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CONSISTENCIES OR CONFLICTS WITH NORMS IN THE MIDDLE EAST?

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General Introduction

'Whoever treads a path in search of knowledge,
Allah will ease for him the path to paradise'.
The Prophet 'Mohamed Ibn Abdullah'[1] (570–632)

'Knowledge is a treasure, but practice is the key to it'[2]
Ibn Khaldoun-Al Muqaddima, Scholar and Statesman (1332–1406)

Three topics crossed my mind for my S.J.D. proposal when I was finishing my LL.M. degree at The George Washington University Law School in 2006. The three topics were: Iran's right to a peaceful nuclear program under international law, human rights and the law of the World Trade Organization (WTO), and US bilateral free trade agreements in the Middle East (Dean Karamanian's suggestion). While each topic constitutes an interesting writing project in international law, the first two topics were less relevant to me given that my Arabic would not help much in consulting Persian documents needed for the first topic and Egypt's human rights record would not support my claims in the second. I made my choice and picked Dean Karamanian's suggestion. The topic has been ideal for me given my background as an academic and a lawyer in Egypt. On the academic level, I have wanted to design and teach a course on international trade law at Cairo University ever since I took Professor Charnovitz's international trade law class in 2005. As a legal practitioner, I am intrigued by the role of international trade regulation in the Middle East and its effect on the practice of law there.

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1. Sahih Bukhari, vol. 1, bk. 56, Knowledge, no. 311, *translated in* University of Southern California, Center for Muslim-Jewish Engagement, available at <www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/003.sbt.html>.
2. Ibn Khaldoun, '*Muqaddimah*' [The Introduction] (Dar Al Shaab, 1959), 21 (Arabic source).

As a law student, I spent ten years studying law in Egypt and the United States, comparing two different legal systems and cultures that operate under international law. My comparative studies are relevant to this book on US bilateral free trade agreements in the Middle East. In the post-September 11 era, the opportunity to study in Washington, D.C. and research US bilateral free trade agreements with the Middle East is quite unique. This is true particularly now when there is much misunderstanding between the United States and the Middle East, which may lead Middle Eastern politicians, intellectuals, and academics to doubt the compatibility of these agreements with relevant norms in the region.

This book does not address the political and economic ramifications of the agreements in the Middle East. It focuses instead on key legal issues relating to the legal validity, scope and effect of the agreements. The analysis addresses the key issues in these agreements as elucidated in the preambles of US bilateral free trade agreements with certain Middle Eastern nations. Namely, these agreements' main objectives are to liberalize trade, protect intellectual property, protect the environment, protect workers' rights, establish a regional bloc and affirm the parties' commitments to the WTO. These issues are examined in terms of their compatibility with the pertinent norms in the Middle East. The norms include international legal norms covering the procedural relationship between WTO law and US bilateral free trade agreements, Middle Eastern norms on regional integration, Islamic norms on trade liberalization and domestic laws covering intellectual property, environmental protection and labour protection.

This book consists of four chapters. The first chapter examines the interaction between dispute settlement under US bilateral free trade agreements and the WTO. The chapter argues that the forum selection provision in relevant Middle East–US bilateral free trade agreements may not be reconciled with international legal norms as reflected in WTO law. In the bilateral agreements, a nation is free to select one of two dispute settlement procedures, either that under the agreement itself or under the WTO. If the nation pursues a remedy under the bilateral agreement, it is barred under the agreement from pursuing relief under the WTO. Nevertheless, the WTO might still entertain that nation's claim, regardless of the language in the bilateral agreement.

The second chapter explores regionalism in the Middle East. Two regional agreements, the Great Arab Free Trade Area (GAFTA) and the Gulf Cooperation Council (GCC), and one regional initiative, the Middle East Free Trade Initiative (MEFTI), shape the relevant legal landscape. Transparency, leadership and enforcement, norms at the heart of US bilateral free trade agreements and the US-initiated MEFTI, remarkably are part and parcel of the GCC. These norms are not, however, reflected in the GAFTA. US bilateral free trade agreements are consistent with these norms at the sub-regional level, for example the GCC, but not at the regional level defined by the GAFTA.

