9-1-2003

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Kontorovich, Eugene (2003) "The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?," *Chicago Journal of International Law*: Vol. 4: No. 2, Article 5.

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The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?

Eugene Kontorovich*

I. INTRODUCTION

The central principle of the General Agreement on Tariffs and Trade (“GATT”), now incorporated into the rules of the World Trade Organization (“WTO”), is the prohibition of discriminatory restrictions on international trade, with a particular emphasis on rooting out protectionism. However, some scholars contend that a trade restriction’s validity under GATT depends not just on its substantive content but also on the motives behind its adoption. They maintain that GATT applies *only* to trade restrictions imposed to protect domestic industry from foreign competition or for other “economic” purposes, and not to restrictions adopted for non-economic “foreign policy” reasons.¹ In this view, even overtly discriminatory trade restrictions, such as boycotts of other nations, do not fall within GATT’s purview if implemented for reasons of foreign policy. While this “foreign policy” exception has been endorsed by the

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¹ See, for example, John A. Spanogle, Jr., *Can Helms-Burton Be Challenged under WTO?*, 27 Stetson L Rev 1313, 1332 (1998) (arguing that in practice, GATT recognizes distinctions based on the motivation behind a trade restriction, and so a “political decision with economic consequences” is not considered a breach of GATT obligations); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime* 136 (Cambridge 1988) (discussing existence of “tacit exception” to GATT for actions involving “broader political questions” that go beyond “trade considerations,” and describing such an exception as “consistent” with GATT). The foreign policy exception is sometimes referred to as a “political purpose” exception, but such a designation is overbroad to the point of uselessness. Even purely protectionist measures arise from wholly political considerations—the desire to gratify a domestic industry. Indeed, any policy a nation pursues is in some sense political. Of course, trade policy and foreign policy are also intertwined, and a “trade war” combines protectionism with foreign policy concerns. This Article will use the term “foreign policy” to refer to policies prompted not by protectionism but rather by considerations such as power, ideology, ethnic sympathy and hatred, alliances, and religion.

influential American Law Institute,² it has otherwise received very little attention from commentators.³ Scholars have not analyzed whether the purported exception would be consistent with the text, structure and purposes of GATT.

The legitimacy of the purported “foreign policy” exception is, however, now a matter of pressing concern. Saudi Arabia, the second largest economy outside the WTO system, has reached an advanced stage in accession negotiations and is expected to be admitted into the organization in the next few years. Saudi Arabia maintains a total boycott of Israel and a secondary and tertiary boycott of firms and individuals in the United States and elsewhere that trade with Israel.⁴ The boycott is part of the broader Arab League Boycott of Israel (“the Boycott”).⁵ While the United States has raised the boycott issue in accession talks with Saudi Arabia, Saudi Arabia might be allowed to accede with its boycott intact.

Because the Boycott appears to be at least a *prima facie* violation of GATT/WTO trade rules, Saudi Arabia’s potential accession puts in sharp relief the question of whether trade restrictions motivated by foreign policy concerns fall within GATT’s purview. The exception appears to be the only rationale under which the secondary and tertiary boycott could be reconciled with GATT obligations. Not surprisingly, Arab League members seeking to join the WTO

² See Restatement (Third) of the Foreign Relations Law of the United States § 812 comment a (1987) (“[T]he GATT has regulated devices employed by states to gain economic advantage for their products over the products of other states; it has been thought to be inapplicable to trade practices to achieve non-economic ends such as national security or foreign policy purposes.”).

³ The Restatement notes that “it has been thought” that GATT contains such an exception, but it does not say who did the thinking. See *id.* Some scholars have cast doubt on the existence of the foreign policy exception but have also not elaborated the basis of their view. See Raj Bhala, *International Trade Law: Theory and Practice* 273 (Lexis 2d ed 2001) (“[A]side from non-application, there is no broad ‘political’ exception to the MFN obligations in the GATT-WTO regime that would easily justify [the United States’ trade restrictions against Communist countries under the Jackson-Vanik Amendment.]”); Hans-Wolfgang Micklitz, *International Regulation and Control of the Production and Use of Chemicals and Pesticides: Perspectives for a Convention*, 13 Mich J Int L 653, 693 (1992) (“[T]here is no mechanism to allow GATT Contracting Parties to restrict exports for foreign policy reasons.”).

