. See Telhami & Hill, supra note 25, at 170, 81 (discussing the declassified documents).
35. See id. at 171, 81 (discussing the declassified documents). For accounts of the Suez Crisis, see, for example, Donald Neff, Warriors at Suez: Eisenhower Takes America into the Middle East in 1956 (Amana 1982), and Hugh Thomas, Suez (Harper Collins 1967).
36. I do not mean to suggest that this economic and strategic logic would apply only to the United States. For example, it would also apply to China. Oil represents thirty percent of Chinese energy consumption, and China imports sixty percent of its oil from the Gulf (with projections showing this figure will rise to ninety percent in the next two decades. See Telhami & Hill, supra note 25, at 170 (presenting these statistics).

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Prophet heard God’s Message. It is where the Prophet himself walked, delivered sayings compiled in the *Haddith*, and lived an exemplary life recounted in the *Sunnah*. For every Muslim, it is to Mecca and Medina he must endeavor to go, to fulfill the fifth of the Five Pillars of Islam, the *Hajj*. The very title of the King of Saudi Arabia, King Fahd Bin ‘Abd al-‘Azîz, reflects the importance of these sites, as it means “Custodian of the Two Holy Places.”¹¹ In sum, Saudi Arabia holds for all time unique significance to Muslims.²⁸ How they perceive it as treated by the United States is of unparalleled interest. To them, the accession of the Kingdom, and its participation in the WTO, takes on significance far beyond the commercial significance that arises from WTO entry terms set for other Muslim countries.

C. EMPATHIZING WITH THE KINGDOM IN ITS WTO ACCESSION ODYSSEY

On June 13, 1993, the Kingdom applied to join the General Agreement on Tariffs and Trade (GATT), yet up through the founding of the WTO on January 1, 1995, and until quite recently, little progress was made towards accession.³⁹ That was true with respect to both of the parallel tracks on which any application must proceed: bilateral agreements between the applicant and any extant WTO Member seeking specific trade-liberalizing concessions on access to the applicant’s goods and services markets; and multilateral talks in the context of a working group, which ensure consistency of the applicant’s trade laws with WTO standards, and which yield a final schedule of goods and services concessions by “multilateralizing” the best treatment agreed to in the bilateral accords.⁴⁰ To be fair to the Kingdom, the length of its odyssey was not for want of its interest in exportation. At the time of the first meeting of the WTO Working Party on the Kingdom’s accession, in 1996, the Kingdom was the world’s twenty-sixth largest exporter.⁴¹ In fact, as of December 2003, the Kingdom was the second largest economy in the world (after Russia) not represented in the WTO.⁴²

To be fair to the WTO, the long odyssey also was not for want of meetings of the Working Party. This Working Party, established on July 21, 1993, has been chaired in recent

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³⁷. See Allen, *Saudia Blame*, supra note 26 (noting the meaning of the title).
³⁸. Id. (discussing the concern the Kingdom’s unique status hindered its entry to the WTO).
³⁹. See World Trade Organization, *Accessions—Saudi Arabia, available at http://www.wto.org* (specifying June 13, 1993, as the date the Kingdom’s application was received) (last visited Sept. 20, 2004). Occasionally, the application date is reported as July 1993. See, e.g., Frances Williams, *Saudi Start Talks on Joining the WTO, Fin. Times*, May 3, 1996, at 4 (stating “Saudi Arabia applied to join GATT, the WTO’s predecessor, in July 1993, but these negotiations had made little progress by the time the WTO was created in January last year”). The GATT, along with the WTO agreements to which I refer, is available on the Web site of the WTO, http://www.wto.org. These texts are widely reprinted, including in Raj Bhala, *International Trade Law Handbook* (Lexis 2001).
years by Mr. Munir Akram, Pakistan's Ambassador to the United Nations.\textsuperscript{43} By the end of 2000, the party had met eight times, typically biannually (in the late spring and late fall):

- In 1996, on May 2–3 and November 6–8.
- In 1997, on May 29–30 and December 2–4.
- In 1998, on November 17–19.
- In 1999, on 22 September 22
- In 2000, on April and 17 October 17.

In connection with these meetings, the Kingdom submitted a large amount of documentation.\textsuperscript{44} Although, the Working Party failed to convene for three years after its October 2000 meeting, it did start up on October 23–24, 2003.\textsuperscript{45} Meetings continued in December 2003, and well into 2004.\textsuperscript{46}

How might this odyssey of more than ten years be characterized? One way is to see it as ebbs and flows of zeal in the Kingdom for trade liberalization. This characterization is preferred by the United States because blame for a lack of progress in accession negotiations can be put on Riyadh, that is, on the failure of public and private sector officials in the Kingdom to embrace free-market principles of Adam Smith and David Ricardo. It is irrelevant that those principles occasionally get adulterated with mercantilism at the nego-


\textsuperscript{44} See World Trade Organization, supra note 39. (listing the meeting dates, as well as the dates of documentary replies from the Kingdom.) With regard to goods, the Kingdom made tariff concession offers on September 24, 1997, and again on June 29, 1999. As of November 2003, the Kingdom had not presented a draft Schedule of Tariff Concessions for goods. With regard to services, the Kingdom filed documentation on September 23, 1997, and a draft Schedule of Services with the WTO Working Party on September 24, 1997, and again on June 28, 1999.


By May 2000, the Kingdom presented the Working Party with "an action plan covering all aspects of WTO rules that must eventually form the basis for a single membership protocol agreement." Warren Giles, "Turning Point" for Saudi Arabia, \textit{Fin. Times}, May 5, 2000, at 6. However, as of January 2004, it appeared the Kingdom had yet to file a detailed legislative action plan.


iating table, particularly when on one side of the table sits a trading power with major market access demands for its businesses.\textsuperscript{47}

This characterization also sits well with the American self-image as an even-handed, honest broker in the Middle East. It is an image associated not only with the Israeli-Palestinian conflict, but also controversies between Arabs and Western countries, such as the boundary dispute in the 1950s over Buraymi, an oasis on the eastern fringe of the Arabian peninsula, between the Kingdom and the British-backed Sultanates in Oman and Abu Dhabi.\textsuperscript{48} Accordingly, from the American perspective, its trade policy is to ask of the Kingdom only what it requests of other Middle Eastern countries in WTO accession negotiations.\textsuperscript{49} However, from the perspective of many Arabs, the American self-image of even-handedness is a study in self-deception and denial. Interestingly, in a survey conducted in the Kingdom in early 2002, “86 percent of Saudi elites and 59 percent of the general public indicated that their frustrations with the United States were based on its policies, not on American values.”\textsuperscript{50}

The point is that there is another way to characterize that policy, especially as it relates to the Kingdom’s WTO accession odyssey. It is a tale of ever-increasing demands, driven often by the United States, for market access and trade liberalization. The odyssey is really a cycle of “demand—concede,” with the United States firmly asking, and the Kingdom typically giving. The demands cover all aspects of commercial relations—goods, services, intellectual property rights (IPR), and FDI. Over the years, some American demands have been consistent. Perhaps a few may have dropped away (though that is not apparent from publicly available sources), particularly if met stiffly by the Kingdom. Is it, then, fair to

\textsuperscript{47} Lest there be any doubt about the ability of the United States to press relentlessly for market access, consider the new Central American Free Trade Agreement (CAFTA). The United States successfully pried open markets in El Salvador, Guatemala, Honduras, and Nicaragua, particularly with respect to banking, insurance, and telecommunications services, but simultaneously: (1) extended the phase out of agricultural trade barriers to twenty years (five more than the maximum fifteen-year period under the North American Free Trade Agreement (NAFTA)); (2) declined to substantially open the American market to the products of keenest export interest to the Central American countries, namely, sugar and textiles; and (3) built product-specific safeguards into the deal with a view to imposing them should a pesky CAFTA partner actually develop a competitive foothold in the American market. Not surprisingly, Costa Rica balked at this lopsided deal. See Edward Alden, \textit{U.S. Agrees Trade Deal with Central American Nations}, \textit{Fin. Times}, Dec. 18, 2003, at 6 (summarizing some of the terms of CAFTA, and noting Costa Rican objections). Thus, media accounts of CAFTA have all but called it a mercantilist bargain. For example, as \textit{The Washington Post} observed,

American exporters will benefit from CAFTA, perhaps to a fault; the deal is distinctly tilted in favor of the United States. While Central American markets would be \textit{fully open} to U.S. financial services, telecommunications and technology exporters, protections for the uncompetitive American sugar and textile industries will be \textit{preserved indefinitely}. . . . The overall effect on U.S. employment would be tiny:

\textit{The total yearly exports to the United States of the CAFTA countries currently amount to about two days’ worth of American imports.}


\textsuperscript{48} For an engaging account of American diplomatic efforts in the Buraymi dispute to steer a course between the territorial claims of the Kingdom and the interests of the British in the Gulf region, see Nathan J. Ciflin, \textit{From Arab Nationalism to OPEC: Eisenhower, King Sa’ud, and the Making of U.S.-Saudi Relations} 19-37 (2002).

\textsuperscript{49} Pruzin, \textit{U.S., Others Urge Saudis}, supra note 31 (observing that “critics counter that Saudi Arabia is only being asked to make the same concessions that other Middle Eastern countries have already agreed to as the price for membership”).

\textsuperscript{50} Telhami & Hill, supra note 25, at 173 (summarizing the poll results).
characterize American demands as “ever increasing?” If the focus was put on one particular topic, then the answer probably would be “no.” But, WTO accession is never confined to one matter, so a characterization of the process cannot be inferred from a single demand by the United States and associated response by the Kingdom. Rather, it is the overall pattern of demands and responses from which a characterization must be drawn.

The author’s sense is that this pattern can be reasonably characterized not as a negotiation, but something more akin to a dictation.51 Put bluntly, with a few exceptions (discussed later, relating to the petrochemical and natural gas sectors), the Americans told the Saudis the price they must pay for WTO entry, essentially in a “take-it-or-leave-it” fashion, and the price has risen since 1996. Adopted here is the second characterization.

It may not be right, in the sense of Absolute Truth, but it is important to present the Kingdom’s status as a WTO Member through the eyes of the Kingdom. Empathy, this author believes, is the single most important forte of an international lawyer, whether in the academy or in practice. That strength is needed to understand and interpret, if only a bit better, the international trade experience of the Kingdom.

D. ISRAEL IS NOT A PROBLEM

It is impossible to discuss trade with the Arab World without having thrust on oneself the question of Israel and the Occupied Territories.52 It should be noted that the Kingdom agreed to drop the secondary boycott of Israel. It did so no later than October 2000.53 Also significant is the point that Israel has agreed not to block the Kingdom’s entry into the WTO and neither country is invoking the non-application provisions of article XXXV of the General Agreement on Tariffs and Trade (GATT) and Article XIII of the Agreement Establishing the World Trade Organization (WTO Agreement).54 Further, Israel has accepted its legal inability to combat a voluntary, private-sector boycott of trade relations.55

Surely, the Kingdom had little choice but to deal with this matter. Israel is a member of the WTO Working Group on the accession of the Kingdom.56 So blatant a violation of the most favored nation (MFN) rule in Article I:1 of the GATT could not be tolerated by the

51. I am confident that this view is neither extreme nor unique. See, e.g., Al-Ammari, supra note 7, at 3 (stating “excessive demands on Saudi Arabia both in the negotiations on market access and on protocol issues temporarily slowed down accession negotiations.” (emphasis added)).

52. For a clear and comprehensive, yet succinct, cartographic account of the Israeli—Palestinian conflict, see MARTIN GILBERT, THE ROUTLEDGE ATLAS OF THE ARAB–ISRAELI CONFLICT (7th ed. 2002). The map at page 121 explains the Arab boycott of companies trading with Israel.


54. Puzin, Saudi WTO Accession, supra note 45 (reporting “[t]rade officials said the Saudis would also be expected to refrain from invoking the” non-application rules, “with the understanding that Israel would also refrain from making such a move”).

55. Id. at 1810 (reporting “Israeli officials admit that there is little they can do about such nonbinding ‘voluntary’ campaigns against trade with Israel, but said they would expect Saudi officials to stop attending meetings of the Central Office [for the Boycott of Israel, in Damascus] after joining the WTO, as other Arab [WTO] members . . . have done”).

56. There are roughly fifty-three members of the Working Group.
world trading community. Never mind the hypocrisy of the United States exerting pressure on the Kingdom on this point, given its own secondary boycott of Cuba, Iran, and Libya under the Helms-Burton Act and Iran and Libya Sanctions Act. They can be excused because neither Iran nor Libya is yet a WTO Member and the President routinely acquiesces to demands from the European Union (EU) and waives the most irksome provisions of the sanctions on Cuba. For the Kingdom to join the WTO with a secondary boycott of Israel in place would have meant it would bar trade with any foreign country that trades with Israel.

Even an average trade law student could spot the MFN violation of preferring imports from countries that do not trade with Israel over imports from countries that do. The Kingdom could try the legalistic last resort of invoking the GATT national security exception in Article XXI—and then, probably, witness WTO Members skittish about, or hostile to, the Arab World invoke the same exception against the Kingdom. In brief, for good reason, the Kingdom and Israel have gotten along well enough in accession negotiations. To put it more grandly, where world peace through world law (the quixotic vision of a generation of public international law scholars after the Second World War) has failed thus far in the context of Palestine, there may be hope for world peace through world trade.

II. Why Kansas Cares

"The basic links that bind us [the United States and the Kingdom] make for almost a Catholic marriage."

Prince Turki al-Faisal, Ambassador of Saudi Arabia to the United Kingdom.

A. About Trade with the Muslim World

For students at the University of Kansas, it is of decreasing necessity to ask why Kansas cares, or ought to, about the Arab and Muslim worlds. Particularly, since September 11th, enrollments in Arabic language and studies courses have jumped dramatically (though students credit curiosity and job possibilities, not just terrorist attacks, for their interest). However, asking about trade between the United States and the Kingdom, and why Kansas ought to care, is not the same inquiry. To this pointed question, hard data is needed.

57. See U.S. Wants Saudis to Cut Tariffs on Drugs, Chemicals, Info Tech Items, and Agriculture, 17 Int'l Trade Rep. (BNA) 1281 (observing correctly a measure barring imports from a third party that trades with Israel would violate WTO rules on non-discrimination). See generally Eugene Kontorovich, The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?, 4 CHI. J. INT'L L. 283–304 (Fall 2003) (arguing there is no implicit exception in the GATT for sanctions undertaken purely for foreign policy purposes, i.e., for political ends, and the absence of such an exception advances the goal of promoting amicable trade relations).


60. See Meghan Brune, Interest in Arabic Studies Growing at KU, LAWRENCE J.-WORLD, Jan. 19, 2004, at B1 (discussing the Arabic Department, and the University's programs located in the Middle East).

61. Unless otherwise noted, all data in Part II are from the web site of the Office of Trade and Economic Analysis (OTEA), Trade Development, International Trade Administration, United States Department of

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Readily apparent from statistics is the importance of the United States to the Kingdom. America is the second largest export market for Saudi products, and the largest source of imports into Saudi Arabia. Table One presents the Kingdom’s major trading partners. But, again, why would Kansans bother about trade with the Kingdom or American trade law toward it? This question should be answered with a progressively narrower focus, from the trade relations of Kansas around the globe, with the Muslim World, with the Arab World, and finally with the Kingdom itself. This approach reveals the breadth and depth of the interest of Kansas in a constructive trade policy toward the Kingdom, and this approach while likely would work for much of the American heartland, with the same outcome. To begin, one misconception about exports from Kansas is that there are not a lot of them, and what little there are go to a handful of countries. Kansas trades with 175 of the 199 countries in the world, exporting nearly $5 billion annually to customers in these countries. Kansas accounts for a bit less than 1 percent of America’s exports to the world, and it has about one percent of the country’s population. (Among the twenty-five countries


(1) 2003 Exports of Total to World.
(2) Percent Change 1999 to 2003 Exports of Total to World.
(3) Percent Change 1999 to 2002 Exports of Total to World.
(4) 2003 Exports of HS Total—Total All Merchandise.
(5) Percent Change 1999 to 2003 Exports of HS Total—Total All Merchandise.
(6) Percent Change 1999 to 2002 Exports of HS Total—Total All Merchandise.
(7) 2003 Exports of Total from Kansas.
(8) Percent Change 1999 to 2003 Exports of Total from Kansas.
(9) Percent Change 1999 to 2002 Exports of Total from Kansas.
(10) 2003 Exports of Total to Middle East.
(11) Percent Change 1999 to 2003 Exports of Total to Middle East.
(12) 2002 Exports to Middle East (including Percent Change 1999 to 2000).
(13) 2003 Exports from Kansas to Middle East.
(14) 2002 Exports from Kansas to Middle East.
(15) 2003 Exports of Total to Gulf Cooperation Council (GCC).
(16) Percent Change 1999 to 2003 Exports of Total to Gulf Cooperation Council (GCC).
(17) 2002 Exports to Gulf Cooperation Council (GCC) (including Percent Change 1999 to 2002).
(18) 2003 Exports from Kansas to Gulf Cooperation Council (GCC).
(19) 2002 Exports from Kansas to Gulf Cooperation Council (GCC).
(20) 2003 Exports of Total to Saudi Arabia.
(21) 2003 Exports to Saudi Arabia (including Percent Change 1999 to 2003).
(22) 2002 Exports to Saudi Arabia (including Percent Change 1999 to 2002).
(23) 2003 Exports from Kansas to Saudi Arabia.
(24) 2002 Exports from Kansas to Saudi Arabia.
(25) Percent Change 1999 to 2003 Exports of Total to Saudi Arabia.
(26) Percent Change 1999 to 2002 Exports of Total to Saudi Arabia.

62. The exact dollar figure in 2003 was $4,553,334,000 and in 2002 it was $4,988,410,000. Of the 175 countries, one is listed as “Unidentified Countries,” which count as a single country.


Kansas ranked thirty-first in 2003, and 28th in 2002, among the fifty states in total dollar value of exports. In 2003, the United States exported $723,743,177,000 to the world, and in 2002 the figure was $693,257,300,000
<table>
<thead>
<tr>
<th>Leading Export Markets</th>
<th>Percentage of Exports from the Kingdom to that Market, 2002 versus 1998 (based on U.S. dollar value)</th>
<th>Leading Import Sources</th>
<th>Percentage of Imports into the Kingdom from that Source, 2002 versus 1998</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
<td>16.0% (2002 data), 17.0% (1998 data)</td>
<td>United States</td>
<td>18.6% (2002 data, worth $5 bil.), 21.0% (1998 data, worth $10.5 bil.)</td>
</tr>
<tr>
<td>United States</td>
<td>16.6% (2002 data, worth $13.15 bil.), 15.0% (1998 data, worth $6.4 bil.)</td>
<td>United Kingdom</td>
<td>6.1% (2002 data), 9.0% (1998 data)</td>
</tr>
<tr>
<td>South Korea</td>
<td>10.3% (2002 data), 11.0% (1998 data)</td>
<td>Japan</td>
<td>11.0% (2002 data), 9.0% (1998 data)</td>
</tr>
<tr>
<td>Singapore</td>
<td>5.4% (2002 data), 8.0% (1998 data)</td>
<td>Germany</td>
<td>7.4% (2002 data), 6.0% (1998 data)</td>
</tr>
<tr>
<td>India</td>
<td>3.5% (2002 data), 4.0% (1998 data)</td>
<td>France</td>
<td>5.0% (1998 data only)</td>
</tr>
<tr>
<td>Total Value of Exports or Imports</td>
<td>$48 billion (f.o.b. prices 1999)</td>
<td>$28 billion (f.o.b. prices 1999)</td>
<td></td>
</tr>
</tbody>
</table>

Major Products Exported or Imported

- Petroleum and petroleum products (90%)
- Machinery and equipment, foodstuffs, chemicals, motor vehicles, and textiles

To the world. In 2003, Kansan goods accounted for $4,553,334,000 of this total, and in 2002 they accounted for $4,988,410,000 of this total.

The states exporting more in 2003 (in value terms) than Kansas also were states with higher (typically, considerably higher) populations. For example, not surprisingly the top three exporting states were Texas ($98,846,083,000); California ($93,994,882,000), and New York ($39,180,708,000). Kansas ranked just ahead of Utah, which exported $4,114,540,000 in 2003.

Kansas did not ship goods to in 2003 are infamous examples like Burma and Sudan, both of which had been Kansan export destinations in recent years—Burma in 1999, and Sudan in 2000–01). Similarly, depending on the time period selected, exports from Kansas have been growing faster than the national average. For example, from 1999 to 2002, the dollar value of America's exports to the world was essentially flat (the precise growth rate was 0.06 percent). During the same period, exports from Kansas to the world grew by a robust 6.8 percent. In contrast, however, 2003 figures reveal Kansan exports falling by 2.49 percent between 1999 and 2003, and American exports in the same period rising by 4.5 percent.65

Of the 175 countries with which Kansas trades, the state's largest trading partners mirror the nation's largest trading partners—the NAFTA Parties, Canada and Mexico. Table Two presents the “Top Third Export Value List.” That is, of the 199 countries in the world to which Kansas potentially could export its products, Table Two lists the top one-third of these countries (sixty-seven of the 199 countries) in terms of the dollar value of their imports from Kansas, and it highlights Muslim countries in bold.66 Not surprisingly, Canadians and Mexicans combine to buy 35.6 percent of exports from Kansas.67 That fact reflects a national phenomenon, namely, America's top two export destinations are within NAFTA. What may be surprising is the importance of Muslim countries as export markets for Kansan products. Twelve Islamic countries appear in the Top Third Value List. These export statistics help explain the importance to Kansas of the Muslim World.

To pluck just a few highlights from the Top Third Export Value List, observe Kansas exports slightly more to Nigeria than to Taiwan, and likewise a bit more to Egypt than to Spain. Perhaps, for Kansans, the political spotlight on America's support for Israel and America's troubled alliance with the EU overshadow the economic facts the state exports roughly the same range of values to Saudi Arabia, Ireland, and Israel (with Kansas shipping nearly two-thirds as much to the Kingdom as to the other two countries). While the new American free trade agreement (FTA) with Chile (which took effect on January 1, 2004) is a noteworthy negotiating success for the United States, from a Kansan perspective, the state exports more to Indonesia than to Chile.68

The disparities in export market growth rates are perhaps even more telling. Table Three presents the “Top Third Export Growth Rates List.” That is, of the 199 potential export destinations, Table Three lists the sixty-seven fastest growing export markets for products shipped from Kansas measured by dollar value growth from 1999 to 2003, again, with Muslim countries in bold. To be sure, countries in the Far East and EU figure prominently if the measurement criterion is the dollar value of exports (as in Table Two). But, if the

65. Consequently, during 1999–2003, Kansas ranked forty-fifth among the fifty states in terms of the percentage growth rate of exports (measured by dollar value). Nevada led the way with 90.5 percent, followed by South Carolina, at 64.7 percent. California followed Kansas, with a decline of 2.5 percent.

66. Muslim countries are identified as such on the basis of an Islamic population equal to or exceeding fifty percent of the country's total population. For certain African countries, the Muslim population figures come from Princeton N. Lyman & J. Stephen Morrison, The Terrorist Threat in Africa, 83 FOREIGN AFF. 75–86 (Jan./Feb. 2004), who constructed a table entitled “Muslim Populations in Selected African Countries, 2003,” using data from the CIA World Factbook.