The third chapter discusses the primary and secondary sources of Islamic law. The Quran, which is more than one thousand years old, acknowledges and endorses commerce and international trade. Islamic and non-Islamic states have been trading for centuries. The administration of tariffs in early and contemporary Islamic

states is analysed to compare early and current applications of Islamic norms in trade. As best as can be determined, no previous work before this chapter has examined and established the compatibility of US bilateral free trade agreements' principles with Islamic norms.

The fourth chapter develops three case studies to examine whether US bilateral free trade agreements are compatible with local legal norms in the Middle East. The first case study addresses the intellectual property chapter in the US–Bahrain free trade agreement. The second case study focuses on the environment chapter in the US.–Oman free trade agreement. The third case study analyses labour protection provisions in the US.–Jordan free trade agreement. The analysis is challenging because the domestic laws of three nations in totally different areas of regulation are under review. Also, the author acknowledges that the bilateral agreements cover a wide range of regulatory subject matters well beyond intellectual property, the environment and labour. Further, the bilateral agreements in some respects are not cookie-cutter documents; each is unique. Yet, the book argues that as to these norms and the respective nations, a high degree of compatibility between the bilateral agreements and local laws can be established and this fact is significant.

The examination of whether US bilateral free trade agreements are compatible with relevant norms in the Middle East cannot take place without delving into the political and economic structure of the Middle East and taking into account the resurgence of Islamic law in the region. This book cannot deny the significance of the political, economic and religious issues. Terrorism, the Israel–Palestine conflict and the war in Iraq have defined the United States' relationship with the Middle East. Yet, the often neglected trade component of United States' relationships with Middle Eastern countries, is significant and is becoming even more so. Paradoxically, as set out below, the United States has signed the largest number of its bilateral free trade agreements (five of twelve) with Middle Eastern countries. Interestingly enough, the concept of a 'free trade area' was introduced into the General Agreement on Tariffs and Trade (GATT)[3] by Middle Eastern countries (Syria and Lebanon) in 1948.[4] Free trade elements, while perhaps not defining features of the Middle East region, should not be overlooked.

Purpose of the Study and Focal Questions

This study examines US bilateral free trade agreements with certain Middle Eastern countries. The bilateral mode is central to the analysis of each chapter. Economists discuss this topic generally, but few published contributions are devoted to the consistency of US bilateral free trade agreements with the relevant legal norms in the Middle East, other regional agreements and the multilateral trading system.

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3. General Agreement on Tariffs and Trade, 30 Oct. 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (hereinafter GATT).
4. World Trade Organization, *Regionalism and the World Trading System* (WTO, 1995), 8.

Four focal questions are at the heart of the analysis and each serves as the basis of a chapter. These questions are as follows:

(1) Are US bilateral free trade agreements consistent with international legal norms?
(2) Are these agreements consistent with Middle Eastern norms on regional integration?
(3) Are the agreements consistent with Islamic norms on trade liberalization?
(4) Are the agreements consistent with local norms on intellectual property, environmental protection, and labour standards?

Scope of Research

A precise definition of the scope of research is needed to keep the project within manageable proportions. Given the public international law focus of the present research in this area, this work concentrates primarily upon the public aspect of free trade agreements. Moreover, due to space limitations and time constraints, it is necessary to further confine the research. This book seeks to touch on the key issues of US bilateral free trade agreements in the Middle East. Therefore, the concentration is on those new and dynamic areas of international law. One of these new areas concerns the overlap of jurisdiction between the WTO and bilateral agreements. Another unexplored yet important development is the emergence of regional free trade agreements in the Middle East. What is their significance and how do they operate? These questions are answered. A third contribution is the development of Islamic international trade law. The fourth novel contribution involves uncovering the link between trade and environmental law, intellectual property law, and labour protection in the Middle East.

Methodology

The first task identifies and examines the rules of international trade law that govern US bilateral free trade agreements. The second one compares US bilateral free trade agreements with regional agreements in the Middle East. The third examines the Islamic law ambit of free trade norms. Finally, the fourth examines whether US bilateral free trade agreements have had an impact on domestic laws in the Middle East.

Throughout the four chapters, a comparative analysis is employed. The comparison takes place between and among multilateral, regional and bilateral trade agreements such as the WTO's covered agreements, the US–Bahrain free trade agreement, the US–Oman free trade agreement, the US–Jordan free trade agreement, the North American Free Trade Agreement (NAFTA), the US–Peru Trade Promotion Agreement, the GCC and the GAFTA. The comparison is essential to answer the central question of this book: Are US bilateral free trade agreements consistent or in conflict with relevant legal norms in the Middle East? A number of factors, including public international law, regional free trade agreements, Islamic

law and domestic laws have helped shape and define the Middle East's legal landscape.