⁴ Secondary boycotts impose trade restrictions on nations or firms that trade with the nation subject to the primary boycott. Tertiary boycotts go one degree of connection further by imposing such restrictions on those who trade with those who trade with the originally boycotted nation. See Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U Pa J Int Econ L 263, 284 (1998) (explaining that the distinction between primary and secondary boycott is that while the former is “an act of self-restraint by the boycotting country,” the latter “is the attempt to limit the extent of economic dealings of third countries with the target country”).

⁵ Two other League members that maintain the Boycott, Algeria and Lebanon, have also begun the WTO accession process, but their candidacies have not advanced as far as has Riyadh’s.

have explicitly invoked this exception to justify the Boycott.⁶ For example, Algeria has declared in its accession application that “[a]s a member of the League of Arab States, Algeria applies the different degrees of the embargo decreed by this institution in 1954 with regard to products originating in Israel. *This measure is of a political and non-commercial nature.*”⁷

This Article uses the occasion of Saudi Arabia’s accession bid to examine whether GATT applies to trade restrictions imposed solely for foreign policy purposes. It finds that an exception for measures motivated by foreign policy would be inconsistent with the language, structure, usage, purpose, and history of GATT. However, some foreign policy-oriented boycotts could be sustained under specific GATT provisions, such as Article XXI’s exceptions for national security. This Article then considers the implications of these findings for the WTO accession of nations, like Saudi Arabia, that adhere to the Arab League Boycott. While the discussion of the purported foreign policy exception will be general, it will often focus on the Arab League Boycott, and Saudi Arabia’s role in it, as the main example. This is because the Boycott is the oldest, broadest, and most systematic set of foreign policy trade restrictions in place today and because Saudi Arabia’s imminent accession makes its role in the Boycott an urgent question for international trade policy.

Only the secondary and tertiary boycotts—but not the direct Boycott of Israel—would conflict with WTO rules, as Part III.B.1 explains. Thus this Article’s discussion of the Arab League Boycott will focus on its secondary and tertiary elements—the parts of the Boycott that could not be easily justified under the plain text of GATT. This Article argues that the accession of nations that enforce the secondary and tertiary Boycott would undermine the WTO’s commitment to free trade. It would also deprive current members of the benefits that the organization is supposed to secure. Moreover, this harm could not be effectively remedied through the WTO dispute-resolution process. Thus the Article concludes that the United States should use its considerable clout in the accession process to require boycotting nations to abandon the secondary and tertiary prongs of the Boycott as a condition of membership.

Part I sketches the history of the Boycott and Saudi Arabia’s role in it. Part II considers whether the text and structure of GATT allow for an implied

⁶ See Edgar C. Cadano, *Economist Clarifies Local Misconceptions on WTO*, Saudi Gazette (Sept 25, 1999) (“WTO does not interfere in trade restrictions if they are imposed for other [than] economic reasons. . . . For instance WTO membership does not interfere with the Arab boycott of Israel.”) (quoting statements of Henry T. Azzam of Riyadh’s National Commercial Bank).

⁷ World Trade Organization, *Accession of Algeria: Memorandum on Foreign Trade Regime*, WTO Doc No WT/ACC/DZA/1 (July 11, 1996) available online at <<http://docsonline.wto.org/DDFDocuments/t/WT/ACC/DZA1.WPF>> (visited Oct 9, 2003) (emphasis added).

foreign policy exception. It shows that the existence of specific, narrow exceptions in the treaty argues against the recognition of the foreign policy purpose exception, because the specific exceptions would be made nugatory or superfluous by the broader, non-textual one. It also discusses the serious interpretive and adjudicative difficulties that would be created by the recognition of the foreign policy exception. Part III examines state practice under GATT and finds that states have very rarely attempted to justify their trade restrictions by invoking such an exception. When states have used the foreign policy excuse, it has usually been rejected by other nations and scholars. Part IV considers the broader free trade purposes of the WTO and GATT. It shows that because the free trade system was designed to promote not just prosperity but peaceful and amicable relations between member states, the purported exception would defeat one of the major goals of the WTO. Part V summarizes the Article's broader conclusion that GATT does not support a foreign policy exception. It then discusses the specific implications of this finding for the United States' attitude toward Saudi accession. It concludes that the US should condition the accession of Arab League members on the abandonment of the secondary and tertiary Boycott.

II. A BRIEF HISTORY OF THE LONGEST BOYCOTT

The Arab League, an umbrella organization that today includes twenty-one states, has banned trade with Jews in Palestine since before the creation of the State of Israel.⁸ Soon after Israel gained independence, the League created a complex, centralized boycott apparatus. The Boycott has three tiers: a primary boycott of Israel and a secondary and tertiary boycott of those trading with Israel. The specific conduct prohibited by the Boycott is described in a dense and comprehensive set of regulations.