67. Of the $4,553,334 exported by Kansas to the world in 2003, Canada bought $1,020,855, and Mexico bought $602,032,000.

68. See Presidential Proclamations Implement Chile, Singapore Free Trade Agreements, 21 Int'l Trade Rep. (BNA) 49 (Jan. 8, 2004) (reporting on the effective dates for the FTAs with Chile and Singapore—both took effect the same day).
### Table Two
The "Top Third Export Value List"
(67 of the 199 Most Important Export Markets for Kansas Products, 2003)

<table>
<thead>
<tr>
<th>Rank Among 199 Potential Export Markets for Kansan Products</th>
<th>Country of Importation of Kansan Products (Muslim countries in bold)</th>
<th>U.S. Dollar Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Canada</td>
<td>$1,020,855,000</td>
</tr>
<tr>
<td>2</td>
<td>Mexico</td>
<td>602,032,000</td>
</tr>
<tr>
<td>3</td>
<td>Japan</td>
<td>542,977,000</td>
</tr>
<tr>
<td>4</td>
<td>South Korea</td>
<td>320,679,000</td>
</tr>
<tr>
<td>5</td>
<td>United Kingdom</td>
<td>249,011,000</td>
</tr>
<tr>
<td>6</td>
<td>Germany</td>
<td>179,909,000</td>
</tr>
<tr>
<td>7</td>
<td>China</td>
<td>175,806,000</td>
</tr>
<tr>
<td>8</td>
<td>Singapore</td>
<td>129,581,000</td>
</tr>
<tr>
<td>9</td>
<td>France</td>
<td>121,090,000</td>
</tr>
<tr>
<td>10</td>
<td>Australia</td>
<td>108,429,000</td>
</tr>
<tr>
<td>11</td>
<td>South Africa</td>
<td>86,605,000</td>
</tr>
<tr>
<td>12</td>
<td>Hong Kong</td>
<td>72,374,000</td>
</tr>
<tr>
<td>13</td>
<td>Brazil</td>
<td>62,831,000</td>
</tr>
<tr>
<td>14</td>
<td>Italy</td>
<td>58,298,000</td>
</tr>
<tr>
<td>15</td>
<td>Nigeria</td>
<td>57,926,000</td>
</tr>
<tr>
<td>16</td>
<td>Taiwan</td>
<td>53,301,000</td>
</tr>
<tr>
<td>17</td>
<td>Belgium</td>
<td>44,406,000</td>
</tr>
<tr>
<td>18</td>
<td>Netherlands</td>
<td>40,400,000</td>
</tr>
<tr>
<td>19</td>
<td>Portugal</td>
<td>31,831,000</td>
</tr>
<tr>
<td>20</td>
<td>Switzerland</td>
<td>30,833,000</td>
</tr>
<tr>
<td>21</td>
<td>India</td>
<td>30,215,000</td>
</tr>
<tr>
<td>22</td>
<td>Thailand</td>
<td>30,000,000</td>
</tr>
<tr>
<td>23</td>
<td>Egypt</td>
<td>29,265,000</td>
</tr>
<tr>
<td>24</td>
<td>Spain</td>
<td>28,919,000</td>
</tr>
<tr>
<td>25</td>
<td>Colombia</td>
<td>23,890,000</td>
</tr>
<tr>
<td>26</td>
<td>Austria</td>
<td>23,818,000</td>
</tr>
<tr>
<td>27</td>
<td>Panama</td>
<td>20,319,000</td>
</tr>
<tr>
<td>28</td>
<td>Indonesia</td>
<td>19,673,000</td>
</tr>
<tr>
<td>29</td>
<td>Greece</td>
<td>19,213,000</td>
</tr>
<tr>
<td>30</td>
<td>Romania</td>
<td>18,007,000</td>
</tr>
<tr>
<td>31</td>
<td>Guatemala</td>
<td>17,963,000</td>
</tr>
<tr>
<td>32</td>
<td>Chile</td>
<td>15,531,000</td>
</tr>
<tr>
<td>33</td>
<td>Argentina</td>
<td>15,113,000</td>
</tr>
<tr>
<td>34</td>
<td>United Arab Emirates</td>
<td>14,960,000</td>
</tr>
<tr>
<td>35</td>
<td>New Zealand</td>
<td>13,509,000</td>
</tr>
<tr>
<td>36</td>
<td>Sweden</td>
<td>12,273,000</td>
</tr>
<tr>
<td>37</td>
<td>Costa Rica</td>
<td>11,416,000</td>
</tr>
<tr>
<td>38</td>
<td>Denmark</td>
<td>10,008,000</td>
</tr>
<tr>
<td>39</td>
<td>Angola</td>
<td>9,268,000</td>
</tr>
<tr>
<td>40</td>
<td>Philippines</td>
<td>9,224,000</td>
</tr>
<tr>
<td>41</td>
<td>Russian Federation</td>
<td>9,149,000</td>
</tr>
<tr>
<td>42</td>
<td>Dominican Republic</td>
<td>9,056,000</td>
</tr>
<tr>
<td>43</td>
<td>Malaysia</td>
<td>8,780,000</td>
</tr>
<tr>
<td>44</td>
<td>Ireland</td>
<td>8,769,000</td>
</tr>
<tr>
<td>45</td>
<td>Tanzania</td>
<td>8,089,000</td>
</tr>
<tr>
<td>46</td>
<td>Israel</td>
<td>8,086,000</td>
</tr>
<tr>
<td>47</td>
<td>Peru</td>
<td>8,051,000</td>
</tr>
</tbody>
</table>

*Continued*
Table Two
Continued

<table>
<thead>
<tr>
<th>Rank Among 199 Potential Export Markets for Kansan Products</th>
<th>Country of Importation of Kansan Products (Muslim countries in bold)</th>
<th>U.S. Dollar Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>48</td>
<td>Venezuela</td>
<td>8,039,000</td>
</tr>
<tr>
<td>49</td>
<td>Bahamas</td>
<td>5,707,000</td>
</tr>
<tr>
<td>50</td>
<td>Luxembourg</td>
<td>5,251,000</td>
</tr>
<tr>
<td>51</td>
<td>Morocco</td>
<td>5,217,000</td>
</tr>
<tr>
<td>52</td>
<td>Saudi Arabia</td>
<td>5,141,000</td>
</tr>
<tr>
<td>53</td>
<td>Uruguay</td>
<td>5,092,000</td>
</tr>
<tr>
<td>54</td>
<td>Finland</td>
<td>4,800,000</td>
</tr>
<tr>
<td>55</td>
<td>Turkey</td>
<td>4,572,000</td>
</tr>
<tr>
<td>56</td>
<td>Czech Republic</td>
<td>4,195,000</td>
</tr>
<tr>
<td>57</td>
<td>Pakistan</td>
<td>3,937,000</td>
</tr>
<tr>
<td>58</td>
<td>El Salvador</td>
<td>3,877,000</td>
</tr>
<tr>
<td>59</td>
<td>Ethiopia</td>
<td>3,736,000</td>
</tr>
<tr>
<td>60</td>
<td>Poland</td>
<td>3,423,000</td>
</tr>
<tr>
<td>61</td>
<td>Ecuador</td>
<td>3,262,000</td>
</tr>
<tr>
<td>62</td>
<td>Yemen</td>
<td>3,186,000</td>
</tr>
<tr>
<td>63</td>
<td>Kuwait</td>
<td>3,123,000</td>
</tr>
<tr>
<td>64</td>
<td>Bolivia</td>
<td>3,053,000</td>
</tr>
<tr>
<td>65</td>
<td>Norway</td>
<td>3,040,000</td>
</tr>
<tr>
<td>66</td>
<td>Jamaica</td>
<td>2,935,000</td>
</tr>
<tr>
<td>67</td>
<td>Jordan</td>
<td>2,664,000</td>
</tr>
</tbody>
</table>

Total to World (175 of 199 Countries to which Kansas exported goods in 2003) $4,553,334,000

criterion changes to export market growth rates (as in Table Three), then their significance diminishes. In sharp contrast, many Muslim countries boast explosive growth rates. To be sure, growth rate statistics need to be treated with some caution, because they can vary depending on the period selected in which to measure growth, and because high rates can result from a low value of exports in the initial year. Nevertheless, it is reasonable to say that many Muslim countries are significant customers for Kansan exporters, and their importance is growing. In fact, only five western European countries (Greece, Italy, Malta, Portugal, and Spain) figure among the top third fastest growth markets for Kansan exports. For growing export markets, Kansas is looking to the Muslim World (for example, Bangladesh, Jordan, Malaysia, Morocco, Pakistan, and Nigeria), and to the Third World (for example, Costa Rica, Jamaica, Tanzania, Thailand, and Vietnam).

B. ABOUT TRADE WITH THE ARAB WORLD AND WITH THE KINGDOM

Data on export value and growth rates, presented in Tables Two and Three, respectively, show that trade with Muslim World matters to Kansas. However, these data do not focus exclusively on Muslim countries in the Middle East, much less on the Arab World or Saudi Arabia. These countries have received plenty of attention from the western media since

VOL. 38, NO. 3
Table Three
The “Top Third Growth Rate List”

<table>
<thead>
<tr>
<th>Rank Among 199 Potential Export Markets for Kansan Products</th>
<th>Country of Importation of Kansan Products (Muslim countries in bold)</th>
<th>Percent Change in U.S. Dollar Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Dominica</td>
<td>22,385.9%</td>
</tr>
<tr>
<td>2</td>
<td>Romania</td>
<td>16,495.2</td>
</tr>
<tr>
<td>3</td>
<td>Congo (Brazzaville)</td>
<td>6,139.6</td>
</tr>
<tr>
<td>4</td>
<td>Slovakia</td>
<td>3,801.0</td>
</tr>
<tr>
<td>5</td>
<td>Zambia</td>
<td>3,655.4</td>
</tr>
<tr>
<td>6</td>
<td>Nigeria</td>
<td>2,441.1</td>
</tr>
<tr>
<td>7</td>
<td>Sierra Leone</td>
<td>2,371.2</td>
</tr>
<tr>
<td>8</td>
<td>Grenada</td>
<td>2,173.0</td>
</tr>
<tr>
<td>9</td>
<td>Moldova</td>
<td>1,790.6</td>
</tr>
<tr>
<td>10</td>
<td>Morocco</td>
<td>1,408.1</td>
</tr>
<tr>
<td>11</td>
<td>New Caledonia</td>
<td>1,276.5</td>
</tr>
<tr>
<td>12</td>
<td>Greece</td>
<td>869.3</td>
</tr>
<tr>
<td>13</td>
<td>Jordan</td>
<td>743.3</td>
</tr>
<tr>
<td>14</td>
<td>Ethiopia</td>
<td>621.1</td>
</tr>
<tr>
<td>15</td>
<td>Uruguay</td>
<td>591.9</td>
</tr>
<tr>
<td>16</td>
<td>Malta</td>
<td>539.0</td>
</tr>
<tr>
<td>17</td>
<td>Qatar</td>
<td>504.4</td>
</tr>
<tr>
<td>18</td>
<td>Pakistan</td>
<td>483.0</td>
</tr>
<tr>
<td>19</td>
<td>Central African Republic</td>
<td>451.2</td>
</tr>
<tr>
<td>20</td>
<td>Bahamas</td>
<td>441.6</td>
</tr>
<tr>
<td>21</td>
<td>Thailand</td>
<td>386.7</td>
</tr>
<tr>
<td>22</td>
<td>Trinidad &amp; Tobago</td>
<td>301.6</td>
</tr>
<tr>
<td>23</td>
<td>Bulgaria</td>
<td>300.3</td>
</tr>
<tr>
<td>24</td>
<td>Portugal</td>
<td>290.4</td>
</tr>
<tr>
<td>25</td>
<td>Vietnam</td>
<td>284.8</td>
</tr>
<tr>
<td>26</td>
<td>Mauritania</td>
<td>268.1</td>
</tr>
<tr>
<td>27</td>
<td>Ivory Coast</td>
<td>262.7</td>
</tr>
<tr>
<td>28</td>
<td>Benin</td>
<td>244.9</td>
</tr>
<tr>
<td>29</td>
<td>Latvia</td>
<td>230.6</td>
</tr>
<tr>
<td>30</td>
<td>Russian Federation</td>
<td>223.2</td>
</tr>
<tr>
<td>31</td>
<td>Greenland</td>
<td>206.7</td>
</tr>
<tr>
<td>32</td>
<td>China</td>
<td>188.0</td>
</tr>
<tr>
<td>33</td>
<td>Haiti</td>
<td>171.7</td>
</tr>
<tr>
<td>34</td>
<td>Saint Lucia</td>
<td>171.3</td>
</tr>
<tr>
<td>35</td>
<td>Turkmenistan</td>
<td>170.8</td>
</tr>
<tr>
<td>36</td>
<td>Mozambique</td>
<td>156.5</td>
</tr>
<tr>
<td>37</td>
<td>Costa Rica</td>
<td>154.5</td>
</tr>
<tr>
<td>38</td>
<td>Nepal</td>
<td>154.3</td>
</tr>
<tr>
<td>39</td>
<td>Brunei</td>
<td>150.7</td>
</tr>
<tr>
<td>40</td>
<td>Hong Kong</td>
<td>139.3</td>
</tr>
<tr>
<td>41</td>
<td>Jamaica</td>
<td>135.9</td>
</tr>
<tr>
<td>42</td>
<td>Hungary</td>
<td>132.1</td>
</tr>
<tr>
<td>43</td>
<td>Yugoslavia</td>
<td>124.8</td>
</tr>
<tr>
<td>44</td>
<td>Czech Republic</td>
<td>122.4</td>
</tr>
<tr>
<td>45</td>
<td>Uganda</td>
<td>110.7</td>
</tr>
<tr>
<td>46</td>
<td>Lithuania</td>
<td>109.2</td>
</tr>
<tr>
<td>47</td>
<td>Ukraine</td>
<td>101.7</td>
</tr>
</tbody>
</table>

Continued
Table Three
Continued

<table>
<thead>
<tr>
<th>Rank Among 199 Potential Export Markets for Kansan Products</th>
<th>Country of Importation of Kansan Products (Muslim countries in bold)</th>
<th>Percent Change in U.S. Dollar Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>48</td>
<td>Indonesia</td>
<td>89.8</td>
</tr>
<tr>
<td>49</td>
<td>Barbados</td>
<td>79.1</td>
</tr>
<tr>
<td>50</td>
<td>India</td>
<td>77.4</td>
</tr>
<tr>
<td>51</td>
<td>Cameroon</td>
<td>72.3</td>
</tr>
<tr>
<td>52</td>
<td>South Korea</td>
<td>71.7</td>
</tr>
<tr>
<td>53</td>
<td>Croatia</td>
<td>65.3</td>
</tr>
<tr>
<td>54</td>
<td>Mexico</td>
<td>57.6</td>
</tr>
<tr>
<td>55</td>
<td><strong>Bangladesh</strong></td>
<td>51.7</td>
</tr>
<tr>
<td>56</td>
<td>Spain</td>
<td>50.8</td>
</tr>
<tr>
<td>57</td>
<td>Dominican Republic</td>
<td>46.9</td>
</tr>
<tr>
<td>58</td>
<td>Belize</td>
<td>44.5</td>
</tr>
<tr>
<td>59</td>
<td>Tanzania</td>
<td>42.6</td>
</tr>
<tr>
<td>60</td>
<td>Malaysia</td>
<td>38.4</td>
</tr>
<tr>
<td>61</td>
<td>Italy</td>
<td>32.7</td>
</tr>
<tr>
<td>62</td>
<td>Angola</td>
<td>30.0</td>
</tr>
<tr>
<td>63</td>
<td><strong>Kuwait</strong></td>
<td>25.2</td>
</tr>
<tr>
<td>64</td>
<td>New Zealand</td>
<td>24.3</td>
</tr>
<tr>
<td>65</td>
<td>Honduras</td>
<td>20.2</td>
</tr>
<tr>
<td>66</td>
<td>Estonia</td>
<td>19.1</td>
</tr>
<tr>
<td>67</td>
<td>French Polynesia</td>
<td>19.1</td>
</tr>
<tr>
<td>Total to World (175 of 199 Countries to which Kansas exported goods during 1999–2003)</td>
<td></td>
<td><strong>-2.49%</strong></td>
</tr>
</tbody>
</table>

September 11th. However, little of it deals with the business-to-business relationships between exporters from the American heartland and importers in the Muslim heartland.

To the entire Middle East in 2002, Kansas exported $92,746,187 (accounting for about one-half of one percent of exports to the Middle East from the United States, which totaled $18,942,506,000). In 2003, Kansas suffered a decline in export performance to this region, with the value falling to $43,126,000 (accounting for hardly a quarter of one percent of the American total of $19,364,881). Between 1999 and 2002, Kansan exports to the Middle East grew by 29.7 percent, though measured between 1999 and 2003 they fell by 39.7 percent. The positive trend between 1999 and 2002 contrasted sharply with the national average, as American exports to the Middle East fell by 9.49 percent in the same period. The 39.7 percent drop between 1999 and 2003 was steeper than the national average, which was a decline of 7.47 percent.

69. Of the states, in both 2002 and 2003, New York boasted the highest value of exports to the Middle East, shipping $2,892,113,000 in 2002 and $3,148,194,000 in 2003. Texas ranked second in both years, with $2,655,546,000 in 2002 and $2,331,901,000 in 2003.
Table Four\textsuperscript{70}  
Values and Growth Rates for Kansas Exports to the Arab World

<table>
<thead>
<tr>
<th>Arab Country (Arab League members, excluding Iraq, on which sanctions were in place, and Palestine)</th>
<th>Value of Exports from Kansas (U.S. dollars as of 2003)</th>
<th>Growth Rate of Exports from Kansas (Percentage growth rates between 1999 and 2003)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>$73,000</td>
<td>- 97.6%</td>
</tr>
<tr>
<td>Bahrain</td>
<td>408,000</td>
<td>- 69.7</td>
</tr>
<tr>
<td>Comoros</td>
<td>Unavailable</td>
<td>Unavailable</td>
</tr>
<tr>
<td>Djibouti</td>
<td>5,000,000</td>
<td>- 88.0</td>
</tr>
<tr>
<td>Egypt</td>
<td>29,265,000</td>
<td>- 28.0</td>
</tr>
<tr>
<td>Iraq</td>
<td>941,000</td>
<td>Unavailable</td>
</tr>
<tr>
<td>Jordan</td>
<td>2,664,000</td>
<td>743.3</td>
</tr>
<tr>
<td>Kuwait</td>
<td>3,123,000</td>
<td>25.2</td>
</tr>
<tr>
<td>Lebanon</td>
<td>501,000</td>
<td>- 54.5</td>
</tr>
<tr>
<td>Libya</td>
<td>11,341,000</td>
<td>25.9</td>
</tr>
<tr>
<td>Mauritania</td>
<td>769,000</td>
<td>268.1</td>
</tr>
<tr>
<td>Morocco</td>
<td>5,217,000</td>
<td>1,408.1</td>
</tr>
<tr>
<td>Oman</td>
<td>1,099,000</td>
<td>1.9</td>
</tr>
<tr>
<td>Qatar</td>
<td>1,858,000</td>
<td>504.4</td>
</tr>
<tr>
<td>\textbf{Saudi Arabia}</td>
<td>\textbf{5,141,000}</td>
<td>- 75.8</td>
</tr>
<tr>
<td>Somalia</td>
<td>4,000</td>
<td>- 99.5</td>
</tr>
<tr>
<td>Sudan</td>
<td>676,000</td>
<td>167.2</td>
</tr>
<tr>
<td>Syria</td>
<td>546,000</td>
<td>- 53.6</td>
</tr>
<tr>
<td>Tunisia</td>
<td>145,000</td>
<td>- 85.4</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>14,960,000</td>
<td>2.1</td>
</tr>
<tr>
<td>Yemen</td>
<td>3,186,000</td>
<td>- 56.2</td>
</tr>
</tbody>
</table>

| Saudi Arabia ($31,482,000 in 2002)               | (+ 47.9% between 1999–2002)                               |                                                                            |

Of the twenty-two members of the Arab League, Saudi Arabia itself was the largest importer of American products in 2002.\textsuperscript{71} Table Four presents data on Kansan exports, in U.S. dollars as of 2003 and growth rates in that value between 1999 and 2003, to the Arab World, that is, it reveals country-by-country statistics. Table Four shows several Arab countries as prominent customers of Kansas exporters, and shows the trends in them. Aside from Saudi Arabia, nine Arab League members (Algeria, Bahrain, Djibouti, Egypt, Lebanon, Somalia, Syria, Tunisia, and Yemen) have negative growth rates. However, war, civil unrest and instability, or unacceptably high business risks, might explain the declines in most of those members (save Bahrain, Egypt, and Tunisia), and there is the hopeful chance of a fresh positive trend in Iraq.

\textsuperscript{70} The dollar values for all countries other than the Kingdom are rounded to the nearest thousand. The growth rate for Kansan exports to Libya pertains to 2001–2002, because available data indicate no such exports in 1999, 2000, and 2003. The growth rate for Kansan exports to Sudan pertains to 2000–2001, because the data show no such exports in 1999, 2002, or 2003.

Interestingly, during 1999–2003, negative export growth rates for Kansan products occurred in Canada (−19.0 percent), France (−28.8 percent), Japan (−21.3 percent), Germany (−17.4 percent), Switzerland (−40.8 percent), Taiwan (−31.1 percent), and the United Kingdom (−23.1 percent). In none of these mature markets does the explanation lie in war or terrorism. It is tempting to add that the United States has not advanced significantly toward an FTA with any Arab League member in which trends are negative (though it is negotiating a pact with Bahrain, and in March 2004 announced completion of negotiations for an FTA with Morocco), and toys with tighter economic sanctions on desperately poor Syria.\(^{72}\) However, exploring the consistency (or lack thereof) of American FTA policy with the interests of Kansas is not at issue here.

\(^{72}\) The highlights of the FTA between the United States and Morocco are as follows:

(1) \textit{Trade in Goods}:

- Immediate tariff-free treatment for over ninety-five percent of trade in consumer and industrial products, with remaining tariffs eliminated within nine years.

(2) \textit{Trade in Agricultural Products}:

- Coverage of all agricultural products, with Morocco granting immediate duty-free treatment for breakfast cereals, pecans, pistachios, pizza cheese, processed poultry, and whey products, and phasing out tariffs in five years on cherries, corn, grapes, ground turkeys, pears, soybeans, and walnuts, and the United States phasing out all agricultural tariffs, though mostly in fifteen years.
- A mechanism to allow for increased shipments of wheat from the United States to Morocco similar to the mechanism in the free trade pact between the EU and Morocco, specifically, for non-durum wheat, allowing for annual shipments from the United States to Morocco of 700,000 tons if Morocco produces less than 2.1 million tons, and 280,000 tons if Morocco produces three million tons or more.
- A preference clause for all agricultural products allowing American exporters to sell amounts equal to other countries.
- A tariff rate quota (TRQ) for high-quality beef used by hotels and restaurants of 4,000 tons a year that increases over time, with the in-quota tariff eliminated over five years and the out-of-quota tariff phased out over eighteen years.
- A phase out of Moroccan tariffs on American poultry exports over five, ten, or fifteen years, depending on the poultry part, except for the two most sensitive poultry products for Morocco, leg quarters and whole birds, where TRQs are set at 4,000 tons and 1,250 tons respectively, and for which tariffs are to be eliminated over twenty years and nineteen years respectively.
- An agricultural safeguard remedy for use in the event of significant price declines on horticultural products.

(3) \textit{Trade in Services}:

- Liberalization of trade in services, with Morocco offering enhanced market access for American audiovisual services, banks, computer and related services, construction and engineering services, distribution services, express delivery services, insurance companies, and telecommunications firms.

(4) \textit{Labor and the Environment}:

- A commitment to enforce existing environmental and labor laws in each country, and a mechanism for cooperation on disputes about such enforcement.