Statement

US bilateral free trade agreements are predominantly consistent with the relevant norms in the Middle East, contrary to some statements from Middle Eastern politicians and intellectuals that they are not. US bilateral free trade agreements do not conflict with the multilateral trading system, regional agreements, Islamic law or domestic laws. The exceptions and tensions, however, are the procedural inconsistencies between US bilateral free trade agreements and international legal norms and the substantive inconsistencies between US bilateral free trade agreements and Middle Eastern regional norms of enforcement, transparency, leadership and the scope of coverage. At the international level, the application of international legal principles may eliminate possible conflicts between US bilateral free trade agreements and the WTO agreements. At the regional level, a successful sub-regional agreement such as the GCC is not incompatible with US bilateral free trade agreements' norms, even though a failed regional agreement such as the GAFTA presents some inconsistencies with US bilateral free trade agreements' norms. At the Islamic law level, the main constitution of Muslims (the Quran) and practices of early Islamic states shaped Islamic norms on trade liberalization. These norms are predominantly consistent with US bilateral free trade agreements' norms. At the domestic level, the examined provisions of the referenced US bilateral free trade agreements are consistent with domestic laws in Middle Eastern countries. This consistency is owed to different phenomenon such as the exporting of American norms in intellectual property and the fact that the relevant Middle East nations already had in place legal regimes whose standards for environment were not at odds with US bilateral free trade agreements. Labour protection norms remain in conflict with the provisions in US bilateral free trade agreements.

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United States Bilateral Free Trade Agreements in Public International Law

INTRODUCTION

Bilateral free trade agreements continue to proliferate in international trade law. This proliferation signifies that bilateralism is distinct from regionalism and multilateralism.[5] It is no longer possible to view regionalism as a comprehensive term that includes bilateral free trade agreements as well as regional free trade agreements. Over 300 bilateral free trade agreements have been notified to the WTO.[6] The three giant players of the WTO – the United States, the European Community and Japan – are expanding their networks of bilateral free trade agreements.[7] The United States, for example, has signed twelve bilateral free trade agreements with different countries across the globe.[8] The Middle East's share of US bilateral free trade agreements remains the largest compared to other regions such as South America and Asia.[9]

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5. World Trade Organization, Regional Trade Agreements Information System, <http://rtais.wto.org/UI/publicsummarytable.aspx> (establishing that 75% of regional trade agreements are bilateral free trade agreements).
6. *Ibid.*
7. *Ibid.* The European Community has signed more than twenty-five bilateral free trade agreements. *Ibid.* Japan has signed more than fifteen bilateral free trade agreements. *Ibid.*
8. Office of the United States Trade Representative, Free Trade Agreements, <www.ustr.gov/trade-agreements/free-trade-agreements>. These countries are Australia, Bahrain, Chile, Israel, Jordan, Morocco, Oman, Peru, Singapore, Colombia, Korea and Panama. *Ibid.* The last three free trade agreements are not in force. *Ibid.*
9. South American partners of US bilateral free trade agreements are Panama, Colombia, Chile and Peru. *Ibid.* Asian trading partners are Singapore and Korea. *Ibid.* The Middle East and North African partners are Israel, Jordan, Oman, Bahrain and Morocco. *Ibid.* For example, Agreement

Chapter 1

This chapter provides a backdrop for the book. It discusses US bilateral free trade agreements signed in the Middle East[10] in light of public international law norms and principles. It further focuses on the compatibility of US bilateral free trade agreements with international legal norms in terms of procedure. The discussion examines the overlap of jurisdiction between US bilateral free trade agreement with Oman (US–Oman FTA)[11] and the WTO Dispute Settlement Understanding (DSU),[12] and discusses the relevant international legal principles on overlap of jurisdiction.

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The author acknowledges the descriptive nature of this section. This section, however, is important for Middle Eastern readers who lack knowledge about basic concepts and terms in international trade law. The concepts are relevant to the discussion of US bilateral free trade agreements in international law as well.