Briefly, the primary boycott bars League members from having direct trade relations with Israel or Israelis.⁹ The secondary and tertiary boycotts reach far more broadly to ban trade with non-Israeli companies that have ties with Israel. Thus League members boycott companies of any nationality that happen to have offices or branches in Israel, use Israeli components or ingredients, advise or consult with Israeli companies, license intellectual property in Israel, or have any of a wide variety of other relationships to the Jewish State. Indeed, a person or firm could be boycotted even without having engaged in any commercial activity with Israel. The Boycott also applies to firms with "Zionist sympathizers" in executive positions or on their boards, people and firms who join foreign-Israeli

⁸ See Andreas F. Lowenfeld, 3 *Trade Controls for Political Ends* 313 (Matthew Bender 2d ed 1983).

⁹ *Id.* at 314–15.

chambers of commerce, or those who engage in political activity sympathetic to Israel. The Boycott also applies to firms that do business with any other firm that meets the description above. As one commentator has put it, “[t]he nature and detail of these rules reflect the boycotting countries’ tolerance for only the most minimal contacts with Israel.”¹⁰

The League’s Boycott Office, manned by a large staff, blacklists people and companies falling into any of the above categories. The blacklist circulates to League members, who then either boycott the listed entities or prevail upon them to abandon their ties to Israel.¹¹ The blacklist is reported to have contained 15,000 firms in its heyday in the 1970s, ranging from Aetna Life and Casualty to Xerox,¹² as well as individuals like Elizabeth Taylor (who had bought Israel Bonds). However, the secretive Boycott Office has never made its list public. This helps coerce those placed on the list into breaking their relations with Israel. Since several nations, including the United States, prohibit their firms from complying with the Boycott,¹³ publishing the blacklist would invite domestic regulatory scrutiny of blacklisted entities and make it more difficult for them to agree to the terms of the Boycott. Thus the Boycott’s biggest effect is deterrent: the only way a company can avoid both the Boycott and violating domestic laws is to not even consider entering into any dealings with Israel in the first place.¹⁴

Egypt and Jordan abandoned all phases of the Boycott, in 1980 and 1995 respectively, after signing peace agreements with Israel.¹⁵ In 1994, in the wake of the Oslo Accords, the Gulf Cooperation Council—a six-nation group that includes Saudi Arabia—agreed to end the secondary and tertiary boycotts. The next year, Saudi Arabia applied for membership in the WTO. When queried about the Boycott during the accession process by concerned members, Riyadh responded that it was over.¹⁶

¹⁰ Howard N. Fenton III, *United States Antiboycott Laws: An Assessment of Their Impact Ten Years after Adoption*, 10 *Hastings Intl & Comp L Rev* 211, 227 (1987).

¹¹ Lowenfeld, 3 *Trade Controls* at 313 (cited in note 8).

¹² See *id.* at 318–19.

¹³ 50 USC app § 2410 (2000) (prohibiting “United States persons” from complying with or assisting in the secondary and tertiary boycott). Several other nations have also adopted anti-boycott laws, though they have apparently not enforced them as vigorously as has the United States. See Carter, *International Economic Sanctions* at 177–78 (cited in note 1).

¹⁴ See *id.* at 178.

¹⁵ Robert A. Diamond, *U.S. Antiboycott Law and Regulations*, 830 *PLI/Comm* 721, 730 (2001).

¹⁶ World Trade Organization, *Accession of the Kingdom of Saudi Arabia: Questions and Replies*, WTO Doc No WT/ACC/SAU/6 at Q38–39 (Sept 30, 1996), available online at <<http://docsonline.wto.org/DDFDocuments/t/WT/ACC/SAU6.WPF>> (visited Oct 9, 2003) (requesting Saudi Arabia to “confirm” removal of boycott); Tomer Broude, *Accession to the WTO: Current Issues in the Arab World*, 32 *J World Trade* 147, 156–57 (Dec 1998) (recounting Saudi evasiveness in describing status of Boycott in its accession materials).