\textit{See Gary G. Yerkey, U.S. Morocco Conclude Free Trade Pact with Most Ag Tariffs Scrapped Over 15 Years, 21 Intl Trade Rep. (BNA) 411–12 (Mar. 4, 2004) (reporting the announcement of this FTA and summarizing its terms).}

As for sanctions on Syria, see Gary G. Yerkey, \textit{President Signs Syria Sanctions Bill But Offers No Clue on Possible Waiver}, 20 Intl Trade Rep. (BNA) 2079, Dec. 18, 2003 (reporting that President Bush signed the \textit{Syria Accountability and Lebanese Restoration Act of 2003}, passed by the House 408–8 as H.R. 1828, and earlier by the Senate, which requires the President to impose economic sanctions on Syria if it does not cease support for terrorism and withdraw its troops from Lebanon, and gives the President authority to waive sanctions if it is in the national interest of the United States).
Table Five
Top 10 Commodities Exported from Kansas to the World

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Airplanes</td>
<td>941.0</td>
<td>18.86%</td>
</tr>
<tr>
<td>Meat of Bovine Animals (boneless, fresh)</td>
<td>437.6</td>
<td>8.77</td>
</tr>
<tr>
<td>Passenger Vehicles</td>
<td>363.2</td>
<td>7.28</td>
</tr>
<tr>
<td>Raw Hides and Skins (bovine)</td>
<td>256.2</td>
<td>5.14</td>
</tr>
<tr>
<td>Wheat and Meslin</td>
<td>237.6</td>
<td>4.76</td>
</tr>
<tr>
<td>Meat of Bovine Animals (boneless, frozen)</td>
<td>191.0</td>
<td>3.83</td>
</tr>
<tr>
<td>Parts of Airplanes or Helicopters</td>
<td>173.3</td>
<td>3.47</td>
</tr>
<tr>
<td>Dog and Cat Food</td>
<td>126.0</td>
<td>2.53</td>
</tr>
<tr>
<td>Radio Navigational Aid Apparatuses</td>
<td>77.1</td>
<td>1.54</td>
</tr>
<tr>
<td>Grain Sorghum</td>
<td>66.8</td>
<td>1.34</td>
</tr>
</tbody>
</table>

Rather, one inference that should be drawn is that trade with the Arab World is significant to Kansas. That inference is evident simply from a cursory glance at the figures in Table Four. A second inference is that trade with the Kingdom, in particular, is of some importance to Kansas. Kansas exported $31.5 million worth of products there in 2002 (accounting for about 0.66 percent of exports to the Kingdom from the United States, which totaled $4,778,472,000), though this figure declined steeply to $5.1 million in 2003 (accounting for just .1 of one percent of exports from the United States, which were $4,595,968,000). Much of the change between 2002 and 2003 resulted from a decline in exports of transportation equipment from Kansas to Saudi Arabia. In 2002, Kansas exported $25,466,297 worth of transportation equipment to the Kingdom, and those exports accounted for 80.8 percent of Kansan shipments to the Kingdom. In 2003, Kansan exports of transportation equipment to the Kingdom dropped to just $2,198,235, accounting for 42.7 percent of the state’s exports to the Kingdom. It is not yet possible to know whether the decline in the transportation equipment sector, as well as the overall drop in exports, are outlying data points, the beginning of a new trend, or possibly statistical errors. If past is prologue, then it would seem the 2003 figures are not representative, because statistics from 1999 through 2002 indicate considerably more robust export values than from 2003.

73. Of the states, Texas boasted the highest value in both 2003 and 2002, shipping the Kingdom $897,095,000 in 2003 and $931,301,000 in 2002. New York placed a distant second in both years, with $147,535,000 worth of exports to the Kingdom in 2003 and $313,236,000 in 2002. For Kansas, the exact figure for 2003 was $5,141,145, and for 2002, it was $31,482,000 worth of goods to the Kingdom.

74. In previous years, the values of all Kansan exports to the Kingdom were: $22,829,000 in 2001; $21,145,000 in 2000; and $21,285,000 in 1999. The values for transportation equipment were: $25,466,000 in 2002; $14,665,000 in 2001; $13,153,000 in 2000; and $16,401,000 in 1999. Proceeding on the hunch that the 2003 data are outliers, I have treated figures from that year with some caution, and where appropriate focused on 2002 statistics (e.g., in Tables Five and Six).
<table>
<thead>
<tr>
<th>Product Type</th>
<th>To Middle East (U.S. dollar value)</th>
<th>To Middle East (percent of total exports from Kansas to Middle East)</th>
<th>To GCC (U.S. dollar value)</th>
<th>To GCC (percent of total exports from Kansas to GCC)</th>
<th>To Saudi Arabia (U.S. dollar value)</th>
<th>To Saudi Arabia (percent of total exports from Kansas to Saudi Arabia)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transportation Equipment</td>
<td>$55,190,277</td>
<td>59.5%</td>
<td>$27,683,610</td>
<td>53.7%</td>
<td>$25,466,297</td>
<td>80.8%</td>
</tr>
<tr>
<td>Machinery Manufactures</td>
<td>15,483,961</td>
<td>16.6%</td>
<td>13,631,891</td>
<td>26.4%</td>
<td>2,421,967</td>
<td>7.6</td>
</tr>
<tr>
<td>Processed Food</td>
<td>7,924,249</td>
<td>8.5%</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
</tr>
<tr>
<td>Computers and Electronic Products</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
<td>2,245,632</td>
<td>4.3%</td>
<td>1,131,331</td>
<td>3.5</td>
</tr>
<tr>
<td>Chemical Manufactures</td>
<td>3,952,044</td>
<td>4.2%</td>
<td>3,081,966</td>
<td>5.9%</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
</tr>
<tr>
<td>Primary Metal Manufactures</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
<td>Not Top 5</td>
<td>957,289</td>
<td>3.0</td>
</tr>
<tr>
<td>All Others</td>
<td>10,195,656</td>
<td>4.2%</td>
<td>4,821,459</td>
<td>4.3%</td>
<td>1,505,554</td>
<td>3.0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>$92,746,187</td>
<td>100.0%</td>
<td>$51,464,558</td>
<td>100.0%</td>
<td>$31,482,438</td>
<td>100.0%</td>
</tr>
</tbody>
</table>
Not surprisingly, then, the growth rate between 1999 and 2002 of Kansan exports to Saudi Arabia was the converse of the national average. Exports from Kansas grew by 47.9 percent. In contrast, the country's average declined by 39.53 percent. Between 1999 and 2003, the national average was a 41.8 percent drop in exports to the Kingdom, and Kansan exports fell by 75.8 percent (again, owing to the steep decline in 2003). What, then, can be said about the trade link between Kansas and the Kingdom? At the very least, the Kingdom matters to Kansan exporters, and it could matter even more so in years to come.  

In connection with these statistical insights, it is worth remedying a misconception about the diversity of Kansan exports. In a state in which the likes of Boeing, Hallmark, and Sprint play important roles, Kansas has a present, and future, interest in exports well beyond the agricultural sector. Table Five lists the top ten commodities Kansas exported to the world in 2002 in terms of value. Table Five also shows the percentage share of the total exports of those commodities from the United States. For a state rightly famed for wheat, Kansas figures even more prominently in America's role in the world's transportation equipment markets.

That connotation is reinforced by looking at data on product-types exported by Kansas to the Middle East, the Gulf Cooperation Council (GCC) countries, and the Kingdom. Table Six presents these statistics. While Kansan farmers certainly do export some of their output to the Middle East region, agricultural products are nowhere near the most important merchandise Kansans ship there. That pattern holds true for the Kingdom. In sum, Tables One through Four explain the depth of the interests of Kansas in trade with the Muslim and Arab Worlds, and with the Kingdom. By contrast, Tables Five and Six suggest the breadth of these interests, namely, it is not confined to the agriculture sector. Put bluntly, Kansans are increasingly inclined to trade a broad array of products with some countries they are being told, by a few prominent professional pundits, are the very ones with which their civilization clashes.

III. Argument #1: Ever Increasing Demands?

"Until we have all the information it would be premature to say what our position would be, other than the fact that from the President down we are extremely supportive of accession [to

75. I hasten to add a caveat about these inferences. I have not ventured a complete trade profile of Kansas. Thus, I do not mean to imply trade with the Arab World, or with the Kingdom, is more valuable than with other regions or countries. I stipulate to the fact that, depending on the export destinations and time periods selected, there are groupings of greater statistical significance to Kansas (such as the EU, in terms of dollar value, or sub-Saharan Africa, in terms of growth rates) than the Arab World. There are stories yet to be told, and consequent policy implications to be considered, about the relative trade importance of other trade blocks to Kansas.


77. The GCC is comprised of the Kingdom, Bahrain, Kuwait, Oman, Qatar, and the United Arab Emirates. The GCC's Economic Agreement, formally entitled The Economic Agreement of the Cooperation Council of the Arab States of the Gulf (GCC), was signed in Muscat, Sultanate of Oman, on October 31, 2001 (on file with author). This Agreement built on a 1981 economic accord among the GCC member states by calling for the creation of a customs union by January 1, 2003.


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the WTO of the Kingdom]. We think it is very important for Saudi Arabia to be fully embraced and recognized by the family of trading nations.”

William Lash, U.S. Assistant Secretary of Commerce, December 2003.79

A. THREE DEMANDS IN 1996–97: IP PROTECTION, AGRICULTURAL MARKET ACCESS, AND SUBSIDY ELIMINATION

As suggested in the first part, the WTO accession odyssey of the Kingdom should be considered from the Saudi perspective. It is now time to do just that. The following sketches out the demands placed on the Kingdom principally by the United States and the corresponding responses of the Kingdom. To be sure, it is not a “blow-by-blow” account; however, it is an endeavor to tell as true a story as possible in a manner that highlights the enormous pressures on Riyadh for American-style capitalistic reforms in the area of trade and investment liberalization.

It is well established that trade negotiations that involve reciprocal give-and-take. This author is no less aware of the historical fact that the Arabs have centuries more experience at this kind of bargaining than the Americans. Yet, in telling an empathetic story, a central question emerges, whether American trade law toward the Kingdom has been constructive. Asked differently, in the post-9/11 world, would it have been more in the interests of Kansas, and the American Heartland, for American trade negotiators not to press the Desert Kingdom almost mercilessly for more market access, but rather to emphasize the importance of long-term, trusting trade relationships? In brief, has the United States demanded too much of the Kingdom?

During the first two years in which negotiations were held, 1996 and 1997, the United States presented the Kingdom with three key demands: (1) improve IP protection; (2) provide better agricultural market access; and (3) eliminate export subsidies.80 Before the first meeting of the WTO Working Party, in 1996, the United States fired its Special 301 weapon at the Kingdom, placing the Kingdom on its “Watch List.” The watch list is essentially a “black list” of countries alleged by the United States to violate IPR.81 Of particular concern was copyright law in the Kingdom, that is, protection against counterfeit goods. The Business Software Alliance (an industry association in Washington, D.C.) estimated 80 percent of business software, and 40 percent of cassettes and CDs, were pirated copies.82

On market access, the United States cited an array of tariff and non-tariff barriers impeding or blocking imports into the Kingdom. As of 1997, for most products, the Kingdom

80. See Saudi Arabia Faces Questions in WTO on Intellectual Property, 13 INT’L TRADE REP. (BNA) 1756 (Nov. 13, 1996) (reporting “heavy questioning from World Trade Organization members, led by the United States and the European Union, on the question of intellectual property rights”); Frances Williams, Saudis Start Talks on Joining the WTO, FIN. TIMES, May 3, 1996, at 4 (stating “trading partners ... raised various concerns, including access for farm goods, non-tariff barriers to imports and export subsidies," and discussing also the American concern about IPR).
81. See Frances Williams, Saudis Start Talks on Joining the WTO, FIN. TIMES, May 3, 1964 (stating the United States put the Kingdom on the Watch List “for violations of intellectual property rights [and] is expected to press Riyadh to adopt tough legislation to enforce copyrights, patents and trademarks”). For an explanation of Special 301, see chapter 19 of RAJ BAMAL, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE (Lexis 2d ed. 2001).
82. See Enter the Saudis?, ECONOMIST, May 17, 1997, at 82, 83 (reporting these statistics).
imposed a tariff rate of 12 percent, and applied a 20 percent duty on merchandise competing with a good made in the Kingdom. The United States charged these figures, were higher than in 1987. Non-tariff measures included import licensing requirements, restrictions on eye glasses and breeding horses, and an import ban on pasteurized milk. Accordingly, the United States demanded of the Kingdom a comprehensive offer to open its market to imported goods.

As for export subsidies provided by the Kingdom, they were linked to the difficulty of obtaining market access in the agricultural sector. Drawing on data from the International Grains Council, the United States observed the Kingdom had provided agricultural subsidies so generous that, from 1992–93, the Kingdom was the sixth largest exporter of wheat in the world.

The Kingdom’s initial response to the demands of 1996 and 1997 was to seek entry into the WTO as a developing country. The Kingdom was far too well off economically to qualify as a least developed country. Developing countries are self-identified, and the Kingdom eyed the benefits of special and differential treatment provisions in the WTO texts, namely, diluted periods for phasing out restrictions and phasing in obligations. Unfortunately for the Kingdom, the United States was never was inclined to allow it longer transition times than were available for fully developed countries, particularly with respect to IP protection. Given the American opposition, the Kingdom essentially abandoned hope for special and differential treatment as a developing country.

The response of the Kingdom in 1996–97 to the specific American demands was hardly positive. It was in the process of developing and implementing new IP protection rules. Market access was linked to the changing structure of the Kingdom’s economy. Most of the productive resources were engaged in oil and petrochemical activities, and were owned by the government. Nevertheless, for many enterprises, privatization was underway or planned.

The difficulty, articulated by the Kingdom, was that the fledgling Saudi private sector needed temporary tariff and non-tariff barrier protection and subsidies. If the industries

83. Id.
84. Id.
85. See Frances Williams, Saudi Arabia Urged to Open Up to Imports, FIN. TIMES, May 30, 1997, at 4 (mentioning these points).
86. See WTO Pressures Saudi Arabia to Detail Market-Opening Measures, 14 Int’l Trade Rep. (BNA) 1007 (June 4, 1997) (reporting this statistic from the International Grains Council); Frances Williams, Saudi Arabia Urged to Open Up to Imports, FIN. TIMES, May 30, 1997, at 4 (mentioning this statistic); Enter the Saudi?, ECONOMIST, May 17, 1997, at 82, 83 (also mentioning this statistic).
87. See Williams, supra note 81 at 4 (stating “Saudi Arabia hopes to join the WTO as a developing country. . . .”). For an accounting of the special and differential treatment provisions in these texts, see BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE, supra note 19, at 179–90.
88. See Williams, supra note 81, at 4 (reporting “the U.S. and other WTO members are expected to insist on early compliance with fair trade rules on such issues as intellectual property, where copyright piracy is rampant, and agriculture, where generous farm subsidies enabled the desert kingdom in 1992–93 to become the world’s sixth-biggest wheat exporter”).
89. Id. (discussing state-owned oil and chemical companies).
90. The skeptical conclusion of The Economist, namely, “it is hard to say where the government ends and the private sector begins,” is based on its observation that “much ‘private’ industry is in the hands of the royal family.” Enter the Saudi?, supra note 81, at 82–83. The Economist might fairly have compared and contrasted this situation with privatization efforts in China and Russia.
91. See Williams, supra note 81 at 4 (discussing protections afforded to the private sector).
being built in the private sector did not survive infancy, and the “Saudization” program (whereby Saudis were replacing expatriate workers) failed, then social instability could occur. In the meantime, the Kingdom could not simply drop tariff revenues to insignificant levels, because of the threat posed to government finances. The drop in world oil prices in the mid and late 1990’s heightened the importance of import duties as a source of funds for government-sponsored social and other programs, and surely a jarring cancellation of some of the programs would be both unfair and unwise.\textsuperscript{92}

The Kingdom explained that agricultural subsidies as a percentage of the value of output were falling. In 1992, they had been worth 25 percent of agricultural output, whereas by 1994 they had dropped to 19 percent of output. With the phase out of wheat subsidies, the volume of wheat output from the Kingdom had fallen, and the Kingdom no longer was a major exporter of the product.\textsuperscript{93} At the same time, the Kingdom pointed to a critical purpose of its agricultural subsidy programs was food security for its burgeoning population.\textsuperscript{94} That is, the Kingdom sought what countries as diverse as India and Japan believed important a reduced dependence on food imports.

In brief, the Kingdom did not respond by saying “no” to the American demands placed on it between 1996–97. It did not respond by saying “if” or “maybe” it will protect intellectual property, open its goods markets, or cut agricultural subsidies. Rather, it responded by saying “yes, but the question is when and how.” From its perspective, the Kingdom needed time. From the American perspective, time was what the Kingdom did not, nor could not, have.\textsuperscript{95} Indeed, in 1997 the United States appears to have added a major item to its list of demands: wider non-discriminatory access to the Kingdom’s government procurement market.\textsuperscript{96}

The United States well appreciated the importance of government contracting in the Kingdom whose economy still largely was state owned, and took aim at regulations in the Kingdom giving explicit preference to Saudi enterprises in the award of public contracts. The United States also looked askance at a regulation in the Kingdom requiring a foreign business winning a government contract to sub-contract at least 30 percent of the work associated with that contract to Saudi businesses. So, the United States pressed, why not join the WTO Agreement on Government Procurement (GPA)?

The Kingdom’s legally correct response to this demand was the GPA is a plurilateral accord, not part of the single undertaking required by founding or new WTO Members.

\textsuperscript{92} See Enter the Saudis?, supra note 82, at 82–83 (linking the Kingdom’s tariff levels, and their increase over the previous decade, to “low oil prices [that] have left the government desperate for cash” (emphasis added)).

\textsuperscript{93} See WTO Pressures, supra note 86 (reporting the phase-out).

\textsuperscript{94} See Enter the Saudis?, supra note 82, at 82–83, (“[a]gainst all climatic odds, Saudi Arabia threw huge subsidies into farming to reduce dependence on food imports” (emphasis added)).

\textsuperscript{95} See WTO Pressures, supra note 86, at 1007 (reporting that at the May 29–30, 1997, meeting of the WTO Working Party “Saudi Arabia had asked for a longer transition time for reducing the high tariff walls protecting its state-owned and chemical industries, but there has been reluctance on the part of the United States and other countries to treat oil-rich Saudi Arabia as a developing country,” and also reporting “the United States, the European Union, and other WTO members pressed the Saudis for quick compliance with WTO norms on such issues as the Agreement on Trade-Related Aspects of Intellectual Property Rights and agriculture” (emphasis added)); Enter the Saudis?, supra note 82, at 82–83 (stating “the Saudis want to be treated as a developing country, which would give them more time to conform with some WTO rules. Not likely, say the Americans”).

\textsuperscript{96} See Enter the Saudis?, supra note 82, at 82–83 (mentioning this demand, which does not appear to have been reported in 1996 in other major American or British news sources, stating “[g]overnment contracts figure large in the Saudi economy,” and mentioning the preferences for local businesses).
Here, as to other demands, the Kingdom never has said “never,” rather it has asked for time. Also, the Kingdom’s response is practically sensible. Negotiations on liberalizing government procurement are complex and involve two levels of interactive debate.

First, internally, the Kingdom has to decide which types of contracts, and from which government agencies, will be subject to the GPA disciplines. The result of that internal debate is a “Positive List,” which the Kingdom then must take to the second level—the WTO accession negotiations. No doubt, during multilateral discussions in the Working Party, and in bilateral talks with the United States, the Positive List will be criticized. The Kingdom assuredly will have to revise it, based on the reaction at the second level, and based on what it can negotiate internally. This two-level process may well be economically salubrious and certainly the baseline rule in the GPA of national treatment for scheduled sectors is economically unassailable. However, whether the Kingdom ought to concede to the American demand had to be gauged in the context of the other demands placed on it, which involve WTO texts that are part of a single undertaking, and the limited, strained negotiating resources of the Kingdom.

B. THE 1998 PRICE HIKES: MARKET ACCESS FOR AGRICULTURAL AND INDUSTRIAL GOODS, SERVICES, AND GOVERNMENT CONTRACTORS

In 1998, surprise, frustration, and even a bit of exasperation would all have been understandable reactions of any official in the Kingdom who thought the United States would not lengthen the list of demands. In August 1998, the Kingdom submitted a revised set of proposed concessions. Along with the EU, the United States castigated the proposal.97 Not surprisingly, the November 1998 meeting of the WTO Working Party was a debacle. The Kingdom found support not only from fellow Muslim countries, principally Egypt, Kuwait, and Pakistan, but also from prominent non-Muslim countries such as India.98 Japan, with the world’s second largest economy, urged the United States to be flexible.99

Over what American demands was all the fuss? First, the Kingdom had to drop yet more its tariff rates on agricultural and industrial products. How could the Kingdom expect the United States to agree to bound tariff concessions set at levels above the Kingdom’s applied rates? The Kingdom could then raise its applied rates after joining the WTO, which would impede market access.100 Second, argued the United States, the Kingdom would have to improve its service sector commitments. The Kingdom had yet to agree to enhanced access for foreign services providers in commercially significant sectors like telecommunications.101 Third, the Kingdom would have to rethink its refusal to join the GPA. In brief, the price of WTO entry went up in 1998.

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97. See U.S., EU Criticize Saudi Arabia’s Efforts to Achieve WTO-Mandated Trade Reforms, 15 Int’l Trade Rep. (BNA) 1988 (Nov. 25, 1998) (mentioning the Aug. 1998 offer from the Kingdom on both goods and services, the heavy criticism of them by the U.S. and EU, which also was “voiced by Canada, Australia, New Zealand, and Switzerland”).

98. See id. (noting this support).

99. See id.

100. See U.S., EU Criticize, supra note 97 (discussing this topic, and reporting “Dorothy Dwoskin of the Office of the U.S. Trade Representative . . . said the United States could not accept a pledge that could result in an increase in tariffs” (emphasis added)).

101. See id. (discussing this topic, and reporting “Dwoskin also criticized the Saudi services offer for excluding certain key sectors such as telecommunications, adding that there is still progress to be made in this area” (emphasis added)).
To be sure, the first and third issues were not unprecedented in the accession negotiations. Market access had been a topic in 1996–97. The Kingdom might well have anticipated the third issue, as the United States had just raised it in 1997. Yet, from the Kingdom's perspective, it appeared the list had become longer in 1998—or at least some items on it had changed. Moreover, from that standpoint, the Kingdom’s progress at trade liberalization on the 1996–97 issues seemed unappreciated by the United States. For instance, the Kingdom had established a distinguished committee to review its protection of copyrights, patents, and trademarks in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP).102

What, precisely, did the Kingdom offer in response to the revised demand list? First, on market access, the Kingdom improved its earlier offer to cut the bound tariff rate on most agricultural products to 50 percent. The new offer was 35 percent.103 Similarly, it sweetened its previous offer of a reduction to 33 percent as the bound rate imposed on most industrial goods. The new offer was a bound rate of 25 percent.104 The Kingdom moved to address sanitary and phytosanitary (SPS) measures, and technical barriers to trade (TBT), by removing measures offensive to the WTO, SPS, and TBT Agreements, respectively.105

Second, the Kingdom agreed to certain “WTO Plus” commitments by agreeing to join the Information Technology Agreement (ITA), plus the side agreement on chemicals, known as the Chemical Tariff harmonization Agreement.106 These concessions meant the Kingdom would provide duty-free access to approximately 180 IT products, and reduce tariffs on chemical products to, if not zero, then between 5.5 and 6.5 percent by 2004.107 Such access was not mandated, because neither of these accords was part of the single undertaking package from the Uruguay Round (hence the rubric “WTO Plus”).

Regarding services, the Kingdom offered to remove restrictions on the temporary movement of natural persons (Mode IV in the categories created by the General Agreement on Trade in Services (GATS) for supplying services across a border). Contrary to American protestations, the Kingdom also agreed to include new services sectors for trade liberalizing commitments, including legal services.

What about the Kingdom’s effort to be treated as a developing country upon accession? In the face of American opposition in 1997–98, it appears that it changed track. Rather than be treated as a developing country for purposes of all WTO texts, it would try to obtain the benefits of special and differential treatment under the accords of greatest relevance to its circumstances. In the 1998 negotiations, the Kingdom identified these as the Agreement on Customs Valuation and the TRIPs Agreement.