A IMPORTANT CONCEPTS IN INTERNATIONAL TRADE LAW

International trade law is a subject of international economic law.[13] Rules of international trade law govern cross-border trade in goods and services.[14] Professor Robert Hudec defined international trade law as 'the law that governs what governments may and may not do to regulate the purchase and sale of goods across their borders'.[15] International economic law is a broader concept. International

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between the Government of the United States of America and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Area, US-Bahr., 14 Sep. 2004, 44 I.L.M 544 (hereinafter US–Bahrain FTA).

10. I use the term US bilateral free trade agreement (singular) to refer to the basic text of the US bilateral free trade agreement that is common to the agreements with Bahrain, Israel, Oman, Morocco and Jordan. These agreements contain terms that are not common, as well. The use of this phrase does not suggest that US bilateral free trade agreement (Mideast Model) is substantially different from other US bilateral free trade agreements signed with any other nation such as US free trade agreements with Peru or Korea.
11. Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the establishment of a Free Trade Area, US-Oman, 19 Jan. 2006, 19 U.S.C. 3805 (hereinafter US–Oman FTA).
12. Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 Apr. 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (hereinafter DSU).
13. Jeffrey Atik, 'Uncorking International Trade, Filling the Cup of International Economic Law', *Am. U. Int'l L. Rev.* 15 (2000): 1231, 1232.
14. Raj Bhala & Kevin Kennedy, *World Trade Law: The GATT-WTO System, Regional Arrangements, and US Law* (Lexis Law Publishing, 1998), at preface.
15. Robert Hudec, ' "Transcending the Ostensible": Some Reflections on the Nature of Litigation between Governments', *Minn. L. Rev.* 72 (1987): 211, 213. It is to be noted that Professor Hudec's definition at that time did not include trade in services.

economic law does not cover international trade of goods only. Professor Stephen Zamora has defined international economic law as 'a broad collection of laws and customary practices that govern economic relations between actors in different nations. It includes the examination of both law and policy issues in multiple levels, including private law, local law, national law, and international law'.[16] Other scholars have taken a more restrictive approach like Pieter Verloren Van Themaat who defined international economic law as 'total range of norms (directly or indirectly based on treaties) of public international law with regard to transnational economic relations'.[17] Both definitions (expansive and restrictive) leave international economic law with a wide range of issues with which to deal. Professor Jeffrey Atik has tried to define this wide range of issues. He has included monetary law, international trade law, competition and antitrust law, intellectual property law and law and development in international economic law.[18] Professor Peter Van Den Bossche has added foreign direct investment, international finance, commodities, health, transport, communications, natural resources, private commercial transactions and nuclear energy to the scope of international economic law.[19]

Scholars do not dispute that international trade law is part of international economic law.[20] Professor Van Den Bossche mentioned that international law excluded international trade from its purview, however,[21] Professor Donald McRae expounded on the exclusion theory when he said, 'the rationale of international law is extremely different if not the contrary to the rationale of international trade law, while the first is about the independence of states, the latter is about the interdependence of states and founded in the concepts of economic welfare and specialization.'[22]

Nevertheless, the exclusion theory overlooked the transformation of international law in the last fifty years from a 'discipline that defined itself on the concept of co-existence, territorial integrity and political independence',[23] as McRae suggested, to a discipline that emphasizes the cooperation of the states and incorporation of interdependence concepts, such as the WTO law, the

16. Stephen Zamora, 'International Economic Law', *U. Pa. J. Int'l Econ. L.* 17 (1996): 63, 64.
17. Pieter Verloren Van Themaat, *The Changing Structure of International Economic Law*, vol. 9 (Martinus Nijhoff Publishing, 1981).
18. Atik, *supra* n. 13, at 1231.
19. Peter Van Den Bossche, *The Law and Policy of the World Trade Organization*, vols 38–39 (Cambridge University Press, 2005).
20. Joost Pauwelyn, *Conflict of Norms in Public International Law*, vol. 25 (Cambridge University Press, 2003) (citing prominent scholars who argued that international trade is part of international law such as John Jackson, *The World Trading System* (MIT Press, 1997) and Ernst-Ulrich Petersmann, 'Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas', *J. Int'l Econ. L* 2. (1999): 189).
21. Van Den Bossche, *supra* n. 19, at 61.
22. Donald McRae, 'The Contribution of International Trade Law to the Development of International Law', *Hague Academy of International Law, Recueil des Cours* (Paris: Sirey, 1996), 114, 114–115.
23. *Ibid.*