This satisfied the existing signatories, and the Saudis proceeded down the accession path. It turns out that Saudi participation in the broader boycott did not end after 1994, though enforcement greatly diminished. The Commerce Department continued to catch American firms that did business with the Saudis complying with the Boycott. As late as 1997, Saudi Arabia made more demands on US firms to comply with the Boycott than any League nation other than the United Arab Emirates.¹⁷

The Saudis began enforcing the Boycott with greater vigor in 2000, as part of the broader Arab League economic action against Israel that coincided with the outbreak of the large-scale Palestinian violence in Israel. Saudi Foreign Minister Prince Sa'ud al-Faysal proclaimed that it "is necessary that there should not be any form of cooperation with Israel, most importantly any [economic] dealings with it."¹⁸ In 2001, seventeen nations of the Arab League, including prospective WTO-member Saudi Arabia, met in Damascus to rededicate themselves to the Boycott. Saudi Arabia alone has blacklisted almost 200 foreign firms—some American—for selling Israeli-made goods in the kingdom and has recently taken various administrative measures to tighten boycott enforcement.¹⁹ "[T]he boycott results in economic harm to U.S. firms in terms of lost sales, foregone opportunities and distortion of investment decisions," the United States Trade Representative ("USTR") concluded in a report published last year.²⁰

III. GATT TEXT AND THE PURPORTED FOREIGN POLICY EXCEPTION

A. GATT OBLIGATIONS AND EXPLICIT EXCEPTIONS

GATT's central principle is that member nations must trade with each other on non-discriminatory terms. The most significant obligations imposed by the treaty all involve a commitment to non-discrimination: that signatories afford each other most-favored nation status ("MFN"), refrain from imposing quantitative limits on the volume of cross-border trade, and treat each other's

¹⁷ See Internal Revenue Service, *Boycott Reports, 1997 and 1998*, 20 Statistics of Income 154 (Dec 22, 2001) (on file with author); see also Broude, 32 J World Trade at 154–55 (cited in note 16) (describing evidence of secondary and tertiary boycott being applied against European corporations in 1997 and 1998).

¹⁸ *Foreign Minister States Position on Iraq, Aid to Palestinians*, Al-Hayat (London) (BBC Summary of World Broadcasts Mar 28, 2001).

¹⁹ Michael Freund, *Saudis Tighten Anti-Israel Boycott*, Jerusalem Post 1 (Aug 6, 2002).

²⁰ US Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers* 1, 3 (2002), available online at <<http://www.ustr.gov/reports/nte/2002/arableague.PDF>> (visited Oct 9, 2003).

exports as they do their own domestic products (“national treatment”).²¹ These provisions ban boycotts outright, since boycotts single out some nations for unfavorable treatment and treat those nations’ products differently from those of other signatories, as well as the boycotting nation’s own products.

GATT makes no mention of a “foreign policy” exception. Those who think such an exception exists concede that it must be read into the agreement.²² However, an interpretation that departs from the terms of a carefully negotiated legal instrument should have strong support in history, purpose, or policy. Before considering whether there are such non-textual justifications for the exception, it must be determined that the purported exception is at least not *inconsistent* with the text and structure of GATT.

GATT contains several explicit exceptions that authorize trade restrictions undertaken for non-economic purposes that would otherwise violate Article I and other GATT obligations. This demonstrates that GATT does recognize the legitimacy of at least some non-economic motives. The exceptions fall into two broad categories. Article XX, entitled “General Exceptions,” enumerates ten types of permissible trade restrictions. The broadest of these exceptions allows nations to adopt discriminatory and restrictive trade laws in order to protect public health, the environment, and public morals.²³ Other items on the Article XX laundry list are quite specific, such as the allowance for trade restrictions on products of prison labor and the allowance for measures designed to prevent the export of cultural artifacts, gold, and silver.

Article XX deals with trade restrictions adopted for reasons of domestic policy other than protectionism. But the structure of the Article shows that GATT does not permit *any* measure that is motivated by non-economic factors. Rather, GATT requires a discriminatory measure to satisfy two conditions. The *chapeau* to Article XX establishes lack of a protectionist purpose as a necessary but not sufficient condition. The measure must also fall within one of the enumerated exceptions set out in the lettered sections below the *chapeau*. If GATT tolerated all measures adopted for non-economic purposes only the *chapeau* would be needed, and not the ten specific sections under the *chapeau*.

²¹ General Agreement on Tariffs and Trade arts II and IV, GATT BISD 3–5, 8 (1969), 61 Stat pts 5, 6, TIAS No 1700 at 639, 55 UN Treaty Ser 194 (1950), as amended (hereinafter GATT). See also, John H. Jackson, *World Trade and the Law of GATT* § 11.3 (Bobbs-Merrill 1969) (observing that the non-discrimination principle expresses itself in several GATT provisions).