Immediately, the EU blasted the Kingdom's more limited strategy. In a nearly ad hominem attack on the Kingdom’s trade negotiators, the EU said talks with the Kingdom were “not very fruitful,” “their efforts have been disappointing,” and the Kingdom’s trade negotiators were “making excessive demands for transition periods to implement WTO agreements.”108

102. See id. (reporting on the establishment of a government committee for this purpose).
103. See id. (reporting on this concession).
104. See id.
105. See id. (reporting on this development).
106. See id. (reporting on these concessions).
108. Id. (quoting an EU official).

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The EU condescendingly opined that the Kingdom had no basis for seeking any kind of special and differential treatment. After all, the Kingdom could have spent the mid and late 1990s implementing the WTO texts, all of which had been in existence since January 1, 1995.109 (The Kingdom politely declined to point out the EU had plenty of implementing of its own to do, not the least of which related to the Agreement on Agriculture.110)

C. The Kingdom Pays in 1999

Whatever the merits of the Kingdom’s responses to the American demands (and European attack), there was little it could do except suffer the increased price of WTO admission. Thus, in June 1999, the Kingdom produced another offer on market access for goods,111 paying a higher price than the preceding year.

The Kingdom agreed to bind its tariff rate for almost all agricultural goods. For 75 percent of these goods, that rate would be 15 percent or less. Likewise, it agreed to bind its tariff rate for most industrial goods. It would decrease the weighted average bound tariff rate on industrial goods from 21 percent to 14.4 percent. The bound rate would be 15 percent or less on 60 percent of industrial goods, and it would be 7 percent on 21 percent of industrial goods. The Kingdom reaffirmed its acceptance of the ITA, binding its rate of zero on most IT goods. It also reaffirmed its acceptance of the Chemical Agreement, binding its rates on most chemicals in the bands of zero, 5.5 percent, or 6.5 percent.

In June 1999, the Kingdom also produced a new offer on market access for services,112 which covered not only telecommunications, but also maritime and railway transport. In banking and finance, a sector in which the Kingdom already had put on the negotiating table, it opened six more sub-sectors for bargaining. The offer also included new sub-sectors in other service areas—medical and dental services, franchising, travel and tourism, architectural services for urban planning, and landscaping. Across all services sectors the Kingdom agreed to loosen equity limitations on foreign ownership of Saudi services businesses allowing, in most instances, foreigners to hold majority stakes.113 The Kingdom also agreed to abolish economic needs testing for the provision of a service, thereby removing an impediment to foreign service providers establishing a commercial presence.114 On one point the Kingdom remained firm: treatment as a developing country for implementation of the TRIPs Agreement and Customs Valuation Agreement; however, even on this point the Kingdom offered a modest concession- it would implement both deals by January 1, 2002.115

109. See id. Stating:

"The EU also criticized the Saudi’s request for a transition period to implement the WTO agreements on customs valuation and Trade-Related Aspects of Intellectual Property Rights, arguing that the country has no reason not to implement the agreements immediately upon accession to the WTO because they have been in existence since 1995."

(Emphasis added).


111. See Daniel Pruzin, Saudis’ Market Access Offer Praised by WTO Trading Partners, 16 Intl’l Trade Rep. (BNA) 1585, 1586 (Sept. 29, 1999) (summarizing the agricultural and industrial tariff concessions).

112. See id. (summarizing the services concessions).

113. See id. (noting this concession).

114. See id. (noting this concession).

115. See id. (explaining this position).

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Japan pronounced the June 1999 offer was satisfactory, at least on goods, Australia credited the Kingdom with considerable progress, and Canada and the EU agreed the accession negotiations had reached an advanced stage. But none of these opinions mattered in Washington, D.C., because the United States half-heartedly and perfunctorily remarked it was "encouraged by the Saudi offer on liberalizing its services market," and then warned "further improvements were needed on the goods side."  

If the negotiating method of the United States was the extraction of ever-better concessions through ever-higher demands, then that method not only was well in play, but also producing gains for American enterprise. By 1999, the two sides were locked in a process akin to haggling over a carpet in a bazaar, whereby—as Captain Sir Richard Francis Burton remarks in the first chapter of the first of his two-volume Personal Narrative of a Pilgrimage to Al-Madinah & Meccah (1893)—the loser is the one whose patience is first exhausted. Of course, in a rug deal between a small merchant and an individual buyer there are unlikely to be implications for the global trading system, the wealth of nations, or the national security of many countries. 

In retrospect, the Kingdom’s 1999 offer might well have been the basis for WTO accession. It would be ludicrous to suggest that, had the Kingdom acceded shortly thereafter, the evils of September 11th and what followed would not have occurred. Maybe, however, through a few more years of shared experience in the world’s leading international economic organization, the United States would have seen the Kingdom less as a threat and more as a partner.

D. New Demands in 2000: Especially FDI

Unfortunately, neither trade law nor geopolitical history unfolded in quite such a pleasant manner. True, in May 2000, the Kingdom reached bilateral accords with Japan and Australia, and by October 2000 it could boast of deals finalized with Argentina, Brazil, Canada, Malaysia, Mexico, Pakistan, South Korea, Uruguay, and Venezuela, but the Kingdom had yet to reach deals with roughly twenty WTO Members, most notably, the United States. The Americans were serious in their assessment that the Kingdom still had not paid enough for a WTO admission. Thus, negotiations continued into the new millennium, both through bilateral talks and within the Working Party.

In bilateral talks in the summer and fall of 2000, as well as Working Party meetings in April and October 2000, the United States continued to push the Kingdom for assurances on IP protection despite the fact that the Kingdom had made substantial strides to comply with the TRIPs Agreement. It had drafted amendments to its existing laws on copyrights,

116. See id. (summarizing the reactions to the Kingdom’s offer, and adding the Canadian critique that the Kingdom needed to add merchandise to its schedule for duty-free treatment under the IT and chemicals accords).

117. Id.


119. See Working Party, supra note 119, at 1616 (reporting on the developments mentioned above).
patents, and trademarks. It had drafted new IP laws to cover industrial designs, integrated circuits, plant varieties, and unfair competition, all of which were reviewed not only by its own Council of Ministers, but also by the World Intellectual Property Organization (WIPO) in Geneva. It had issued new regulations to its Customs Department to stop infringing goods at its borders. For the United States—and, therefore, for the Kingdom—the strides were steps. The kingdom continued its efforts. Between the April and October 2000 Working Party meetings, the Kingdom had developed new, WTO-consistent rules on import licensing and SPS measures, and issued a directive to implement the TBT Agreement.\(^\text{120}\) Unfortunately, “fine, but . . .” appeared to be the American response. On market access for goods, the United States demanded the Kingdom cut agricultural subsidies, substantially reduce tariffs on agricultural products to a range of between 5 and 10 percent, drop import bans on milk and tobacco, lower tariffs on cars and certain other industrial products, and guarantee duty-free access for all information technology, chemical, and pharmaceutical products.\(^\text{121}\)

On services, the United States (along with the EU) continued to press the Kingdom to liberalize access for foreign banks, insurance firms, and telecommunications providers, and upped the ante with calls for removing restrictions on foreign participation in certain professional services and pledges on distribution rights for foreign films (notwithstanding the prohibition on public movie theaters in the Kingdom).\(^\text{122}\) The Kingdom pointed out, apparently to no avail, its state-owned telecommunications carrier had a monopoly until 2008, but it had agreed to foreign ownership of that carrier up to a limit of 49 percent.\(^\text{123}\) Even though as of mid-2000 only twenty-six of the then 138 WTO Members had signed the GPA, the United States not only renewed its call for the Kingdom to join it, but also the EU and Canada demanded the Kingdom commit to participation in negotiations on a separate accord on transparency in government procurement.\(^\text{124}\) Not surprisingly, the Kingdom “chafed” at the latter demand.\(^\text{125}\) It was a naked attempt to inject into the accession negotiations an issue from the 1996 WTO Ministerial Conference in Singapore that, to this day, remains a sore point for many Members.

Most significantly, to its list of demands, the United States added a “crucial” item: FDI.\(^\text{126}\) By no means had the Kingdom been ignorant of the importance of FDI to WTO accession and in early 2000, the Kingdom’s Supreme Economic Council drafted new FDI legislation.\(^\text{127}\) In March 2000, the Shura approved a new FDI law, called the “Foreign Investment

\(^{120}\) See id. (reporting these developments).

\(^{121}\) See id. at 1617 (reporting these demands); U.S. Wants Saudis to Cut Tariffs on Drugs, Chemicals, Info Tech Items, and Agriculture, 17 Intl’l Trade Rep. (BNA) 1281 (Aug. 17, 2000) (summarizing what “Washington had spelled out” (emphasis added)).

\(^{122}\) See Pruzin, U.S., EU Push, supra note 107 (reporting on American demands for access for insurance firms, as well as EU pressure that foreign companies be allowed to hold a majority stake in Saudi telecommunications services); Working Party, supra note 119 (reporting on these demands); U.S. Wants Saudis to Cut Tariffs on Drugs, Chemicals, Info Tech Items, and Agriculture, 17 Intl’l Trade Rep. (BNA) 1281 (Aug. 17, 2000) (dubbing services trade liberalization as likely “Saudi Arabia’s biggest difficulty,” given what “the United States and major European countries want. . . .” (emphasis added)).

\(^{123}\) See Pruzin, U.S., EU Push, supra note 107 (discussing the telecommunications issue).

\(^{124}\) See Working Party, supra note 119 (reporting on the GPA issue).

\(^{125}\) Id.


\(^{127}\) This Council was formed in August 1999 by Royal Decree. See Al-Ammari, supra note 7, at 2.
Law,” and in April 2000, the Kingdom’s Council of Ministers ratified the Law.\textsuperscript{128} Indeed, for the Kingdom, more than WTO accession was at stake. The Kingdom needed these reforms to reverse its poor FDI record.\textsuperscript{129} Between 1984 and 1997, the Kingdom attracted a net inflow of $4.32 billion in private investment from overseas, which was just eighteen percent of the amount during the same period into Indonesia ($24 billion), 12 percent of the amount into Malaysia ($36 billion), and 8.4 percent of the amount into Singapore ($51.4 billion).\textsuperscript{130} Of the $4 billion, only 20 percent went to the private sector in the Kingdom, the rest of it flowing to government infrastructure project investments, which in comparison with private investments in other countries, generate lower returns.\textsuperscript{131} By 2000, the Kingdom was experiencing an average annual capital outflow of $16 billion.\textsuperscript{132}

Naturally, the Kingdom, along with independent analysts, believed the Foreign Investment Law would enhance its WTO application.\textsuperscript{133} The United States did not react with the same degree of optimism. Rather, American scrutiny of the Foreign Investment Law added a substantial dimension to the external assessment of the Kingdom’s progress. The United States would judge the Law on more than just the usual criteria, such as transparency, the extent to which that law granted equal treatment to foreign and domestic investors, the protections it provided against expropriation (including the definition of “expropriation”), and the formula it utilized for compensating foreign investors in the event of an expropriation. The United States also would examine the new legislation to see whether it greatly expanded the number of sectors open to foreign investment.

The Foreign Investment Law appeared to fare well based on some of the familiar criteria. Part One of the Law provided for 100 percent foreign ownership of any project or industrial company (other than those on the Negative List, discussed below), thus also eliminating the technical necessity of a Saudi sponsor of a project.\textsuperscript{134} The Law guaranteed national treatment for foreign investors on tax matters including tax holiday periods (generally abolishing them and the old rule that foreign ownership of 49 percent or more would disqualify a business from a tax holiday), and tax rates (reducing the highest income tax rate on businesses, specifically, on their distributed profits, from 45 to 30 percent, and treating


\textsuperscript{130} See Al-Ammari, \textit{supra} note 7, at 1 (discussing FDI statistics).

\textsuperscript{131} See id. (making this comparison).

\textsuperscript{132} See Allen, \textit{Guarded Business}, \textit{supra} note 129.

\textsuperscript{133} Al-Ammari, \textit{supra} note 7, at 2 (calling the Foreign Investment Law “the most significant reform in Saudi Arabia’s investment climate”); Allen, \textit{Guarded Business}, \textit{supra} note 129, at 8 (reporting reactions to the Law).

\textsuperscript{134} See SAGIA Web site, \textit{at} http://www.sagia.gov.sa (last visited Sept. 20, 2004) (explaining equity interests); Al-Ammari, \textit{supra} note 7, at 2, 4 (noting the Foreign Investment Law allows 100 percent ownership of local entities, observing there are seventy-two companies listed on the Saudi stock exchange, and explaining that since October 1999 foreigners have been able to invest in the exchange through eleven mutual funds and a twelfth close-end fund, the “Saudi Arabian Investment Fund,” which is listed on the London Stock Exchange); Allen, \textit{Guarded Business}, \textit{supra} note 129, at 4 (mentioning ownership reforms).
foreign and domestic businesses and joint ventures, equally). Some provisions of Part One even indicated better treatment for foreign over domestic businesses. For example, foreign companies could defray (in part) one year's worth of losses until they are recouped, and the government would pay 15 percent of the tax owed by any foreign company on profit in excess of 100,000 Saudi riyals (equivalent in April 2000 to about $26,700). Part One of the Law granted foreign business enterprises the right to own land in the Kingdom (other than in the Holy cities of Mecca and Medina), not only for a project but also for housing personnel, and it eased rules for getting business visas (specifically, sponsors for these visas).

No less important than these reforms in Part One of the Foreign Investment Law were the contents of Part Two. It established a single, powerful government agency to deal with FDI, namely, the Saudi Arabian General Investment Authority (SAGIA). SAGIA was required to decide on an investment application within thirty days of receiving the completed package, or the application would be deemed approved, and it had to give reasons for any rejection. To be sure, even measured by conventional criteria, the new Law is not unassailable. Regarding transparency, the law was to take effect thirty days after publication in the Official Gazette. Apparently, publication was to have been in May 2000, but delays of a few months ensued. Regarding taxation, rules on how (if at all) dividends would be taxed were ambiguous. Nonetheless, the Law was a watershed in the history of the Kingdom's economic and legal development.

The degree to which the Foreign Investment Law liberalized access for foreign capitalists is also meaningful. Part One of the Law suggested foreign business enterprises would be able to bid for at least some government contracts. Part Two of the Law charged SAGIA with attracting FDI, which hardly sounded like a mandate to reject ideas from foreign capitalists. The Law did connote a change in mentality from "a foreign investment [is] prohibited unless specifically sanctioned" to a foreign investment "is specifically authorized by" SAGIA. Still, the precise powers of SAGIA were unclear—would it be able only to

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135. See SAGIA web site, at http://www.sagia.gov.sa (last visited Sept. 20, 2004) (explaining equity interests); Al-Ammari, supra note 7, at 2 (discussing tax law changes, and pointing out that the tax rate falls to twenty-five percent for a business earning a profit of less than US$100,000); Allen, Guarded Business, supra note 129, at 4 (mentioning these reforms).

136. See Al-Ammari, supra note 7, at 2 (mentioning rules on carrying losses forward); Allen, Guarded Business, supra note 129, at 4 (mentioning these reforms).

137. See SAGIA Web site, at http://www.sagia.gov.sa (last visited Sept. 20, 2004) (explaining real estate ownership); Al-Ammari, supra note 7, at 2 (noting the Foreign Investment Law allows non-Saudis to own real estate); Allen, Saudi Arabia Set to Ease Foreign Investor Curbs, FIN. TIMES, Apr. 3, 2000, at 3 (mentioning these reforms).

138. See id. SAGIA superseded the Kingdom's Foreign Capital Investment Committee. Id.

139. See Al-Ammari, supra note 7, at 2 (explaining SAGIA's licensing process).

140. See Allen, Guarded Business, supra note 129, at 8 (discussing publication).

141. See Allen, Saudis Blame, supra note 26, at 8 (observing the Foreign Investment Law had not been published in the Official Gazette as of mid-June 2000).

142. See Allen, Guarded Business, supra note 129, at 4 (discussing ambiguities in the Foreign Investment Law).

143. See id. at 3 (reporting on the content of the Foreign Investment Law).

144. See id. at 8 (quoting a prominent lawyer in the Kingdom on this "fundamental shift in official Saudi attitudes to foreign investors"). See also SAGIA Web site, at http://www.sagia.gov.sa (last visited Sept. 20, 2004) (identifying all sectors, except those on the Negative List, as open to FDI).
issue licenses to foreign capitalists to do business in the Kingdom, or would it be a one-stop shop for all their needs?\footnote{See Al-Ammari, supra note 7, at 2 (opining SAGIA has sufficiently wide-ranging powers to be a one-stop shop); Allen, Guarded Business, supra note 129 at 4 (discussing ambiguities in the Foreign Investment Law).} Perhaps even more importantly, foreign capitalists lacked the certainty and predictability of a detailed list of sectors open to FDI.

E. The Kingdom Pays Again, a Bit, in 2001

Thus began negotiations between the Kingdom and United States over drawing boundaries and delineating sectors open to FDI from sectors on the “Negative List,” which would be closed to foreigners. One of the boundaries to be drawn, according to the United States, was to circumscribe monopoly agency and distribution requirements. After all, how much practical benefit would follow from opening a sector to foreign investment if the output associated with that investment had to be channeled through a Saudi agent or distributor and worse yet, if a foreign investor could have only one agent and distributor in the Kingdom?\footnote{See Allen, Saudis Blame, supra note 26, at 8 (accounting the western criticism that vested conservative interests in the Kingdom, not external pressure, were to blame for the slow process of accession negotiations, and mentioning the issue of monopoly agencies).} Of course, from the Kingdom’s perspective, drawing boundaries—be they around closed sectors or exclusive agency and distributorship arrangements—meant a corresponding set of internal negotiations among constituencies with prospective or vested political and business interests.

To chalk up to avarice the American motive for scrutinizing the Negative List, and the subsequent iteration of “demand—response,” would be unfair. Such scrutiny was justified by economic data from the post-Second World War era showing the more open an economy to FDI and trade, the better the economy performs (measured principally by growth in GDP or per capita GDP).\footnote{See, e.g., Bhalla, Trade, Development, and Social Justice, supra note 19, at 51–53 (citing, in footnotes 1–8, the large number of studies documenting the stimulatory effects of trade on growth); M.A.B. Siddique, Economic Development: Then and Now, (Univ. of W. Aust. Dep’t of Econ. 1997), available at http://www.econs.ece.uwa.edu.au/economics/research/1997/dp975.pdf (highlighting there is a positive link between trade and growth).} At the same time, the perspective of the Kingdom amidst this cycle must be remembered. Might too short a Negative List mean the Kingdom’s economy would be swallowed by American businesses? If so, then what employment opportunities would exist for the Kingdom’s youth—and under what terms and conditions? What might the Kingdom’s man-made landscape look like in a decade or two—yet more fast-food
restaurants and shopping malls? Into what might the cultural milieu of Riyadh evolve (or devolve)—one ever-less distinguishable from that of Beirut or Los Angeles?

To its credit, given these uncertainties, the Kingdom eschewed a siege mentality. It considered at least some candidates for the Negative List not in terms of whether to open, but when and how to open. Still, even being solicitous to the Kingdom, the number of sectors and sub-sectors on the Negative List it proposed in February 2001 was incongruous with the reforms promised by the Foreign Investment Law. Table Seven summarizes the boundaries established by the Kingdom via the List.148

The boundaries in the initial Negative List cordoned off from American (and other overseas) businesses projects of keen interest—from insurance policies offered by AIG to Slurpees sold by 7-Eleven. The United States objected to the extent to which the Kingdom sought to protect its economy, and more generally inquired whether the List was a device to take away what the Foreign Investment Law had given. Not surprisingly, therefore, the demand-concede cycle continued.

F. The Kingdom Pays More in 2003–04

By July 2003, when bilateral negotiations with the United States and EU again took place, the Kingdom agreed to lower its tariff rates on goods to the levels of the Gulf Cooperation Council (GCC).149 It should not go unnoticed that the latter concession lessens the value of the GCC as a customs union. That is because the lower the MFN duty rates the Kingdom charges, the lesser the margin of preference resulting from duty-free treatment for products originating in the GCC. Moreover, the Kingdom pledged full compliance upon WTO accession with the WTO SPS, TBT, and TRIPs Agreements, as well as the Agreements on Rules of Origin and Trade-Related Investment Measures (TRIM).150 It dropped its request for entry as a developing country, with just one exception: it sought two extra years to comply with the Customs Valuation Agreement, during which it would phase out minimum valuations on certain imported merchandise.151 If there was one point on which the Kingdom remained resolute, then it was on joining the GPA.152

Of course, the key topic of the new demand-concede cycle of 2002–2003 was FDI. What concessions did the Kingdom make? By the October 2003 meeting of the WTO Working Party—the first one in three years—the Kingdom cut back on the boundaries, that is, it reduced the length of the Negative List by specifying the sub-sectors in which foreign

148. The Table is based on accounts rendered in Pruzin, supra note 31; and Daniel Pruzin, Trade Officials Express Disappointment with Saudi Foreign Investment Exclusion List, 18 Int’l Trade Rep. (BNA) 446 (Mar. 15, 2001). In addition, I infer from various sources (including the Web site of SAGIA, at http://www.sagia.gov.sa (last visited Sept. 20, 2004)), that the sub-sectors listed in the manufacturing sector likely were on the List. The Table represents a partial account, as nineteen sectors were on the initial Negative List. See Frances Williams, WTO Entry Closest for Saudi Arabia, Fin. Times, Oct. 25–26, 2003, at 3 (discussing the original list).
151. See id. (explaining this point).
152. Id.
<table>
<thead>
<tr>
<th>Sector</th>
<th>Sub-Sectors Of Limits (Specific Areas Not Open to Foreign Investors)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>• Fisheries</td>
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<tr>
<td>Audiovisual Services</td>
<td>• Cinemas</td>
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<tr>
<td></td>
<td>• Film production and distribution</td>
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<td></td>
<td>• Radio services</td>
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<td></td>
<td>• Satellite transmission</td>
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<td></td>
<td>• Television services</td>
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<tr>
<td></td>
<td>• Video production and distribution</td>
</tr>
<tr>
<td>Banking and Financial Services</td>
<td>• Certain commercial and investment banking activities</td>
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<tr>
<td>Construction</td>
<td>• Construction services</td>
</tr>
<tr>
<td>Distribution Services (including Agency)</td>
<td>• Auto dealerships</td>
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<tr>
<td></td>
<td>• Auto parts outlets</td>
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<tr>
<td></td>
<td>• Commercial agency, including services of commission agents</td>
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<td></td>
<td>• Food retailing</td>
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<td></td>
<td>• Non-food retailing, including medical retail and private pharmacies</td>
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<tr>
<td></td>
<td>• Wholesale trade</td>
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<tr>
<td>Education Services</td>
<td>• Adult education</td>
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<td></td>
<td>• Primary education</td>
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<td></td>
<td>• Secondary education</td>
</tr>
<tr>
<td>Employment Services</td>
<td>• Recruitment and employment services, including local recruitment offices</td>
</tr>
<tr>
<td>Energy and Energy Services</td>
<td>• Oil exploration, drilling, and production</td>
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<tr>
<td></td>
<td>• Natural gas exploration, drilling, and production</td>
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<tr>
<td></td>
<td>• Pipeline transportation</td>
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<tr>
<td></td>
<td>• Services incidental to electrical energy distribution</td>
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<tr>
<td></td>
<td>• Services related to the mining sector</td>
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<tr>
<td>Environmental Services</td>
<td>• All environmental services</td>
</tr>
<tr>
<td>Health Care Services</td>
<td>• Blood Banks, poison centers, and quarantine facilities</td>
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<tr>
<td></td>
<td>• Services rendered by midwives, nurses, paramedics, and physio-therapists</td>
</tr>
<tr>
<td>Insurance Services</td>
<td>• All insurance products, other than health care</td>
</tr>
<tr>
<td></td>
<td>• All insurance-related products, including re-insurance</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>• Civilian explosives</td>
</tr>
<tr>
<td></td>
<td>• Military equipment, devices, and uniforms</td>
</tr>
<tr>
<td>Printing and Publishing</td>
<td>• All printing and publishing services</td>
</tr>
</tbody>
</table>

*Continued*
### Table Seven
**Continued**

<table>
<thead>
<tr>
<th>Sector</th>
<th>Sub-Sectors Off Limits (Specific Areas Not Open to Foreign Investors)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real Estate</td>
<td>• Real estate brokerage activities, including commission services&lt;br&gt;• Real estate investment in Mecca and Medina</td>
</tr>
<tr>
<td>Security and Security-Related Services</td>
<td>• Catering to military sectors&lt;br&gt;• Security and detective services</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>• Data and message transmission&lt;br&gt;• Business network services&lt;br&gt;• Public telecommunications services</td>
</tr>
<tr>
<td>Tourism</td>
<td>• Tourist orientation and guidance services related to <em>Hajj</em> and <em>Umrah</em></td>
</tr>
<tr>
<td>Transportation</td>
<td>• Courier services&lt;br&gt;• Freight transport by land or air&lt;br&gt;• Passenger transport by land or air&lt;br&gt;• Space transport</td>
</tr>
</tbody>
</table>

Investment could be directed. *Table Eight* summarizes the revised Negative List (highlighting these areas in the third column, with the language “except for . . .”).

The Kingdom’s new concessions on FDI were consistent with the declaration of Crown Prince and First Deputy Prime Minister Abdullah ibn 'Abd al-'Aziz Al Sa’ud, who explained “the Saudi state can no longer assume the burden for economic development and welfare in the country.” In other words, the concessions were needed for the Kingdom to privatize large state-owned monopolies, and for it to increase the share of GDP accounted for by the private sector (which, in 2002, was around 25 percent). Among the enterprises slated for full or partial privatization, or in the midst of being privatized, were domestic aviation

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The source from which the Kingdom derives its classifications is not apparent, but presumably is based on the United Nations Standard Industrial Classification (SITC) system. I encountered difficulties with respect to classification in two sectors. First, regarding mining services, the STIC does not contain a listing for services related to the mining sector. However, chapter 5, which deals with chemicals and related products, marks as subheading 511 organic chemicals, mainly hydrocarbons, n.e.s., and their halogenated, sulphonated, nitrated, or nitrosated derivatives. That subheading, along with its location in the chapter, suggests the exception deals with mining. See http://www.census.gov/foreign-trade/sitc/2002/c5170.html (last visited Sept. 20, 2004). Second, concerning printing and publishing, the STIC system, as well as the North American Industrial Classification code system, lists this sector as heading 2221 (or a number close to 2221). See id.

154. Al-Ammari, *supra* note 7, at 4. See also *Enter the Saudif*, *supra* note 82, at 82–83. (observing “Saudi Arabia and China present the WTO with a similar problem: the state is everywhere”).

155. See CIA *FACTBOOK*, *supra* note 2.
<table>
<thead>
<tr>
<th>Sector (General Classification)</th>
<th>Sub-Sectors Off Limits (Specific Areas Not Open to Foreign Investors)</th>
<th>Except for . . . (that is, Sub-Sectors Open to 100 Percent Foreign Ownership, Unless a Specific Limit is Set Forth)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>· Fisheries</td>
<td></td>
</tr>
<tr>
<td>Audiovisual Services</td>
<td>· Cinemas · Film production and distribution · Radio services · Television services · Satellite transmission · Video production and distribution</td>
<td></td>
</tr>
<tr>
<td>Banking and Financial Services</td>
<td></td>
<td>· Most commercial and investment banking activities, subject to obtaining a license, with restrictions on commodity brokerage, currency exchange trading, and securities underwriting</td>
</tr>
<tr>
<td>Construction</td>
<td></td>
<td>· Construction services</td>
</tr>
<tr>
<td>Distribution Services (including Agency)</td>
<td>· Auto dealerships · Auto parts outlets · Commercial agency, including services of commission agents · Food retailing · Non-food retailing services, including medical retail and private pharmacies · Wholesale trade</td>
<td>· Franchise rights (internationally classified at 8929), with foreign ownership not to exceed 49 percent, and a limit on grants of franchises to one per geographic area · Full trading rights (equal to those of Saudis)</td>
</tr>
<tr>
<td>Education Services</td>
<td>· Adult education · Primary education · Secondary education</td>
<td></td>
</tr>
<tr>
<td>Employment Services</td>
<td>· Recruitment and employment services, including local recruitment offices</td>
<td>· Eased restrictions on Mode IV entry for professionals</td>
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</tr>
</thead>
<tbody>
<tr>
<td>Energy and Energy Services</td>
<td>• Oil exploration, drilling, extraction, and production</td>
<td>• Electricity sector being privatized</td>
</tr>
<tr>
<td></td>
<td>• Pipeline transportation</td>
<td>• Natural gas development projects, such as exploration, drilling, and production, could be opened, pending further review</td>
</tr>
<tr>
<td></td>
<td>• Services incidental to electrical energy distribution</td>
<td>• Services related to mining (as listed at 5115 + 883 of the International Industrial Classification Code)</td>
</tr>
<tr>
<td>Environmental Services</td>
<td>• Blood Banks, poison centers, and quarantine facilities</td>
<td>• Certain environmental services</td>
</tr>
<tr>
<td>Health Care Services</td>
<td>• Services rendered by midwives, nurses, paramedics, and physiotherapists (internationally classified at 93191)</td>
<td></td>
</tr>
<tr>
<td>Insurance Services</td>
<td>• All insurance products, other than health care</td>
<td>• Foreign investment in insurance and re-insurance, in line with Islamic legal doctrine of cooperative insurance, new Insurance Act, and implementing decrees</td>
</tr>
<tr>
<td></td>
<td>• All insurance-related products, including re-insurance</td>
<td></td>
</tr>
<tr>
<td>Manufacturing</td>
<td>• Civilian explosives</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Military equipment, devices, and uniforms</td>
<td></td>
</tr>
<tr>
<td>Printing and Publishing</td>
<td>• Drawing and calligraphy (internationally classified at 87501)</td>
<td>• Foreign media offices and correspondents (internationally classified at 962)</td>
</tr>
<tr>
<td></td>
<td>• Photography (internationally classified at 875)</td>
<td>• Media consultancies and studies (internationally classified at 853)</td>
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<tr>
<td></td>
<td>• Pre-printing services (internationally classified at 88442)</td>
<td>• News agency services</td>
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<tr>
<td></td>
<td>• Printing presses (internationally classified at 88442)</td>
<td>• Press and publication services (internationally classified at 88442)</td>
</tr>
<tr>
<td></td>
<td>• Promotion and advertising (internationally classified at 871)</td>
<td>• Public relations (internationally classified at 86506)</td>
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<td></td>
<td>• Production, selling and renting of computer software (internationally classified at 88)</td>
<td>• Studios for radio and television broadcasting (internationally classified at 96114)</td>
</tr>
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<td></td>
<td>• Typing and Xerographing</td>
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</tr>
</thead>
</table>
| Real Estate                     | • Real estate brokerage  
                                • Real estate investment in Mecca and Medina                  |                                                                 |
| Security and Security related services | • Catering to military sectors  
                                • Security and detective services                              |                                                                 |
| Telecommunications              | • Public telecommunications services                                | • Electronic Data Interchange (EDI) (internationally classified at 7523)  
                                • Electronic Mail (internationally classified at 7523)  
                                • Enhanced/value-added facsimile (fax) services, including storage, forwarding,  
                                and retrieving (internationally classified at 7523)  
                                • Fax services (internationally classified at 7529 + 7521)  
                                • GMPCS services (internationally classified at 75299)  
                                • Information provision and online retrieval and/or processing, including transaction processing (internationally classified at 843)  
                                • Internet Service Provider (ISP) services (internationally classified at 75299)  
                                • Online information and database retrieval services to overseas operators (internationally classified at 7523)  
                                • Telegraph services (internationally classified at 7522)  
                                • Telex services (internationally classified at 7523)  
                                • VSAT services (internationally classified at 75291) |
| Tourism                         | • Tourist orientation and guidance services related to Ḥajj and Umrah |                                                                 |
| Transportation                  | • Freight transport by land or air  
                                • Passenger transport by land or air  
                                • Space transport                          | • All courier services |
services (including Saudi Arabian Airlines), education services, postal services, the Saline Water Conversion Corporation (that is, water desalination services), the Saudi electricity company (that is, generation and distribution, as well as other power companies), SABIC, sewage services, certain banking and telecommunications services, railways, and seaports (that is, port authorities).\textsuperscript{156} Concomitantly, the Kingdom made concessions on the temporary movement of persons (Mode IV in the GATS scheme for providing cross-border services), thereby easing further restrictions on the entry of foreign professionals.\textsuperscript{157}

Interestingly, and to the pleasant surprise of many observers, these concessions satisfied the EU. In August 2003, the Kingdom finalized its bilateral agreement with the EU for WTO accession. That accord included lower duty rates on agricultural and industrial products (with an average industrial tariff of 12 percent, and a correspondingly low level on agricultural imports) and the elimination of bans on certain food imports. In services sectors, the accord also provided for enhanced market access for foreign providers of banking, construction, courier, distribution, environmental, insurance, news agency, telecommunications, and transportation services, and better access for foreign government contractors interested in bidding on the Kingdom's $42 billion worth of projects to modernize electricity, telecommunications, and water infrastructure.\textsuperscript{158} Apparently, the Kingdom also agreed, or reaffirmed its commitment to, full compliance with all WTO rules by the date of WTO accession.

In retrospect, there ought not to have been much surprise. By almost any measure, the Kingdom's October 2003 Negative List was a dramatic manifestation of intent to liberalize with as few restrictions as possible.\textsuperscript{159} The List not only continued the presumption of openness unless a sub-sector was articulated therein, but also allowed for 100 percent foreign ownership, absent an equity limit for a particular sub-sector. Also, the Kingdom itself, through the Minister of Commerce, explained that while it would take some time, the eventual goal was to do away with the List entirely—including the previously "unthinkable" opening up of upstream petroleum services (for example, oil exploration).\textsuperscript{160}


The Kingdom has an established and sophisticated telecommunications system. In its air, sea, and land transportation network, the Kingdom has approximately seventy airports with paved runways, several seaports and harbors, and many unpaved roads (about 102,000 km). \textit{See} Country Profile: Saudi Arabia, BBC News, May 29, 2004, \textit{at} http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/791936.stm (last visited Sept. 20, 2004).

\textsuperscript{157} \textit{See} Pruzin, \textit{WTO Working Party, supra} note 150, at 1763 (noting the concession on the temporary movement of persons).

\textsuperscript{158} \textit{See} Robert Bailey, \textit{Rules of Engagement, Gulf Bus.}, Nov. 5, 2003, at 2 (quoting EU Trade Commissioner Pascal Lamy on the terms of the agreement); Tobias Buck, \textit{EU Deal Likely to Smooth Saudi Path to WTO Entry, Fin. Times}, Sept. 1, 2003, at 5 (reporting on the terms of the agreement, which also included the elimination of certain obstacles to foreign professionals settling in the Kingdom and, apparently, a clause in which the Kingdom reportedly "agreed to end its practice of selling gas at cheaper rates to domestic businesses than to the world market"). As of early 2004, the agreement was not made public. See \textit{also} the Web site of the Directorate General of Trade of the European Commission, \textit{available at} europa.eu.int/comtrade/issues/bilateral/regions/gec/pr010903.htm (last visited Sept. 20, 2004) (announcing the deal).

\textsuperscript{159} \textit{See}, \textit{e.g.}, SAGIA Web site, \textit{at} http://www.sagia.gov.sa (citing Arab News, Oct. 25, 2003).

\textsuperscript{160} Pruzin, \textit{Saudi WTO Accession, supra} note 45, at 1809, 1810 (quoting a statement by the Commerce...
Among the noteworthy features of the List was the willingness of the Kingdom to open its natural gas sector to development. Candidly, that flexibility followed the collapse of the Saudi Natural Gas Initiative, which would have included power, water, petrochemicals and gas exploration and development. The Kingdom reached agreement on a joint venture gas deal with Royal Dutch Shell, and the French giant Total Fina Elf, in which Shell holds 40 percent, and Total and the Kingdom, 30 percent equity interest. Furthermore, the List had to be read with an entrepreneurial spirit, because even ostensibly closed sectors could be unraveled on a sub-sectoral basis. For example, the Kingdom has announced it will privatize all airports, and it eschewed putting airport ownership and operation on the List. Consequently, while foreigners are not allowed to participate in land and air transportation generally, at least after a certain period they may be able to run, and perhaps own, airports.

In concluding its bilateral deal with the Kingdom, was the strategy of the EU to isolate the United States as the hardest bargainer in the rug negotiations, as well as bolster its efforts to forge an FTA with the GCC. If so, then the EU succeeded—though the EU was not alone in isolating the United States. By January 2004, the Kingdom had signed bilateral agreements towards WTO membership with sixteen countries, namely Australia, Argentina, Brazil, Canada, Czech Republic, EU, Japan, Malaysia, Mexico, New Zealand, Pakistan, Slovakia, South Korea, Turkey, Uruguay, and Venezuela. This list is hardly dominated by “light weights.”

Along with the EU, Canada, and Japan are members of the Quad. Australia has played an important role in multilateral trade talks ever since the preparatory conferences in 1946 and 1947 in London and Geneva, respectively, which led to the GATT, and leads the Cairns Group on agricultural trade issues. Brazil, Mexico, and South Korea have emerged as prominent global trading forces, and Mexico, in particular, showed its negotiating prowess in bilateral talks with China on the Middle Kingdom’s accession to the WTO. Pakistan and Turkey are (to say the least) important powers in the Muslim World. Venezuela is an OPEC country, and New Zealand boasts innovative trade-liberalizing policies (including, for example, the elimination of tariffs on all products, including textiles, clothing, and

Minister). See also Pruzin, In Path to Finalize, supra note 46, at A-4 (repeating the Minister’s statement about the Kingdom’s intention eventually to “eliminate the list altogether”).

Mexico, which became a GATT contracting party in 1986, but which is not an OPEC member, provides an interesting comparison. In the near future Mexico is unlikely to privatize PEMEX (Petroleos Mexicanos), and Mexican presidential candidates even remotely suggesting privatization have fared unsuccessfully in campaigns. Only recently has the government of President Vicente Fox considered opening up distribution of natural gas (but not oil) to the private sector, including to foreign investors, but thus far the results are mixed. See José de Córdoba, Mexico’s Auction of Natural-Gas Pacts Draws Few Major Bidders, WALL ST. J., Jan. 15, 2004, at A12.


162. Id.

163. Id.

164. Id.

165. It appears for the time being, airport ownership and security will be open to Saudi nationals, but in the short- or medium-term, the Kingdom will privatize all aspects of airport control. See SAGIA Web site, at http://www.sagia.gov.sa (last visited Sept. 20, 2004).

166. After reaching the deal, the EU Trade Commissioner, Pascal Lamy, expressed optimism it would lead to similar pacts in the Middle East region. See Bailey, supra note 159 (paraphrasing Commissioner Lamy).

footwear, for least developed countries). From the Kingdom’s perspective, the refusal of the United States to join this list showed that a price acceptable to trade negotiators from a diverse group of significant countries was not high for the Americans. The difference was all the more poignant just over one month later. By early March 2004, the Kingdom announced that in February, it had finalized fourteen bilateral agreements during February, with countries such as India, Norway, Switzerland, and Thailand.\textsuperscript{168} In other words, the Kingdom had struck thirty bilateral deals, and “the last major obstacle remaining in the accession process” was striking one with the United States.\textsuperscript{169}

True, the United States was not the only country with which the Kingdom had yet to conclude a bilateral accord. In the spring 2004, negotiations were underway with China, Indonesia, Panama, and the Philippines, and a few other countries, but trade diplomats reported them to be progressing swiftly.\textsuperscript{170} The reports were correct. In April 2004, Saudi Arabia finalized bilateral agreements not only with Indonesia, Kyrgyzstan, and the Philippines, but also with China and India.\textsuperscript{171} It is true that in July 2003 the Kingdom and United States signed a Trade and Investment Framework Agreement (TIFA).\textsuperscript{172} However, any TIFA is a minimalist document, basically stipulating that the United States and the other country will try to expand the trade of goods and services between the two. It sets up a Council on Trade and Investment, which monitors trade and investment and identifies new opportunities for the expansion of both. As for broad, deep, substantive concessions, they are not found in a TIFA, which contains non-committal language like “will seek to . . .” (in the chapeau to article One, referring to expanding trade and investment), “shall consider . . .” (in article Four, referring to whether further trade and trade-related agreements “would be desirable”), and “shall endeavor to provide . . .” (in article Five, paragraph two, referring to the opportunity for consultations). Rather, the real terms are haggled over in bilateral trade talks in the context of WTO accession. Thus, the haggling continued not only on some old matters, but also on new demands.

As for the terms the two countries had debated about for years, the United States continued to press the Kingdom about its commitment to WTO rules on non-tariff measures, particularly import licensing, SPS measures, and TBTs. The United States questioned the Kingdom for not having a law on the protection of sound recordings, broadcast transmis-

\textsuperscript{168} See Pruzin, Officials Report, supra note 46, at 412, 413 (reporting on the bilateral deals).
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} See Daniel Pruzin, Saudi Arabia Makes Progress on Finalizing Trade Deals; U.S. Likely to Be Last Barrier, 21 Int’l Trade Rep. (BNA) 660 (Apr. 15, 2004)[hereinafter Saudi Arabia Makes Progress] (reporting on these deals, observing the United States and Panama were the only countries yet to conclude bilateral accords, and stating the only issue in the talks with Panama “concerned the tax-exempt status of Panamanian service providers in the Kingdom,” whereas “problems remained in the U.S.-Saudi talks regarding Saudi commitments in the areas of financial services, telecommunications, the protection of intellectual property rights, and non-tariff measures”). See also Daniel Pruzin, Saudis Officials Arrive in Washington to Finalize WTO Deal with United States, 21 Int’l Trade Rep. (BNA) 793 (May 6, 2004) (reporting American officials “complained in particular about a backlog of patent applications,” which the Saudis attributed to delays in promulgating new implementing regulations).
\textsuperscript{172} See Agreement between the Government of the United States of America and the Government of the Kingdom of Saudi Arabia Concerning the Development of Trade and Investment Relations, July 31, 2003, U.S.-Saudi Arabia, at http://www.ustr.gov/regions/eu-mad/middleeast/saudiarabia/tifa.pdf. Working Party, supra note 158 (reporting that the TIFA was signed on July 31, 2003, and it was expected to lead to a Bilateral Investment Treaty).
sions, and satellite transmissions. It pointed out that the Kingdom protected audiovisual works for twenty-five years, whereas the TRIPS Agreement standard was fifty years, and characterized the Kingdom's penalties to deter copyright piracy as weak. From the Kingdom's perspective, this pressure surely belied any profession of trust the Americans professed to have in their Saudi counterparts. After all, the Saudis pledged to fulfill upon entry the obligations in the SPS, TBT, and TRIPS Agreements. The pressure must have also seemed unfair. Notwithstanding the fact that a country like New Zealand (which, as any traveler to it well appreciates, understands the importance of fresh fruit, vegetables, dairy products, meat, poultry, and seafood) was satisfied with the Kingdom's shelf-life requirements, the United States queried whether they were unduly short. Were the Americans trying to push frozen foods, or foods loaded with preservatives on the Kingdom?

Some of the American pressure appeared to smack of mercantilism. The United States remained unpersuaded by the market access commitments the Kingdom had made on goods. It also unsatisfied it's the Kingdom's concessions on services, particularly in the banking, insurance, and telecommunications sectors. Also, the United States could not let go of the GPA issue, continuing to insist that the Kingdom join this plurilateral accord. The United States objected even to the Kingdom's request for developing country status under the Agreement on Customs Valuation, pressing for complete implementation of customs valuation rules upon entry. The Kingdom argued for a two-year transition period to phase out minimum customs valuations on certain imports because of chronic undervaluation of those products. The United States countered the Kingdom could try a method other than minimum valuation, and thus drop its demand for a phase out period. By April 2004, the United States won the point, as the Kingdom agreed to drop its request for a post-accession transition period for compliance with the ban in the Agreement on the use of minimum values to determine tariff liability.

If the United States disappointed the Kingdom with its lack of enthusiasm for the Kingdom's revised Negative List, or frustrated the Kingdom with its renewed concerns about the old terms, then it must have exasperated the Kingdom with two new demands. First, the United States (through the Working Party) expressed concern about the precedence of WTO obligations in the Kingdom’s legal system. Was the United States oblivious to the importance of the Qur'an and Sunnah in the Kingdom's legal system? Had it forgotten basic

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173. See Pruzin, Officials Report, supra note 46 (reporting on the non-tariff measures and IP problems); Working Party, supra note 158.

174. Id., supra note 45 (reporting on this controversy).

175. See Pruzin, Officials Report, supra note 46 (reporting on the financial services, insurance, and telecommunications problems); Pruzin, In Push to Finalize, supra note 46 (reporting "Saudi Arabia’s market access commitments for foreign financial services and insurance firms" remained an "outstanding issue[]" in negotiations with the United States (emphasis added)); Pruzin, Saudi WTO Accession, supra note 45 (reporting "[t]he United States is still negotiating with Riyadh in both the goods and services sectors" and "Washington wanted to know what the Saudis were now able to offer in the telecommunications sector [in] light of the recent privatization of its state phone operator" (emphasis added)).

176. See Working Party, supra note 158.

177. Id.

178. Id.

179. Id., supra note 172.

180. See Pruzin, Saudi WTO Accession, supra note 45 (reporting "U.S. officials also told the working party meeting that they wanted clarification from Riyadh on whether international law would take precedent [sic] over domestic law" (emphasis added)); Working Party, supra note 158.

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American legal principles about the precedence of its Constitution? And, what about the content of section 102 of the American Uruguay Round Agreements Act, which intones American law and takes priority over any inconsistent provision of a WTO text?

Second, on trade remedies, the United States essentially demanded to review the Kingdom’s draft antidumping (AD) law. Did the United States not care about offending Saudi sensibilities? Apparently, the Kingdom was too polite to point out (publicly, anyway) the blatant hypocrisy of the American demand; contemporaneous with it was the American loss in WTO litigation over the Byrd Amendment, an AD law enacted without review by other WTO Members (much less the Saudis), and held by the Appellate Body to be inconsistent with America’s WTO obligations. It seemed the United States simply ignored (or did not put any faith in) the Kingdom’s agreement not to impose any AD, countervailing duty, or safeguard remedy until it had implemented WTO-compatible legislation in these areas.

Amidst these controversies, and notwithstanding the Kingdom’s testimony that it had terminated the secondary boycott of Israel, the United States Department of the Treasury listed the Kingdom in its October 15, 2003, Federal Register notice as one of the countries supposedly requiring participation or cooperation in a boycott against Israel, and did so again in its April 13, 2004 notice. Ironically, and probably maddeningly to the Saudis, “U.S. and Israeli officials . . . said they were not aware of any direct boycott against Israel being written into Saudi legislation . . . .” Were different parts of the American government not communicating with one another, or was the Kingdom being singled out as untrustworthy?

IV. Argument #2: How Accommodating of Islamic Concerns?

“[T]he key role that Saudi Arabia plays psychologically and symbolically in the lives of Muslims worldwide cannot be underestimated. It is one thing to have radical non-state groups that advocate and employ violence against the United States; it would be a very different matter to have a radical government employ the pulpit of Mecca, where millions come every year on pilgrimage, to set a hostile tone in the name of Islam.”

Accession to the WTO for any Muslim country poses religious issues, no less so for the Kingdom, which (as explained at the outset) holds a special—sacred—trust in the minds and hearts of Muslims around the world. Consequently, the way in which the Kingdom is treated by the United States in WTO accession negotiations on Islamic issues, and the

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181. See Puzin, Saudi WTO Accession, supra note 45 (reporting “U.S. officials . . . wanted . . . details about a new antidumping law the Saudis were now drafting” (emphasis added)); Working Party, supra note 158.