²² Restatement (Third) of the Foreign Relations Law of the United States § 812 comment a (cited in note 2). See also Carter, *International Economic Sanctions* at 136 (cited in note 1).

²³ See GATT art XX(a) (cited in note 21) (allowing restrictions to protect public morals); GATT art XX(b) (cited in note 21) (allowing restrictions “necessary to protect human, animal or plant life and health”); GATT art XX(g) (cited in note 21) (allowing restrictions “relating to conservation of exhaustible natural resources” under certain circumstances).

Furthermore, the *chapeau* states that even if a measure has non-economic purposes and fits within one of the Article's ten sections, it still runs afoul of GATT if applied in an arbitrary or discriminatory manner. Yet most sanctions adopted for foreign policy purposes are necessarily and intentionally discriminatory—their selectivity is what makes them effective tools of foreign policy.

Article XXI, the national security exception, permits signatories to adopt any measures they consider necessary to protect their own "essential security interests." The drafters of GATT realized that nations would be unlikely to abide by the agreement if it meant compromising their security. Clearly, there is a substantial overlap between foreign policy and security concerns. And indeed, many commentators believe that the security exception is sometimes abusively invoked to justify measures undertaken for more general foreign policy reasons, such as ideological opposition to a signatory's regime.

The first and third sections of Article XXI are narrow and uncontroversial. Neither could be used to justify most political sanctions. Section (a) allows nations not to "furnish any information" that would harm their national security, and section (c) allows nations to impose trade restrictions when obligated to do so under the United Nations Charter. The latter provision allows nations to comply with Security Council embargoes and other sanctions and prevents the decisions of that body from creating conflicting obligations for GATT signatories. Article XXI(b) is the heart of the national security exception and is recognized as the most sweeping exception in GATT, allowing for trade restrictions in a far broader range of situations than the other two sections.²⁴

Arab League members have in the past described the Boycott as a national security measure, and Saudi Arabia has adopted this position in an accession document.²⁵ This position has considerable merit for some boycotting nations. Lebanon and Syria, for example, are still engaged in intermittent hostilities with Israel, and Israel has until recently occupied Lebanese territory and continues to hold land taken from Syria. Saudi Arabia, on the other hand, has no objectively plausible grounds for invoking Article XXI. Israel has never attacked or threatened Saudi Arabia, and Jerusalem certainly has no designs on Arabian land. Furthermore, there have been no hostilities between the two states since the 1948 War of Independence, when Saudi Arabia joined other Arab nations in an invasion of the newly-created Jewish State. Indeed, several of Saudi Arabia's neighbors, such as Yemen and Djibouti, have dropped the secondary and tertiary Boycott, with Qatar and Oman even opening trade relations with Israel.

²⁴ See, for example, Bhala, 19 U Pa J Intl Econ L at 266–67 (cited in note 4) (describing section (b) as the "most important and controversial . . . exception").

²⁵ See Broude, 32 J World Trade at 156 (cited in note 16).

This further undermines Riyadh's suggestion that Israel poses a security threat to Arabia.

More importantly, the world at large does not plausibly threaten the "essential security interests" of Saudi Arabia or other Arab states, yet it is the world at large that must comply with the secondary and tertiary boycotts. Many nations and commentators have taken the position that non-primary boycotts could never pass muster under Article XXI;²⁶ one might think that the word "essential" precludes measures against nations that have a very indirect, remote, and attenuated relationship to the security interest in question. Certainly Saudi Arabia and other non-neighboring Arab states are *hostile* to Israel, but to conflate hostility with hostilities would be to turn Article XXI's exception for "essential security interests" into an exception for any interests that matter to a nation.

Broad as it is, Article XXI(b) has limits. It does not allow trade restrictions premised simply on security interests but rather on "essential security interests." Furthermore, it enumerates only three particular types of essential interests that would permit discriminatory trade restrictions. These involve i) anything relating to fissionable materials; ii) anything relating to the arms trade or military supplies; and iii) measures taken in "time of war or other emergency in international relations."²⁷ Thus apart from discrimination in times of war or comparably critical situations, the supposedly broad security exception only allows restrictions relating to military materiel, arms, and nuclear materials and is thus inapplicable to most trade in goods and services.