182. This Amendment is reviewed in Raj Bhala & David Gantz, WTO Case Review 2003, 21 Ariz. J. Int’l & Comp. L. 317 (Summer 2004).

183. See Working Party, supra note 151, at 1763.


185. Puzin, Saudi WTO Accession, supra note 45, at 1809.

solutions for these issues, are more important for far more than commercial reasons. What are those issues, and is the United States sufficiently appreciative of the unique perspectives of the Kingdom on them?

Essentially, there are three issues arising under the Shari'a in connection with the Kingdom's accession negotiations:

- Must the Kingdom remove its ban on importation of alcohol, pork, pork products, and pornography?
- Must the Kingdom relieve Saudi business associations of their obligation to pay a zakat tax?
- Must the Kingdom allow foreign service providers to offer products reprehensible (even forbidden) from a religious perspective, such as life and wage insurance policies sold by insurance companies, and financial products involving interest sold by banks?

Happily for the Kingdom and Muslims generally, the answer to each question is "no." That is, to join the WTO no compromise need be made on any basic Shari'a principle. (I might add that if the opposite were true, then the price of admission would be too high.) However, to reach this answer takes skillful negotiation. The Kingdom ought never to be under significant pressure from the United States to preserve Islamic values in ways the Kingdom finds less than pure.

A. **Forbidden Goods**

Consider, first, the ban in the Kingdom on imports of alcohol, pork, pork products, and pornography. Each of these items is forbidden to Muslims (with an exception, known as darura, for necessity, which could be relevant in extreme circumstances). Never mind that some medicines contain alcohol, that some soaps have oil from pigs, or that some easily-available magazines contain "soft" pornography. The fact is, serious practice of Islam entails forswearing these products.

That fact can be squared with WTO obligations. There is no affirmative duty in multilateral trade law to import any product, least of all merchandise forbidden on religious or moral grounds. Most (if not all) Muslim countries in the WTO—including the two latest Arab Members, Jordan (in 2000) and Oman (also in 2000) content themselves with applying a "prohibitive" tariff on alcohol, pork, and pork products, and with making use of the GATT article XX:(a) exception for immoral articles for pornographic materials. Aside from the possibility of garnering tariff revenues from an honest importer willing to pay the tariff, in certain circumstances, there is a certain rather surprising logic for this methodology.

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187. The Kingdom bans importation of seventy-three products, including the above-mentioned items for religious reasons. The other products, which are banned for various reasons (e.g., SPS protection, security concerns, social preferences, etc.) include animal fertilizer, asbestos, electronic greeting cards, mobile phones fitted with cameras, mobile phone chips, prepaid mobile phone cards, satellite Internet receivers, used tires, video boosters. See Pruzin, Saudis Flexible, supra note 154, at 288 (summarizing the banned imports).

188. See Allen, Saudis Blame, supra note 26, at 8 (quoting the Kingdom's former Minister of Commerce, Osama Jafar al-Faqih, as follows: "Under no circumstances will we allow the importation of pork, pork items or alcohol which are traditionally prohibited according to our religion and our culture, nor will we allow access of audiovisuals which offend our public morals" (emphasis added)). For an overview of goods that are forbidden (haram), see Jamila Hussain, Islamic Law and Society: An Introduction 114–16 (1999) [hereinafter Hussain]. On the darura exception, see Joseph Schacht, An Introduction to Islamic Law 84, 298 (1982) [hereinafter Schacht].

189. See Allen, Saudis Blame, supra note 26, at 8 (citing WTO officials on this point).

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Consider Algeria, which applied to join the GATT in June 1987, but is not yet a WTO Member. It maintains a government monopoly on the production, sale, and export of wine, and permits production of beer in both state-owned and private breweries. For alcoholic beverage imports, Algeria uses a system of reference prices. In 2003, the National People's Assembly attempted to enact an outright ban in these imports (via an amendment to the 2004 budget bill), despite the admonition of the Finance Minister that accession negotiations would be jeopardized. In the Algerian context, the logic against the ban is it would be vulnerable to the charge of protectionism, that is, the real aim of the ban is to insulate the government monopoly on wine from foreign competitors, and preserve lucrative tax revenues on beer sales.

This logic does not apply to the Kingdom. From a strict Islamic perspective, with respect to alcohol, pork, and pork products, this resolution is not satisfying. A tariff, even one set at a very high rate, is not a ban. It remains technically lawful to import the product, as long as the importer is willing to pay the tariff. That being so, it would be difficult for the Kingdom to proclaim to the Muslim World it “bans” alcohol, pork, and pork products in accordance with the Shari'a. Moreover, there might well be importers in the Kingdom willing to pay, for example, a duty of 2,000 percent (or more) on alcoholic beverages from abroad. In other words, the tariff is not “prohibitive,” merely an expensive impediment. Worse yet, the more expensive an impediment is, that is, the higher a duty rate, the greater the incentive to avoid it by smuggling alcohol (or pork or pork products). Put differently, an extraordinary tariff creates an extraordinary customs enforcement headache.

One resolution to this matter would be to urge the Kingdom to accept a distinction between banning importation and banning consumption. Notwithstanding the practical problem of encouraging a “black market,” a “prohibitive” tariff would not alter the truly key Islamic precept, which is not to consume alcohol, pork, or pork products. The problem with this resolution is it may not be persuasive from a strict Islamic perspective, and it could lead to a proverbial “slippery slope,” that is, the presence of foreign alcoholic beverages, pork, and pork products could encourage their consumption. Accordingly, the Kingdom would do well to argue in its accession negotiations that alcohol, pork, and pork products are immoral articles within the meaning of GATT article XX(a). In other words, from a strict Islamic perspective, why not urge that these products are no different from pornography? My point is not this argument is correct; rather, that it is neither reasonable nor respectful to disregard it.

That said, there is one appropriate rebuttal. The Kingdom’s definition of “immoral article” could redound to its detriment in the future. The more expansive, or elastic, the definition of this term, the greater the likelihood some other WTO Member may one day ban an export from the Kingdom it dubs “immoral.” Not surprisingly, some WTO Mem-

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191. This provision authorizes derogations from GATT obligations “necessary to protect public morals,” so long as the requirements of the chapitre to article XX also are met. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 55 U.N.T.S. 187.

192. The United States may have done so as early as Oct. 2000. See Pruzin, U.S., EU Puch, supra note 107, at 1654 (reporting “[t]he Saudis have also taken offence at what they see as efforts by some WTO members to force them to make commitments on the import of alcohol and pork products . . . ” (emphasis added)).
bers feared a broad definition would create a precedent for import bans on religious or moral grounds that were, in fact, protectionist abuses. Consider four examples, all of which are or could be shipped from the Kingdom: an iqal, a guttral (sometimes called a “kaffa”), a tbobe, and a Bedouin dagger. The first three items are articles of clothing typical in the wardrobes of Saudi men, and the fourth item is common in Saudi souks as a souvenir. Might a foreign country say terrorists don these clothes, and they and their garb are immoral? Might another country say a dagger is a weapon to which children ought not be exposed? To be sure, the foreign country would have to ban these items in its own territory (that is, not allow them to be manufactured there), and the ban on importing them would have to be non-discriminatory (for example, apply to iqals from Jordan and daggers from Yemen). Still, the Kingdom ought to think carefully about the elasticity of the definition of “immoral article.”

B. The Zakāt Tax

The zakāt tax is the second issue relating to the Shari‘a arising in the context of the Kingdom’s WTO accession negotiations. This “religious tax” is an Islamic obligation, and the Third of the Five Pillars of Islam (the others being the recitation of the faith, or sbahūda, daily prayer, as-salaam, the Ramadan fast, and the pilgrimage, or Ḥaǧj). The proceeds from zakāt collections are contributed to the poor. In brief, the zakāt “tax” is a form of almsgiving.

Philanthropy is its own justification, and the practice of corporate giving hardly needs explaining in Kansas. Kansas City consistently ranks at the top of the list of American cities measured by philanthropic and foundation giving, number of foundations and charitable organizations, and volunteering. However, in the American media the noble Islamic practice has been conflated with a good deal of adverse publicity about possible connections between charitable foundations (known as waqfī), on the one hand, and, funding terrorist activities, on the other. To some degree, that conflation is unfortunate—not because there never were any such links, but because there is another side to the story. The Financial Action Task Force (FATF) of the Organization for Co-operation and Development (OECD) reports that the Kingdom now has world-class laws to combat terrorist financing (including, for example, banning cash collections at mosques and the transfer of charitable funds overseas without approval from the Foreign Ministry). Moreover, as the United Nations Development Program duly notes in its Arab Human Development Report 2002, the Arab

193. See Pruzin, U.S., Others Urge Saudi, supra note 31, at 334 (discussing taboo goods); Pruzin, U.S.-EU Push, supra note 107, at 1654 (also discussing taboo goods).

194. This discussion of zakāt is drawn from Bhala, Trade, Development, and Social Justice, supra note 19, at 172–75 (discussing almsgiving and zakāt, and contrasting it with adāqa, which is voluntary almsgiving); Hussain, supra note 198, at 169–70 (discussing zakāt and taxation).


197. See Edward Alden, Saudis Meet Anti-Terror Finance Benchmarks, FIN. TIMES, Mar. 8, 2004, at 3 (discussing the FATF report on these laws).
World is home to less abject poverty (defined as daily income of less than US$1.00) than any other developing region. 198 The Economist rightly observed this fact “is in part a tribute to Arab and Islamic traditions of charitable giving to the destitute.” 199

In general, the zakāt contribution on the part of each Muslim is 2.5 percent of income, with a deduction for essential needs of the individual and his family, and exceptions for poor persons, or persons for whom payment would render them financially insecure or bankrupt. Zakāt is expected of Muslim individuals and domestic business associations. The amount to be contributed is calculated as 2.5 percent of the gross assets of the individual or association, and typically it is paid before the end of the month of Ramadan. 200 Thus, for instance, cash, cattle and other farm animals, and real property, all would be considered gross assets included in the “taxable asset base.” Significantly, payment is expected of a business association whether or not that entity earns a profit during the “tax period.”

In the context of WTO accession, the issue posed by the zakāt is whether this tax runs afoul of the national treatment obligation contained in article III:1–2 of GATT, and possibly also the equivalent provision in Article 2:1 of the TRIMs Agreement. 201 Depending on the service commitments the Kingdom makes, specifically with respect to Mode III (FDI), a national treatment issue also may arise under article XVII of the GATS. What, precisely, is the possible incongruity? As a general matter, in all its textual manifestations, national treatment demands equality of treatment, both in terms of procedural and substantive rules (though not formally identical treatment). The multilateral trade law jurisprudence surrounding this principle, particularly as it is manifest in GATT article III, dates from the origins of the GATT itself in 1946–47. Through decisions of the WTO Appellate Body, the case law on national treatment continues to evolve. Since the birth of the WTO on January 1, 1995, the Appellate Body has issued major reports dealing with GATT article III, most notably in Japan——Alcoholic Beverages and France——Asbestos. 202

Thus, while characterizing the large and growing body of national treatment law is risky, suffice it for now to say the critical inquiry in any national treatment matter is about the even-ness of the playing field on which imported goods (or services) and like domestic products (or services) compete. That is, does the measure in question alter, in fact or potentially, the conditions of competition between imported merchandise (or services) and a like domestic product (or service)? (In the context of FDI, the question is put in terms of

198. See Self-Doomed to Failure, supra note 5, at 24–25 (discussing this Report).
199. Id.
200. By some anecdotal accounts, a higher rate (e.g., 12.5 percent) is expected from farms. Also by some accounts, certain deductions are allowed from gross assets before reaching the taxable asset base. Discussions, supra note 15.
201. Article 2:1 of the TRIMs Agreement states “no Member shall apply any TRIM that is inconsistent with the provisions of article III . . . of GATT.” The first sentence of GATT article III:2 requires imported products “shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.” The second sentence of GATT article III:2, which applies to “directly competitive or substitutable product[s]” (as explained in the interpretative note, at article III, paragraph 2), forbids the application of “internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in” article III:1. In turn, article III:1 prohibits “internal taxes and other internal charges, and laws, regulations, and requirements” affecting the sale, distribution, or transportation of products, that “afford protection to domestic production.” GATT art. III.
the competitive conditions affecting a foreign direct investor or service supplier and a domestic company producing a like product or offering a like service.) The measure in question for the Kingdom is the zakāt tax.

If the zakāt tax were imposed on importers, and on foreign investors (and service suppliers), then there would be no national treatment issue. To the contrary, all merchandise, and all business associations, would be treated equally, as all would be asked to ante up the 2.5 percent contribution for charity. However, as a religiously based obligation, zakāt is expected only of Muslims. Consequently, a foreign business association (or service supplier) is not expected to pay the zakāt tax—only a Muslim entity, which in practice means only domestic businesses. To be sure, foreign companies (and service suppliers) are obligated to pay an income tax, and the rate is 30 percent, though it is being lowered to 25 percent. Under the Kingdom’s tax rules, that obligation is triggered only if the foreign entity makes a profit, and they are entitled to carry over losses indefinitely into the future. Here, then, is the potential national treatment problem: are foreign businesses (and service suppliers) treated less favorably than their domestic competitors because they are subject to an income tax, while their competitors bear a zakāt tax?

As a threshold point, the United States is well advised not to “attack” the zakāt tax, whether in public or in private. Indeed, to do so would be nearly hypocritical. After its defeat in the Foreign Sales Corporation case, whereby the WTO’s Dispute Settlement Body authorized retaliation by the EU of roughly $4 billion to counter America’s unlawful tax-based export subsidy, the United States surely is sensitive to attacks on “sovereign” domestic tax matters. Arguably, the sensitivity should be greater to the Kingdom’s interest in preserving the zakāt scheme, because it is a matter of sacred law and has a bona fide charitable purpose. However, aside from making its case to the media that “the Americans are trying to interfere with the zakāt tax,” the Kingdom does have plausible legal arguments against a challenge.

First, the Kingdom might urge the zakāt tax is more akin to an income (or direct) tax than to an internal (or indirect) tax. If that were so, then GATT article III:1–2 would be inapplicable, because it does not purport to reach income taxes. Any WTO Member is at liberty to maintain differential income taxation schemes for foreign and domestic businesses (though to do so obviously can discourage FDI). Assuming the Kingdom was unsuccessful in thwarting the application of the national treatment principle to the zakāt tax, then it could offer a second argument, namely, substantively equal treatment exists. To make this argument, the Kingdom would have to show in practice that the tax burden is the same on Muslim businesses and their foreign competitors. It also would have to show that there is no potential for discrimination against the foreign businesses (and service suppliers). For proof of both points, the Kingdom would need adequate financial data and expert testimony.

What if neither argument works? Must the Kingdom scrap the zakāt tax system? Absolutely not. If the Kingdom were obliged to, then I would query whether the price of WTO admission would be too high, because it would include destroying a Pillar of Islam. Rather, the Kingdom’s option would be to impose the same zakāt tax scheme on non-Muslim,

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203. This case is excerpted and discussed in Bhala, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE, supra note 40, at 988–1008, and the authorized retaliation has been widely reported in The Financial Times and International Trade Reporter.

204. By some anecdotal accounts, the zakāt tax results in a higher burden on business associations in the Kingdom than does the income tax on foreign business associations. Discussions, supra note 147.
foreign business associations (and service suppliers). Foreign entities would pay it, as do their domestic competitors, whether they make a profit or loss. The question for the Kingdom would be whether that response would be revenue neutral. Would imposing the zakāt tax on foreign businesses—and, presumably, simultaneously relieving them of the income tax—result in a net loss in revenues to the treasury? If so, then absent corresponding cuts in expenditures, the Kingdom would have to make up for the diminution.

C. PROBLEMATIC SERVICES

The third Shari‘a issue concerns market access for foreign service suppliers; specifically, insurance companies and banks. As a general proposition, there is no Islamic legal precept that would prohibit entry of these service suppliers from overseas into the Kingdom. To the contrary, most, if not all, Muslim countries in the WTO permit—to one degree or another, and with constraints varying from Member to Member—foreign insurance companies and banks to offer services to their citizens. Indeed, Islamic financial engineering is big business. At the 2003 International Islamic Finance Conference, the General Council for Islamic Banks and Financial Institutions estimated Islamic banks and financial institutions operating on Shari‘a principles manage about $260 billion of assets, and another $200–300 billion worth of assets are managed by the Islamic departments and subsidiaries of international banks in financial centers like New York, London, and Tokyo. The question, then, under the Shari‘a is what is the acceptable way to structure insurers and banks and, even more importantly, the products they are permitted to offer?

With respect to structure, the Shari‘a does not know the concept of a corporation, as a legal person, in the Anglo-American legal sense. To be sure, the Shari‘a provides for an array of forms of business association, often akin to partnerships, and the generic Islamic legal term for a partnership is “sharīka” (also sometimes called a “sibīka”). Essentially, a sharīka is a society involving joint association, that is, a general business association, and each partner is called a “sharīk.” The general Islamic legal term for a “mercantile partnership” is “sharīkat ‘akd,” and there are various types of mercantile partnerships. In any mercantile partnership, each partner owns a specified number of shares in the business.

The three most prominent types of business associations acknowledged by the Shari‘a are a mu‘āwada, a sharīkat ‘inān, and a muḍāraba. In most instances, two partners are

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205. See Drawing the Roadmap for Islamic Banking, BANKER MIDDLE EAST, Dec. 2003, 1 (mentioning these statistics). See also Tom McCawley, Islam’s Edges, FAR E. ECON. REV., Feb. 5, 2004, at 36–37 (reporting on the growth in Islamic banking in Asia, and the opening of Islamic banking departments in multinational financial institutions like the Hong Kong Shanghai Banking Corporation).

206. This discussion of Islamic business association law is drawn from Hussain, supra note 188, at 166–68, 178. Schacht, supra note 188, at 155–57.

207. In contrast, the general Islamic legal term for a partnership in which partners are joint owners is “Sharīkat mu‘ā.” That is to say, it is possible under the Shari‘a to have a partnership in which the partners are joint owners.

208. Among the other types of business associations contemplated by the Shari‘a are a sharīkat al-ṣanā‘i‘i‘ wal-takabbul, a sharīkat al-zayjūb, and a mu‘āraba. A sharīkat al-ṣanā‘i‘ wal-takabbul is a partnership among artisans in the same line of business. The purpose is to pursue jointly a specific trade, or a series of allied trades. A sharīkat al-zayjūb is a credit cooperative. The partners do not contribute any capital to the business, but rather pool the credit they have with lenders. The sharīkat al-zayjūb purchases goods by leveraging off of this pooled credit, re-selling them immediately, and dividing up profits as per an agreed-upon ratio. A mu‘āraba (also called a “mu‘ākht”) is a special device for leasing agricultural land whereby profit-sharing is called for under the lease contract.
envisaged, though more than two are permissible. A muṣāraḥa is an unlimited mercantile partnership, with each partner holding an equal share in the entity. Each partner has full power to direct the affairs of the muṣāraḥa, and each partner is fully liable for the affairs of each partner. All of the property of each partner, except for his food and clothing, and that of his families, is engaged in the muṣāraḥa. All partners in a muṣāraḥa must be Muslim, that is, it is not permissible to have a non-Muslim, or a dhimmī, as a partner.

A sharīkat ʿinān is a limited liability company. Each partner is responsible to third parties for the transactions in which the partner has engaged. But, no partner is liable for the acts of another partner. In fact, each partner has a right of recourse against the other partners, up to the amount of the shares held by the first partner. Thus, unlike a muṣāraḥa, in a sharīkat ʿinān, the partners can hold different amounts of shares. Consequently, partners who do different amounts of work may receive portions of the profit commensurate with their work. Also in contrast to a muṣāraḥa, which uses all of the assets of the partners except for their food and clothes, a sharīkat ʿinān engages only the assets the partners choose to bring into the business. Moreover, the partners can restrict the use of those assets to certain kinds of transactions. Thus, the distribution of profits may be unequal not only because of differing amounts of ownership stakes in the partnership, but also because it is rendered on the basis of actual work, and assets contributed to that work, rather than just on initial capital contributions.

The term “muḍāraba” is typically translated as a “sleeping” or “dormant” partnership. Technically, a muḍāraba is not a business association, but rather a fiduciary relationship, that is, a relationship of trust, called an “ʿamānūn.”209 Still, profits earned are split up as if a muḍāraba were a partnership. The muḍāraba is of great practical significance because of its use as a device to circumvent, in a lawful manner, the rule (discussed below) against ṭibā. In a muḍāraba, the “sleeping partner” is called the “rabb al-māl.” (Frequently, this partner is a bank contributing capital to the venture.) The sleeping partner is liable for any losses incurred (up to its capital contribution), and receives a proportion, agreed upon in advance, of any profits (but not a fixed return, as that would amount to ṭibā). The other partner (or partners) is (are) working partner(s), called “muḍārib.” The muḍāraba agreement specifies in detail the sharing of expenses between the rabb al-māl and working partner(s). As with any business engagement, a muḍāraba may experience profits in one year, but losses in another year. The working partner does not bear any loss—again, that is for the sleeping partner. Thus, if a loss occurs after a profitable year, then the muḍāraba behaves as if the (non-existent) profit already had been distributed.

What relevance are these types of business association to the entry of foreign insurance providers and banks? The short answer is that entry can be made through a structure permissible under the Shariʿa. In other words, these types matter because they provide the structure by which entry is both religiously and legally acceptable. From an American perspective, it may be feared that these structures are a non-tariff barrier to entry of foreign

209. There are technical requirements to be followed in organizing a muḍāraba. If they are not satisfied, then the muḍāraba is said to be “defective.” In the event that the muḍāraba is defective in some way, the arrangement is treated as a simple contract for the hire of services. Among these requirements are the three. First, as suggested above, there should be no stipulation in the arrangement that a partner earns a fixed sum, i.e., earnings should be specified in terms of a percentage of the profits. Second, it must be possible to determine (calculate) the profit exactly. Third, there must be no stipulation that a working partner bears the loss. Its only downside risk is time and effort lost. See Hussain, supra note 188. Schacht, supra note 188 at 155–57.

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insurers and banks. After all, one way to keep out foreign service providers is to negotiate strict requirements they must satisfy for Mode III entry (FDI) into a sector or sub-sector. From the Kingdom’s perspective, however, using Shari’a business association rules are not a veil for protectionism. Rather, to disrespect these structures, is to disrespect the Shari’a itself.

Doubtless American trade negotiators have had to deal with business association laws of countries in the civil law tradition, countries with inchoate and hybrid legal systems, and countries with economies in transition from socialism to capitalism. It is no less important to the Kingdom than in these other contexts that the United States defers to the interests of the Kingdom with respect to the structure of foreign insurers and banks. Arguably, the case of the Kingdom is more compelling than the others, because of the sacred character of the Shari’a in the eyes of Muslims.

The structure of a business association is, of course, about how an enterprise is permitted to enter into the market of the Kingdom. To businessmen, what matters even more than structure is what the enterprise can do once it is established in the Kingdom. Foreign insurance companies would like to offer the full array of products they do in the United States and other countries. That array includes life insurance, and non-life insurance products like real property, personal property, automobile, and casualty coverage, and insurance for wages and pensions. Similarly, foreign banks would like to offer the vast array of commercial and investment banking products they provide in the American and other markets. Some of these financial products involve the charging or paying of interest. The key question under the Shari’a is whether some insurance and banking products are impermissible, and hence cannot be offered by foreign (or domestic) providers.

As a general proposition, the Shari’a forbids gambling. There are stated exceptions, for example, for horse racing, or for tests of knowledge about the Qur’an. Such exceptions involve skill, not mere chance. Life insurance, and possibly also wage and pension insurance, are analogous to gambling, as only God can know when a person will die, when his wages will fall, or when his pension will lapse. Moreover, taking payments (premiums) from an insured person for a policy can be unconscionable, particularly where no funds are returned to the policyholder. Structuring an insurance carrier in a manner that contemplates the return of at least some premiums paid is, therefore, necessary. In particular, insurers are to operate according to the Islamic concept of cooperative insurance (takaful), “whereby resources in a firm are pooled and policyholders act almost like shareholders, sharing in the profits and paying into the pool in the event of losses.”

As for banking products, it is widely appreciated the Shari’a forbids riba, which while typically translated as “interest,” is more accurately considered excess (in the sense of unjust enrichment), or usury. There are various devices (known as “hiyal”) for managing it—that is, lawfully circumventing it—most notably, a mudaraba. In fact, the plethora of

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210. See, e.g., HUSSAIN, supra note 188; SCHACHT, supra note 188 (all discussing the rules on games of hazard and related insurance matters). By no means do I mean to suggest a complete analysis of the complex topic of insurance products under the Shari’a.

211. Pruzin, Officials Report, supra note 46.


213. Generally, a hiyal device involves splitting an overall transaction, which would be forbidden, into separate, distinct components, each one of which is permitted. See SCHACHT, supra note 188, at 200, 299; Tarek El Diwany, Traveling the Wrong Road Patiently, BANKER MIDDLE E., Sept. 30, 2003, at 3.
them prompted one Islamic law expert to bemoan "[w]e have arrived at a financial wonderland in which there exists an Islamic equivalent to almost all the major products of the interest-based sector, with quantitative and qualitative features that are frequently indistinguishable from them." 214 His concern is the decreasing distinction between conventional and Islamic banking renders the latter an un-Islamic system of money creation, which "is a sin that requires interest-based lending in order to make it profitable." 215 The "sin" is the replacement of a true profit-sharing basis of lending with a search for fixed rate returns. 216

Obviously, it is for the Kingdom to decide the insurance and banking products that may be offered in its market, and the manner in which they are to be offered. Here, again, the United States risks offending Shari'a principles. The Kingdom is (and has been for years) open to foreign providers of health care insurance. 217 But, at least as early as October 2000, the United States began pressuring the Kingdom to allow foreign insurers to offer life insurance and pension services. 218 In early and mid 2004, the American insurance giant AIG reportedly

expressed concern that [it] might be hindered from continuing to offer insurance services in Saudi Arabia because its existing operations there are not completely in line with the new cooperative insurance requirements [of the Kingdom, found in a new insurance law and two implementing decrees allowing for provision of insurance services]. 219

Would AIG demand its special position be grandfathered (as it had in the case of the Chinese WTO accession talks, resulting in a delay in those talks), notwithstanding the possibility that if it "won," it hardly would endear itself to prospective devout Muslim policyholders? 220

To be sure, from an economic standpoint, there is little wrong with encouraging the Kingdom to open its insurance and banking markets to products that could benefit its citizens. But, economic logic and religious principle often interact. Aggressive negotiating demands about foreign insurance companies and banks offering a full array of products, insensitive to the Islamic issues some of the products they raise are (to say the least) disrespectful. From a religious perspective, surely the Kingdom is well-advised to resist inappropriate compromises. 221

V. Argument #3: How Concerned About Comparative Advantage?

"[T]he [WTO] accession will produce both winners and losers with no particular fate assured. . . . Joining the Organization is not the ultimate goal. It is only a way to a higher goal.

214. Diwany, supra note 213.
215. Id. at 3.
216. Id.
217. See Pruzin, U.S., EU Push, supra note 107 (mentioning this point).
218. See id. (observing "the United States is keen to see the Saudis open the sector further to life insurance and pension services" (emphasis added)).
219. Pruzin, Officials Report, supra note 46. See also Saudi Officials Arrive, supra note 172 (mentioning the issue).
220. See Pruzin, Officials Report, supra note 46 (discussing the AIG controversy).
221. See Pruzin, U.S., Others Urge Saudis, supra note 31 (noting the Saudi prohibition on certain life insurance services "on religious grounds"); Pruzin, U.S., EU Push, supra note 107 (stating "[t]he Saudis . . . are balking, arguing that the insurance restrictions are justified on religious grounds").
Our process, after full WTO membership, should be guided by only one credo: We need to have a clear and controlled process in order to increase our gains from global trade."

Wabih Binzagr, prominent Saudi businessman, September 2003. 222

A. The Petroleum Sector and OPEC

The Kingdom's participation in the Organization of Petroleum Exporting Countries (OPEC) seems an unlikely WTO issue, but for the fact that in 2000, the Chairman of the Senate Finance Committee made one of it. 223 In fact, Senator Charles E. Grassley (R-Iowa) nearly single handedly raised the price of WTO admission in February 2000. Until that point, the Finance Committee Chairman had supported the Kingdom's entry, but switched to adamant opposition because of what he claimed was the Kingdom's "pivotal role" in causing world oil prices to rise 224 (never mind the possibility of the Senator being unper- turbéd by a rise in the world market price of crops grown in Iowa).

Senator Grassley's focus was on the effect on Iowa farmers of higher diesel fuel and petrol costs, which he said had been rising since March 1999 due to an OPEC agreement to cut oil output and eliminate world excess supply. 225 These increases essentially were a "harsh duty" on American farmers of corn, soybeans, and other crops. 226 The farmers faced a devil's choice. They could pass on the higher input costs by raising the price of their output, which would make that output less competitive on world markets. Or, they could suffer the income loss if they did not pass on the higher cost. Disregarding the fact American corn and soybean farmers were not alone in facing this choice, the cost hikes applied on a most-favored nation basis. Blame had to be put somewhere, so why not the Kingdom and OPEC?

To be fair, American leaders were not alone in wondering about the impact of the Kingdom's accession on its OPEC dealings. 227 Early on in discussions about joining the WTO, a fundamental and not altogether cynical question was posed by leading Saudi public and private sector officials: why join the WTO, if it is an exporter's club, and if the Kingdom has little to boast in the way of exports other than petroleum (that is, oil), petroleum products, and natural gas? This question still resonates in influential circles in the Kingdom. It has to, because the petroleum sector accounts for 34 percent of the Kingdom's GDP.

223. OPEC consists of eleven countries: Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela. See the Organization of Petroleum Exporting Countries at http://www.opec.org (last visited Sept. 20, 2004). Of these countries, six are members of the WTO; Indonesia, Kuwait, Nigeria, Qatar, United Arab Emirates, and Venezuela. See World Trade Organization web site, at http://www.wto.org. According to OPEC, its objective is to "coordinate and unify petroleum policies among Member Countries, in order to secure fair and stable prices for petroleum producers; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on capital to those investing in the industry." See OPEC, History, at http://www.opec.org (last visited Sept. 20, 2004).
225. See id. (recounting the Senator's views).
226. See id. (quoting the Senator).
227. To be clear, there is no publicly available information to support the proposition that OPEC countries that hold membership in the WTO have reduced their participation in OPEC because of participation in the WTO.
which is less than the percentage 20 years ago—then it was 66 percent. Yet, the oil sector still gives the Kingdom roughly 75 percent of its government revenues, and 85 percent of its export earnings. In brief, now and for the foreseeable future, oil is its “life blood.”

At the root of the question about oil and multilateral tariff concessions is the fact (or apparent reality) that since GATT entered into force on January 1, 1948, there has been a tacit bargain among the GATT contracting parties, and since January 1, 1995, among the WTO Members, not to subject oil and natural gas to multilateral tariff concession negotiations. Yet, already, the Kingdom has set forth in writing its views that the Members ought to consider at least some aspects of global oil trade. That is one illustration of positive contributions by the Kingdom to the development of multilateral trade law and policy.

Pursuant to Paragraph 32(6) of the November 2001 Doha Ministerial Declaration concerning negotiations on trade and the environment, in September 2002, the Kingdom circulated a paper on taxes imposed by developed countries on energy sources. The paper brought to light two key points: (1) the negative economic effects on poor countries of taxes imposed by rich countries on the carbon content of fuels; and (2) the discrimination in tax regimes of rich countries in favor of polluting energy sources. On the first point, the Kingdom showed in its paper that taxes in countries in the Organization for Economic Cooperation and Development (OECD) aimed at limiting carbon emissions inflict significant losses (measured in terms of GDP declines) on oil-exporting developing countries. On the second point, the Kingdom stressed the bias against oil and petroleum products created by differential fossil fuel taxes in OECD countries, as well as by their subsidies for coal and nuclear energy.

Unfortunately, the Kingdom’s paper met with little response from the major trading powers in the WTO. Logically, therefore, public and private sector officials in the Kingdom ask, what market access benefits would the Kingdom obtain for its prize commodity by joining the WTO, if there is an unwritten, unspoken deal to allow oil importing countries to tax oil as they please, both at and after the border?

The short answer is “none.” As long as oil importers seek to preserve their sovereignty over oil consumption patterns, through the policy device of taxes of one form or another, neither the Kingdom nor any other oil-exporting country will benefit from MFN tariff commitments bound under GATT Article II in the Schedules of Concessions of oil importing WTO Members. Indeed, it is inconceivable that in WTO accession negotiations the Kingdom could have successfully demanded a roll back of this historic preserve of oil importing countries. How, then, could the Kingdom respond?

Arguably, and speaking metaphorically, it needs to draw two lines in the sand: one for oil, and the second for natural gas. First, the Kingdom, together with other OPEC members, ought not to compromise on OPEC activities. They share a comparative advantage

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228. See Al-Ammari, supra note 7, at 1 (mentioning these statistics).
229. See id. See also Enter the Saudis, Economist, May 17, 1997, at 82, 83 (reporting 40 percent of the Kingdom’s GDP, seventy-five percent of its government revenue, and ninety percent of its export revenue, came from state-owned oil and chemical industries).
230. See Pruzin, Saudi WTO Accession, supra note 45 (quoting the Minister of Commerce).
231. Weaponry is the other major internationally traded commodity left off the tariff negotiating table.

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in the petroleum industry, they exploit it to their advantage through OPEC, and—from their perspective—their sovereign interests lie in continuing this arrangement. Second, the Kingdom ought not to surrender its comparative advantage on natural gas prices.

As for the first line in the sand, if the Kingdom cannot compel oil importers to bind tariffs oil and subject oil as a commodity to GATT disciplines; then it ought not to be subject to trade law constraints on its OPEC activities. The obvious difficulty arises because of OPEC production quotas, which are set periodically by the OPEC members to influence world price and quantity figures. These country-specific quotas call for restraints by each OPEC member on exports of petroleum. GATT Article XI:1 contains a prophylactic ban on quantitative restrictions that typically is thought of the context of imports. However, it also applies to export limitations. What exception to this ban exists for the Kingdom and its OPEC quotas?

There are three answers, custom, text, and special and differential treatment. The Kingdom can rely on the custom in accession negotiations involving oil exporting countries, at least the most recent OPEC members to join the WTO—Qatar in 1996, and the United Arab Emirates, also in 1996. In those deals, OPEC quotas appear not to have been raised by the WTO Working Group, or in bilateral accession negotiations, at least not in an explicit manner that imposed restraints on the OPEC activities of the acceding countries. Were the Kingdom’s activities to be scrutinized more harshly than its predecessors in OPEC, surely the reasonable response would be to press why it is singled out for unique treatment.

The text of GATT itself contains the second answer, namely, a provision helpful to the Kingdom. Article XX:(g) concerns the conservation of exhaustible natural resources. Like article XI:1, it normally is thought of in terms of import limitations, yet both are applicable to export restraints. Surely oil qualifies as an “exhaustible natural resource,” and arguably, a country-specific export restraint allocated by an international commodity organization ought to fit within the listed exception in article XX paragraph (g). To be sure, applying the jurisprudence of the WTO Appellate Body would not be the end of the legal inquiry. The Kingdom would need to show its production and export quotas not only fit within the exception, but also satisfy the criteria of the chapeau to article XX, namely, the quotas are neither “a means of arbitrary or unjustifiable discrimination,” nor “a disguised restriction on international trade.”

The third response to foreign pressure on the Kingdom and its OPEC activities arises from the concept of special and differential treatment. No, the Kingdom does not enter the WTO as a developing country. It sought this status early on in the accession negotiations. But, it backed away from this demand in the late 1990s in the face of stiff resistance from the United States and other countries. However, GATT article XX:(h) contains a limited exception for international commodity agreements (that satisfy a review by the WTO Members). True, it may seem better suited for products like coffee or cocoa from countries like Colombia or Ghana than for petroleum from well-off Gulf states. However, the Kingdom could still offer a plausible argument that many people within OPEC countries are poor, and without the careful management of the world’s oil markets through


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supply-side constraints, those people would be considerably worse off. Adding they could fall prey to extremist, violent messages would make the argument yet more poignant.

B. A Word on GATS and Energy Services

Before drawing the second line in the sand, on natural gas, a brief digression on a little-publicized matter—energy services—is worthwhile. Among the many efficiency-based reasons for the Kingdom joining the WTO any international trade law teacher can trot out (for example, increased market access for exports, improved competitiveness and the realization of comparative advantages through production specialization, increased FDI and technology flows, and improved consumer welfare resulting from expanded choices of goods and services at lower prices), a legal rationale stands out as pre-eminent. It is the ongoing potential to shape the broad contours, and specific details, of a rules-based system. It is not just the benefit from greater certainty and predictability afforded by the GATS and WTO legal texts, the adjudication of disputes about provisions in these texts via set procedures by WTO panels and the Appellate Body, or the enforceability of adjudicatory rulings through, if necessary, trade retaliation.\(^\text{234}\) It is also the influence on amending old, and making new, laws by being in the arena in which they are crafted.

It is unlikely that there is an example of this potential more relevant to the Kingdom than energy services. Presently, no comprehensive system exists in the GATS for classifying the energy services sector and its many sub-sectors. Rather, these services come under three disparate and incomplete sub-sector headings:\(^\text{235}\)

- Pipeline transportation of fuels
- Services incidental to energy distribution
- Services incidental to mining

Yet, energy services involve a far broader array of activities than these three sub-sectors cover.

These services include nearly every transaction, from development to delivery, such as upstream oil and gas exploration, mapping, drilling, construction and operation, transportation (through oil tankers at sea and trucks by road, and by pipeline), storage (in tanks), building and maintaining power plants, distribution, marketing, auditing, and metering. Depending on the particular transaction, energy services may be provided through cross-border supply (known as “Mode I” in the GATS scheme, for example, where an engineering firm in Kansas provides a study for a company in the Kingdom), by a commercial presence (that is, FDI, known as “Mode III,” for example, Royal Dutch Shell investing in a joint venture project in the Kingdom), or from the temporary movement of persons (that is,

\(^{234}\) See Raj Bhala & Lucienne Attard, *Austin's Ghost and DSU Reform*, 37 Int'l Law. 651 (Fall 2003) (evaluating the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* according to the strict legal positivist criterion of what “law” is as laid down by John Austin).

\(^{235}\) See World Trade Organization, Services Trade, available at http://www.wto.org/tratop_e/serv_e/serv_e.htm (last visited Sept. 20, 2004). With respect to mining, the Kingdom has gold, phosphates, aluminum, copper, and zinc. *Ma'aden* is the major mining business in the Kingdom. It is approximately six years old, and may be privatized in the future. The bulk of the minerals it mines (including about ninety percent of phosphates and aluminum) are exported. Discussions, supra note 15.
business immigration, known as “Mode IV,” for example, where a business in the Kingdom hires employees from overseas).\textsuperscript{236}

The lack of a unified, distinct, and commercially sensible classification framework for energy services may be one reason for the slow progress of multilateral negotiations on liberalizing trade in these services. As of November 2003, eight WTO Members offered proposals for a classification system: Canada, Chile, Cuba, EU, Japan, Norway, United States, and Venezuela. Their proposals could lead to a WTO reference paper on energy services, which in turn could be a road map for liberalization in this sector. With their large energy services markets, only Russia and Iran (both outside the WTO), and Mexico (which acceded to the GATS in 1986), come close to the Kingdom as being a noteworthy omission from this list of authoring countries.\textsuperscript{237}

The American (and, to a lesser degree, the EU) proposal are for a definition of “Energy Services” that would embrace all transactions, and it also boasts an Index for the Classification of Energy Services.\textsuperscript{238} Thus, the American proposal covers all activities, from “upstream” endeavors like exploration, to downstream functions like marketing. In brief, the

\textsuperscript{236} Consumption abroad, or “Mode II,” is not as relevant to energy services as the other three modes of delivery. An example would be where an individual travels to the Kingdom to consume a service therein.

It is worth adding that negotiations to define energy services sub-categories are only the first step towards the no less difficult talks about liberalizing trade in these services. Once that second step is taken, undoubtedly disputes about interpreting the length and breadth of sub-categories, and the precise nature and timing of concessions, will follow. Even the United States, with a large and sophisticated team of trade negotiators sometimes runs into difficulty, as its dispute with Antigua over online gambling illustrates.

In 2003, Antigua and Barbuda challenged American federal, state, and local measures blocking the cross border provision of gambling and betting services. These services happened to be provided from Antigua, and Antigua experienced a decline in just two years (2001–03) in the number of its service providers from over 100 to around thirty-six. The United States argued that the WTO services sectoral classification list, which in chapter 10.D contains a category for “sporting and other recreational services,” does not encompass online gambling. If true, then the United States could not have made a commitment under the GATS to liberalize trade in these services, and its restrictions do not violate the GATS. See Daniel Pruzin, \textit{U.S. Loses Preliminary WTO Ruling on Review of Gambling Restrictions}, 20 Int’l Trade Rep. (BNA) 1883, 1884 (Nov. 13, 2003); Daniel Pruzin, \textit{WTO Sets Up Panel at Antigua’s Request to Rule on U.S. Online Gambling Restrictions}, 20 Int’l Trade Rep. (BNA) 1382 (Aug. 14, 2003).

The American trade negotiators might have avoided the controversy either by clarifying this definition during GATS negotiations, or by stating in the services schedule for the United States words to the effect “Unbound” (meaning no commitments are made in the category) or “None, except for online gambling services” (meaning no limits are imposed on foreign service providers, except for the restrictions set forth). However, my point is not to criticize them, but rather emphasize if they occasionally slip up, then \textit{a fortiori} the Kingdom will, too, as it participates in WTO affairs.

\textsuperscript{237} A number of articles have appeared in \textit{The Financial Times and International Trade Reporter} (BNA) on the WTO accession negotiations for Russia, and I have written elsewhere on American policy toward the accession of Iran. See Raj Bhala, \textit{Poverty, Islam, and Doha}, 36 Int’l Law. 139, 184 (Spring 2002). With respect to Mexico’s GATT accession, see http://www.wto.org/english/tratop_e/countries_e/mexico_e.htm (posting information about this accession). As for the Kingdom, its energy services market is lucrative. It is projected to spend as much as $40 billion on energy services between 2003 and 2007. Discussions, \textit{supra} note 15.

\textsuperscript{238} The EU proposal identifies eight specific energy services sub-sectors:

\begin{itemize}
  \item Services related to exploration and production.
  \item Construction of energy facilities
  \item Energy networks
  \item Energy storage
  \item Supply of energy
  \item Final use
\end{itemize}

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American proposal urges the combination of many sub-sectors into the single Energy Services sector. In contrast, the Venezuelan proposal is circumspect. It distinguishes between “core” and “non-core” energy services, and identifies certain upstream and downstream activities that are core services. The Venezuelan proposal also differs from the American (and EU) proposal in the way it disaggregates energy services into sub-sectors.

These contrasting approaches to defining “Energy Services” and classifying sub-sectors in that definition reflect dramatically different commercial impulses. The Americans would like businesses, such as Bechtel, Exxon, and Halliburton, to enjoy the broadest possible access to the widest array of energy services markets in the Kingdom. After all, these companies are world-class, even dominant, competitors in many energy services markets. In contrast, the Venezuelan proposal reflects the commercial interests of energy-producing, energy-exporting countries in the developing world. Under it, liberalization commitments in GATS negotiations would be made in narrowly-defined sub-sectors. Consequently, the negotiating dynamic created by the Venezuelan proposal would empower Venezuela to preserve its sovereign right to grant limited market access to a select few foreign industries and companies. The proposal might also increase the prospects for Venezuela to make use of provisions in the GATS affording special and differential treatment to developing countries.

Consider each approach from the perspective of the Kingdom. The American commercial impulse could mean challenging the exclusive access of the Kingdom’s flagship enterprise, Saudi Aramco, to the oil and gas infrastructure in the Kingdom, by calling upon the Kingdom to grant third-party access to pipelines, storage facilities, and terminals. Were the expansive American definition of “Energy Services” incorporated into the law of the GATS, then the Kingdom would be on the defensive in future multilateral negotiations on energy services trade. The Kingdom would have to choose between: (1) making all-encompassing liberalization concession, which might put too much competitive pressure on its businesses, and might infuriate constituencies in the Kingdom concerned about protecting sovereign natural resources; and (2) making no concession at all, which might exasperate the Americans. In contrast, were the disaggregated, sub-sector approach embodied in the Venezuelan approach to become the basis for classifying energy services, then the Kingdom would have an easier time of making deliberate, calibrated concessions in specific markets.

This is not to imply the American strategy “reeks of neo-colonialism,” and the Venezuelan one “suffers from protectionism.” Rather, I wish to highlight only the stakes associated with WTO Membership. Sitting on the sidelines of a WTO debate on these proposals is manifestly unwise. The specter of having to accept a WTO reference paper on energy services—particularly one embodying the American approach—might not be in the best interests of all energy-exporting countries. To put it bluntly, surely the Kingdom could not be comfortable being represented by Venezuela (with respect!) to negotiate rules covering the key services sector in the Kingdom’s economy.

* De-commissioning facilities and fuel
* Other related services

For the EU proposal, see http://trade-info.ccc.eu.int/doclib/docs/2003/december/tradoc_113105.pdf. Possibly, the EU proposal is less elegant than the American one, in that it is neither as straightforward nor as holistic. However, a fair comparison is difficult, because the American proposal is not posted on either the Web site of the WTO or the United States Trade Representative, nor is it otherwise readily available.

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C. The Natural Gas Sector and Feed Stock Pricing

As intimated above, the second line in the sand concerns natural gas, specifically, the pricing of natural gas products. From the Kingdom's perspective, it ought to be clear to the world trade community that the Kingdom will not be robbed of its comparative advantage in providing such products cheaply—on a non-discriminatory basis—to businesses that use them as "feed stock" (that is, raw materials, or inputs) in a finished good.

Methane and ethane are particularly important natural gas products in the Kingdom. Methane is used as fuel for plants, such as petrochemical plants, power plants, and desalination plants. Ethane is feed stock for other products. Typically, ethane is processed through a methane-powered petrochemical plant to make end products. The Kingdom specializes in "mid stream" petrochemical products, such as sheets and pellets of plastic, which the Kingdom exports, for example, to China, where they are used in finished products. Ethane is preferable to natural gasoline as a feedstock, in part because its productivity is superior, in the sense that more output is possible from the same unit quantity of input. The petrochemical industry is notable in the Kingdom, with the Kingdom accounting for roughly ten to fourteen percent of global industry output.

Like oil, natural gas products are priced in U.S. dollars. The price at which methane and ethane are sold in the Kingdom is seventy-five cents per million British thermal unit (mbtu). This price is offered to all buyers, whether foreign or Saudi business associations. The Kingdom does not export methane or ethane. Interestingly, ethane is considered a superior gas to methane, as ethane is "gas rich," whereas methane is "plain gas" and, therefore, can be used only for powering plants. The difference suggests that ethane ought to be priced higher than methane. Significantly, the seventy-five cent per mbtu price is cheaper than methane and ethane in other foreign countries. Therein lies a source of comparative advantage for the Kingdom. It can provide these natural gas products to businesses operating in the Kingdom that need them as an input into mid-stream or finished products.

Unfortunately for the Kingdom, the United States (along with the EU) have focused on this source of comparative advantage with a view to lessening, if not eradicating, it. The

239. The term "natural gas" refers to gas that occurs naturally in a gaseous state, and it may be "associated" in that it comes from or with oil, "unassociated" in that it is unconnected with oil. Methane (C1), also sometimes called "sales gas," and ethane (C2) are the two kinds of natural gas. In addition, there are three natural gas liquids (or NGL), which as their name suggests, occur naturally in a liquid form, namely, propane (C3), butane (C4), and natural gasoline (C5). These five natural gas products represent a spectrum of weights, or more specifically, density (which is mass divided by volume). Methane is the lightest and natural gasoline is the heaviest. Discussions, supra note 15.

240. Two other natural gas products, propane and butane are sold locally to gas companies, which put them in cylinders used by Saudi households for cooking. Id.

241. The Kingdom's single, state-owned petrochemical enterprise is the Saudi Arabian Basic Industries Corporation (SABIC). See Enter the Saudis, ECONOMIST, May 17, 1997, at 82, 83. SABIC is a holding company with roughly two to three wholly-owned subsidiaries, and four to five joint ventures with foreign companies like Exxon and Shell. Seventy percent of the shares of SABIC are held by the Saudi government, and thirty percent are in private hands and tradeable. Discussions, supra note 15.

242. This price is as of December 2002.

243. It was reported that the terms of the bilateral deal with the EU include a clause in which the Kingdom "agreed to end its practice of selling gas at cheaper rates to domestic businesses than to the world market." Tobias Buck, EU Deal Likely to Smooth Saudi Path to WTO Entry, FIN. TIMES, Sept. 1, 2003, at 5. The EU Trade Commissioner, Pascal Lamy, declared: "We particularly value the decision that Saudi Arabia has taken ... to eliminate a number of obstacles to international trade like ... the dual pricing of gas product."
major powers argue that the Kingdom should charge a higher price than seventy-five cents per mbtu, which supposedly would correspond to a world market price, and as long as it does not, the Kingdom is providing a subsidy of sorts. They seem to suggest a price between, say, $1.50 and $2.50 per mbtu would be appropriate.

Aside from the fact that there is no single world market price for methane or ethane, there are three major weaknesses in this argument. First, the Kingdom offers the same price for natural gas products to all prospective buyers on a non-discriminatory basis. That is, Saudi and foreign businesses operating in the Kingdom face the same cost for methane and ethane. Second, this offer is not specific to any particular industry. Rather, any business using methane to power its plants, and any business using ethane in its production process, is offered the same price. The first two points suggest the Kingdom is not providing an unlawful subsidy to domestic production.

Third, the Kingdom does not export methane or ethane. Thus, there should not be an issue as to whether it subsidizes exports of these products. Furthermore, there should not be an issue concerning “dual pricing,” because the Kingdom does not charge differential prices for natural gas products shipped domestically and overseas. If these points indeed are defects in an American (and European) effort to compel the Kingdom to raise natural gas prices, then that effort is nothing more than an attack on precisely what the Kingdom should always defend, and what David Ricardo would insist on—comparative advantage.

Indeed, reducing or defeating this comparative advantage could well be what the United States, EU, and other major powers have in mind. The suggested price of $1.50 to $2.50 per mbtu would represent at least a 100 percent increase in methane and ethane costs to businesses in the Kingdom. The higher price, apparently, would correspond to the price for those products in other countries, for example, businesses in Europe. To the extent this motive underlies the trade law of the major powers, and to the extent it lacks a compelling justification, it should be challenged. Put bluntly, the Kingdom should never give away at the negotiating table the, few comparative advantages it has, which the major powers cannot earn through hard work in the market place or cannot obtain because of the geographic distribution of natural gas reserves. 244


244. Resistance on methane and ethane price hikes may be difficult because of a concession the Kingdom apparently made on pricing the other natural gas products. Reportedly, with respect to propane, butane, and natural gasoline, the Kingdom’s past practice was to sell these products to any business (domestic or foreign) at thirty percent below the lowest (i.e., best) market price in the world. See Enter the Saudis?, Economist, May 17, 1997, at 83, 84 (reiterating the complaint of European chemical firms that the Saudi Arabian Basic Industries Corporation (SABIC) “is, in effect, subsidized because it is guaranteed gas feedstock (the basic ingredient of petrochemicals) at thirty percent below world prices”). The EU complained about this practice, and apparently the Kingdom agreed to a commercial, market-based formula for pricing these products. That formula is based on the price of these products in the cheapest market, with a deduction for transportation costs to that market. For example, if the best price for butane were in Japan, then the price of butane in the Kingdom would be computed on the basis of the price of butane in Japan, minus the cost of transporting butane from the Kingdom to Japan. The difficulty with this formula is the major trading powers could confront the Kingdom with the argument that it is not substantively different than its former practice of choosing the lowest price in the world, and subtracting a thirty percent discount. However, the precedent of a market-based formula leading to higher natural gas product prices already may have been set.

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Possibly, another motive lurks within American (and EU) trade officials. They may be pursuing (whether they admit it or not, or even whether consciously appreciate it or not) a “divide and conquer” strategy with respect to the Saudis and Russians.\textsuperscript{245} Businesses operating in Russia benefit from inexpensive natural gas feed stock prices. If the United States persuades the Saudis to raise their methane and ethane prices, then it could use that concession as a precedent in WTO accession negotiations with Russia.\textsuperscript{246} The reverse scenario also could be true. Indeed, in May 2004, Russia signed a bilateral accession accord with the EU in which it agreed to double the prices of domestic gas to industrial companies by 2010, in exchange for the EU dropping a challenge to the export monopoly held by the state owned gas group, Gazprom. Specifically, Russia promised to set domestic gas prices based on the sum of: (1) cost of production; (2) profit; and (3) investment, leading to a range of $49 to $57 per thousand cubic meters of gas by the end of the decade.\textsuperscript{247} Of course, these kinds of concessions potentially work to the detriment of American (and EU) businesses operating in the Kingdom and Russia, which—like their Saudi and Russian counterparts—benefit from inexpensive feedstock.

D. Agriculture and Market Access\textsuperscript{248}

In debating “why join the WTO if the Kingdom's chief export is not the subject of trade negotiations,” and in considering how to respond to foreign pressure on the Kingdom’s oil and natural gas policies, the Kingdom might do well to draw a third line in the sand. It should to resist subjecting its infant industries to potentially ruinous competition from overseas products. After all, as highlighted at the outset and suggested throughout, “[t]he challenge for Saudi Arabia is... to generate economic growth outside of the oil sector and to secure a steady rise in the standard of living of the Saudi people.”\textsuperscript{249}

\textsuperscript{245} See, e.g., Anna Raff, Russian Official Questions Need for Gas Overhaul, \textit{Wall St. J.}, Jan. 13, 2004, at A12 (stating “the European Union, which says Russia's low gas prices at home represent a subsidy to industry, has made gas-market liberalization a condition for entry to the World Trade Organization,” and quoting the Russian Prime Minister, Mikhail Kasyanov, that the government may reverse its policy of raising natural gas prices “so that Russia’s economy could enjoy its natural competitive advantage—cheap natural resources”); Pruzin, \textit{WTO Working Party, supra} note 150, at 1763, 1764 (explaining the EU position, namely, “dual pricing provides an unfair advantage to locally based firms and has been pushing for a similar concession from Russia, so far without success”).

\textsuperscript{246} According to the account rendered by the EU, the Kingdom agreed in its bilateral accord with the EU to end its double-pricing scheme in the natural gas sector, and also drop exclusions of foreign companies from the energy sector. See the web site of the Directorate General of Trade of the European Commission, \textit{available at http://www.europa.eu.int/comm/trade/issues/bilateral/regions/gcc/pr010903.htm} (last visited Sept. 20, 2004).

\textsuperscript{247} See Andrew Jack, \textit{Russia and EU Agree Terms for WTO Entry}, \textit{Fins. Times}, May 22–23, 2004, at 5. The other concessions made by Russia in its bilateral accord with the EU include (1) cutting tariffs to no more than eight percent on industrial goods, eleven percent on fishery products, and thirteen percent on agricultural commodities, and (2) opening the financial, telecommunications, and transportation services market to foreign companies. See id.


\textsuperscript{249} Al-Ammari, \textit{supra} note 7, at 1.

At the risk of sounding melodramatic, the efforts of a major trading power to thwart emerging competitive advantages in a smaller country, in order to protect one of its own declining industries, should never to be underestimated. Consider, for example, the April 2003 textile and apparel agreement signed by the United States and Vietnam, contemporaneously with Vietnam's WTO accession process. Notwithstanding the duty-
Unfortunately, to inquire “what can the Saudis export except oil?” is to invite sarcastic comments or hopeless expressions. Those reactions are unlikely to be from individuals familiar with the Kingdom’s efforts in the agricultural sector, particularly those people who have visited leading agricultural companies in the Kingdom. True, agriculture does not loom large in the Kingdom’s economy, which is not surprising given its harsh, desert climate with limited arable land and water resources. By sectoral composition, the Kingdom’s GDP is 51.2 percent industry, 43.6 percent services, and 5.2 percent agriculture, and by occupation, 25 percent of its labor force is employed in industry, 63 percent in services, and 12 percent in agriculture. However, there are agricultural products into which the Kingdom is diversifying and can continue to do so if trade liberalization occurs at a reasonable pace.

Presently, the Kingdom’s major agricultural output consists not only of dates, but also of chickens, mutton, citrus, melons, tomatoes, eggs, and milk. In fact, the Kingdom is undergoing an aggressive de-desertification program in order to increase the amount of its agriculture, reduce dependence on foreign food producers, and foster its own agricultural industry. There are promising signs for the future of agriculture. To illustrate the point, consider the impressive Al Safi Dairy, located roughly 100 kilometers outside of Riyadh in the Al Kharij province.

The Al Safi Dairy is the largest integrated dairy farm in the world. The Dairy is a joint venture between the French multinational corporation, Groupe Danone, and the Al Faisaliah Holding Group, which was established in the Kingdom in 1969, and now boasts operations throughout the Middle East in six sectors: (1) food and beverages; (2) consumer electronics and computers; (3) medical, measurement, and media equipment; (4) information technology and communications; (5) entertainment and multimedia; and, (6) petrochemicals and plastics. The Group is headed by His Royal Highness Prince Mohammed

free, quota-free world created by the WTO Agreement on Textiles and Clothing (ATC), the United States—under pressure from its garment manufacturers—insisted on capping Vietnamese exports in this sector. Between January and October 2003, fifty-five percent of Vietnam’s global textile and apparel exports went to the United States, an increase of 155 percent over the same period in 2002. Under the bilateral quota agreement, which took effect on May 1, 2003, thirty-eight categories of garments (worth about $1.7 billion in 2003) are subject to quotas. The permitted annual increases in quota volumes are small: seven percent for cotton items, and two percent for wool items. While this quota regime benefits Mexico, and countries in the Caribbean and Central America, which use American fabrics and obtain duty-free, quota-free access to the American market for finished garments, it obviously impedes the development of Vietnam’s textile and apparel (which, as American retailers unsuccessfully argued, could be a viable alternative source to China). See Margot Cohen, Thwarted Potential, Far E. Econ. Rev., Feb. 5, 2004, at 40–41.

250. See CIA Factbook, supra note 2 (material posted on the Kingdom’s economy). Within industry, the Kingdom’s major activities are crude oil production, petroleum refining, basic petrochemical products, cement, construction materials, fertilizers, and plastics. See id.

251. See geography.about.com/library/cia (last visited Sept. 20, 2004) (material posted on the Kingdom’s economy). To be sure, the Kingdom is aware it will have to avoid costly but ineffectual ventures of the past, like subsidizing wheat production. Discussions, supra note 15.

252. It is certified as such by no less than the Guinness Book of World Records. The adjective “integrated” is not so much limiting as impressive. It indicates the Dairy makes every item needed from hay and silage to cartons and labels. As for water, the Dairy relies on an underground source.

All of the information about the Al Safi Dairy is based on a September 2003 Power Point Presentation about the Al Faisaliah Group (on file with author), and my personal tour of the Dairy in December 2003. I am grateful to His Royal Highness Prince Mohammed al Faisal for this tour, and more generally for the extraordinary opportunities and insights I gained through his hospitality and that of his colleagues at the Group.
al-Faisal, has roughly 5,000 employees, and an annual turnover of nearly half a billion dollars.

The Dairy itself employs roughly 1,400 people from twenty-six countries, including thirteen full-time veterinarians. It began in 1979 with approximately 4,500 head of cattle imported from countries, like the Netherlands, known for top-quality dairy cows. By 1981, these imports were unnecessary, as the Dairy began breeding through artificial insemination (using semen imported from Arizona bulls). Now, it has approximately 45,000 head, and roughly thirty-five calves are born each day. The Dairy skillfully employs Swedish technology not only to milk the cattle and monitor by computer the milk output from each cow, but also to package and label the finished products.

Not surprisingly, the Al Safi Dairy leads the Kingdom in fresh dairy products, which include a full range of milk (skim, reduced fat, and whole, and regular and flavored), yogurt and yogurt drinks, children's and sports beverages, and pudding. (One of the many salubrious opportunities the author had in the Kingdom in conducting international trade law research was to sample this delicious product line.) It has a domestic market share of 30 percent, which results from annual production of 200,000 tons of these products, and daily distribution to over 27,000 retail outlets (including about 145,000 liters of milk each day carried via eighteen to twenty large trucks). The Dairy has twenty-six main distribution centers in the Kingdom and Kuwait. About 90 percent of the Dairy's products are sold within the Kingdom, and 10 percent are exported. Beyond Kuwait, it exports products to the Gulf States of Bahrain, Oman, Qatar, and the United Arab Emirates, and to the Levantine States of Lebanon and Syria.

In brief, the operations of Al Safi Dairy illustrate not only the Kingdom's potential for a comparative advantage in certain agricultural areas, but are a microcosm of globalization in the Kingdom. From the Kingdom's vantage point, then, one question is whether American trade law supports these kinds of operations. At least, American agricultural subsidies—whether domestic support subject to Amber Box reduction commitments under the WTO Agreement on Agriculture, or export credits exempt from the Agreement—should not to hinder the Kingdom's efforts at building its agricultural sector. Indeed, it is a highly significant fact that while the initial financing to establish the Al-Safi Dairy came from government sources, the Dairy receives no government support, and has not for some time. Despite its lack of government support, the Dairy is profitable. In fact, it is the largest source of revenue among the divisions of the Al Faisaliah Group (larger than even the Group's Sony distributorship, which enjoys a forty percent market share in the Kingdom).

Certainly, it is premature to gauge the success of the Kingdom's efforts to diversify its economy by raising the profile of agriculture. However, the fact the Kingdom must literally battle the elements, suggest that it has a large stake in a second trade law question: the outcome of the global debate on genetically modified organisms (GMO). Indeed, the Kingdom would do well to participate actively in this debate. From its perspective, a worse outcome scarcely can be imagined than import bans (whether official or by private action), motivated by near-hysteria in major trading countries, against crops produced from safe GM seeds resistant to hot, dry conditions and not requiring much water. In other words,


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if the Kingdom is to develop a comparative advantage in certain primary products, then it may well need the benefit of desert-friendly technology, the implementation and commercial exploitation of which is not thwarted without a scientific basis in accordance with the WTO SPS Agreement.

VI. It Had Better Be

As Oliver Cromwell spoke to England, so history speaks to all men: “I beseech you, in the bowels of Christ, consider that ye may be mistaken.”

It is not claimed that this article’s characterization of American trade policy toward the Kingdom comports with conventional wisdom. Rather than viewing the Kingdom through suspicious American eyes as a recalcitrant partner with episodic enthusiasm for reform accession, I have sought to portray the Kingdom’s accession odyssey with empathy for the Saudi perspective.

In questioning whether American trade law toward the Kingdom is constructive, in the sense of the development of long-term, trusting trade relationships, this article has offered three arguments. First, and most significantly, is the argument that the United States has put on the Kingdom ever-increasing demands. The Kingdom’s concessions appear impressive, particularly given the infant state of many of its private sector enterprises, and its bona fide concerns about social instability created or exacerbated by the adjustment costs of trade liberalization. It has made deep cuts in tariff rates on agricultural and industrial products, provided for much-improved protections of intellectual property rights, and responded with a Foreign Investment Law and a reasonable Negative List. Yet, it is too early to judge the long-term implications of the ever-increasing American demands, and corresponding Saudi concessions.

Second, is the argument that the United States may not have done all it can to accommodate the Kingdom’s pre-eminent religious concerns. It seeks a theologically credible prohibition on alcohol, pork, pork products, and pornography, support of the zakat tax obligation, and appropriate regulation of the provision of certain banking and insurance products. Third, it has been argued that the United States does not seem to have supported the Kingdom in its efforts to maintain its comparative advantages, and perhaps more importantly, to develop new areas in which it can succeed in global competition.

Underlying all three arguments, and the thesis they are intended to support, is one basic premise: trade with the Kingdom is about our security. One trade analyst astutely pointed out with respect to the Middle East: “The biggest problem we have there is not lack of market access. The biggest problem we have is that there’s a tremendous amount of radicalism and anger, and much of it’s directed at us.”

If there is any substance to the perception that poverty creates an environment for extremism, then the conditions in the Kingdom affected by American trade law are not yet salubrious.


256. Consider two different approaches published in the same highly-regarded newspaper, The Financial
The population growth rate of the Kingdom is 3.5 percent. Its GDP growth rate (in real terms) is 1.2 percent. The obvious inference from these two statistics is demographic change is outpacing economic growth, so living standards as measured imperfectly by real per capita GDP are falling. The Kingdom relies considerably on expatriate workers, who account for about 48 percent of the labor force, yet the Kingdom knows it must develop local human capital and gainfully employ Saudi citizens. These goals are intended by its plans for the "Saudization" of the workforce. With a budget deficit of 4.5 percent of GDP, a ratio of

Times, within forty-eight hours of each other, and shortly after yet another horrific terrorist act inside the Kingdom. The editors of The Financial Times wrote:

As things stand, Saudi Arabia provides near laboratory conditions to incubate thousands of bin Ladens. The oil-dominated economy produces few jobs to employ a fast-growing, restless population. Neo-central planning inhibits investment, while getting Saudis into jobs now occupied by millions of foreigners raises costs because locals get paid, on average, three times more. School textbooks drip with religious bigotry, while technology exposes Saudis to the full blast of modernity. The stultifying control of the mosque and political grip of the security services underpin a bloated monarchy.

To prevent these challenges combining into a perfect storm, Crown Prince Abdullah, the de facto ruler, has pledged reforms ranging from partial elections to tighter financial controls. He should now implement them, even if it is unrealistic to expect his family to do other than tightly manage a very gradual process of change.


From a different vantage point, Jamal Khoshoggi, the media adviser to the Saudi Ambassador to the United Kingdom, and the former editor of a leading Saudi newspaper, Al-Watan, observed:

The extremists in Saudi Arabia have attained levels of inhumanity seen only in the most ferocious of extremist movements. But their cause has failed to develop into a widespread insurgency. They remain a minority among the Saudi people.

[Are such [terrorist] acts simply a desperate expression of their [the terrorists'] inability to influence the government's actions—an attempt to thwart the government's modernization and reform plans. These groups regard ideas such as elections, a greater role for women in the workplace, the enactment of coded laws and other reforms as contrary to Islamic teachings. Consequently, their battle against such changes may be partly aimed at preventing what they see as a dangerous slide away from Islam.

In the end, reform is not a choice for Saudi Arabia—it is the Kingdom's future. While the silent majority may be willing to take a passively cooperative stand with the government against terrorism and extremism, there is also a need for action to develop a realistic plan to build a culture of tolerance and progress in Saudi society.

Jamal Khoshoggi, Saudi Reformers Must Not Yield to Terror, Fin. Times, June. 3, 2004, at 17 (emphasis added). The approaches obviously differ on the breadth and depth of support in the Kingdom for extremism. However, both agree reform is essential, and thereby imply a link between economic underdevelopment and that support.

257. See Roula Khalaf, Saudi Arabia Urged to Speed Up Economic Reform, Fin. Times, Oct. 23, 2002, at 6 (mentioning these statistics and reporting on a study by the International Monetary Fund); Al-Ammari, supra note 7, at 1 (observing "economic growth in Saudi Arabia has been disappointing over the last eighteen years, averaging less than two percent annually together with population growth of more than three percent, resulting in lower per capita income in real terms").


There are about 4.5 million jobs in the private sector, of which about ten percent are taken up by Saudi nationals. The Kingdom plans to decrease dependency on expatriates and increase Saudi participation in the private sector. It is estimated by the year 2020 there will be near ten million jobs in the private sector, and the Kingdom aims for seventy-five percent of them to be filled by Saudi citizens. Partly in pursuit of this goal, the Kingdom is revamping its education system. See SAGIA Web site, at http://www.sagia.gov.sa (last visited Sept. 20, 2004) and CIA FACTBOOK, supra note 2.

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government debt to GDP of 95 percent, and considerable vulnerability to declines in oil prices, implementing these plans successfully while adhering to serious WTO obligations will not be easy.  

The question to consider, therefore, is whether American trade law will lead to a Kingdom happily and more deeply integrated into the multilateral trading system? Will it be, like China, an active participant in WTO affairs? Or, will there be profound dislocations in the Kingdom caused by the reforms required under the terms of accession? Will resentment in the Kingdom against the United States worsen, as the psychological (if not real) link between globalization and Americanization strengthens? Looking back in the year 2010 or 2020, will American pressure on the Kingdom (particularly after September 11th, the Afghanistan War, and the Iraq War) have contributed to an increased volume and value of trade, and a more diversified pattern of trade?  

For the vast majority of the Saudi people, as well as for Kansans, only one answer to these questions is acceptable. Indeed, for everyone, the answer to the question "is American trade law toward the Kingdom constructive?" is that it bad better be.  

Whether it will be was put in yet more doubt on the eve of publication of this article. While Panama finalized its bilateral deal with the Kingdom by June 2004, in September 2004, the Dominican Republic and Honduras announced they would seek bilateral accords with the Kingdom, and the United States blacklisted Saudi Arabia as a "Country of Particular Concern" (CPC) under the International Religious Freedom Act of 1998 (along with Burma, Eritrea, Iran, North Korea, Sudan, Vietnam, and China, which acceded to the WTO on December 11, 2001), alleging failure to provide religious liberty in the Kingdom, and triggering possible economic sanctions—which might mean yet more delay in progress on accession.  

259. See Roula Khalaf, Saudi Arabia Urged to Speed Up Economic Reform, FIN. TIMES, Oct. 23, 2002, at 6 (mentioning these statistics and reporting on a study by the International Monetary Fund).  

260. Notwithstanding this statistical recitation, I write from a legal perspective, fully cognizant the topic is inherently about more than just about law. May I say, however, it seems all too often American academic economists are uncritically favorably disposed to free trade, and their enthusiasm for that paradigm leads to overstating benefits, and understating losses, from trade liberalization. I find few (if any) better examples than Columbia’s Professor Jagdish Bhagwati, whose ubiquitous newspaper editorials and think-tank essays lead the cheerleading for multilateral free trade. See, e.g., Jagdish Bhagwati, Don’t Cry for Cancun, 83 FOREIGN AFF. 52–63 (Jan./Feb. 2004) (asserting the collapse of the WTO Ministerial Conference in Cancun in September 2003 was nowhere near the debacle that the Nov. 1999 Seattle Ministerial Conference was, and that multilateral trade talks are the "only one real option"). His book, In Defense of Globalization (2004), compiles his views that “economic globalization is an unambiguously good thing, with a few downsides that thought and effort can mitigate.” It is reviewed favorably by a leading figure in the American economic academy, Harvard’s Professor Richard N. Cooper (from which the preceding quote is taken). See Richard N. Cooper, A False Alarm—Overcoming Globalization’s Discontents, 83 FOREIGN AFF. 152–55 (Jan./Feb. 2004) (book review).  