The purported foreign policy exception would be far broader than the security exception, which itself is widely viewed as overly malleable. Because it has no grounding in GATT text, the foreign policy exception has no discernible limits; it would seem to span the entire range of potential foreign policy concerns. Yet national security concerns are a subset of foreign policy concerns. Under Article XXI, only a subset of actual (to say nothing of contrived) security concerns warrants discriminatory trade restrictions. Since the foreign policy exception does not have such narrow criteria for its invocation, it would entirely subsume the security exception and render the carefully drafted restrictions on the latter useless. Indeed, the foreign policy exception could also swallow up the general exceptions of Article XX. One can easily argue that any restriction on foreign trade that is not motivated by protectionism is a foreign policy measure because it deals with relations with other nations. The foreign policy exception would not simply add an extra exception to GATT—it would effectively supplant Articles XX and XXI.

²⁶ See, for example, *id* at 157.

²⁷ GATT art XXI(b)(iii) (cited in note 21).

This would contradict the basic interpretive rule-of-thumb *expressio unius est exclusio alterius*: the expression of one thing (the particular exceptions in Articles XX and XXI) excludes other things (any implicit exceptions). And while *expressio unius* has its limits, the canon makes the most sense when, as with GATT, the express exceptions are numerous, carefully drafted, and detailed. The case for *expressio unius* is also stronger when the subject matter of the proposed implicit exception was within the contemplation of the drafters. Exceptions for foreign policy measures were clearly considered by GATT's authors; both Articles XXI and XXXV address, in different ways, foreign policy concerns. Finally, the case for *expressio unius* becomes compelling when reinforced by other canons of construction. Here, recognizing the atextual exception would make much of the textual provisions nugatory, violating another recognized principle of statutory interpretation.

A foreign policy exception would allow for limitless abuse. The breadth of Article XXI(b) is already seen by commentators as GATT's Achilles' heel, too easy to invoke in an opportunistic and bad faith manner.²⁸ Much recent WTO scholarship has focused on developing procedures to restrain abuses of that article. Most of these attempts focus on ensuring an objective reading of the exception's language, or at least a good faith connection between the ostensible reasons for the invoking the exception and the text of Article XXI(b), which insists that the national security purpose be "essential" and limited to war or military supplies.²⁹ Recognizing a general foreign policy exception would frustrate all efforts at cabining the security exception. It would create the same potential for abuse as Article XXI(b) but on a far greater scale.

B. THE OPT-OUT CLAUSE

1. The Legality of the Primary Boycott

If Saudi Arabia were to accede to the WTO, the primary boycott of Israel would most likely not cause any conflict with GATT requirements. Article XXXV, known as the "non-application clause," allows a newly acceding nation

²⁸ Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exemption: Reducing the Role of Power-Based Relations and Establishing a New Balance between Sovereignty and Multilateralism*, 26 Yale J Int'l L 413, 423 (2001); Bhala, 19 U Pa J Int'l Econ L at 272–73 (cited in note 4); René E. Browne, Note, *Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense after Helms-Burton*, 86 Georgetown L J 405, 409 (1997) ("[T]he national security exception . . . poses a latent, lingering threat to the stability of the fledgling [WTO], as . . . [it could] encourage other countries to carve out 'national security' exceptions to justify any number or type of international trade restrictions.").

²⁹ See, for example, Cann, 26 Yale J Int'l L at 467–68 (cited in note 28); Bhala, 19 U Pa J Int'l Econ L at 275–76 (cited in note 4).

to opt out of GATT's requirements with respect to particular members.³⁰ Non-application works both ways, and the member towards whom it is invoked is also freed from any GATT obligations towards the invoking nation.³¹ After an invocation of Article XXXV, both nations are members of the WTO, but the WTO obligations are not in force between the two nations.³² Saudi Arabia would almost certainly invoke Article XXXV with respect to Israel upon its accession. Egypt, Morocco and Tunisia, who also participated in the Boycott, invoked this option with respect to Israel upon their accession to GATT.³³ Indeed, the non-application clause was created to allow pairs of nations that do not recognize each other to join the agreement and thus at least secure free trade benefits in their relations with all other nations.³⁴

If Saudi Arabia declares GATT obligations non-applicable between it and Israel, the primary boycott would not violate WTO rules. Indeed, even adamant opponents of the Boycott concede that the primary level is of no concern to nations other than Israel and raises no questions of international trade law because "the choice of trading partners is anyone's right, the Arabs' included."³⁵ But Saudi Arabia will certainly not use the opt-out clause with respect to the US and Europe, the main targets of the secondary and tertiary Boycott, because it seeks WTO membership precisely to secure better trade terms with these large economies. The other Arab nations that have acceded with the Boycott intact have not invoked the opt-out clause with respect to the United States. Yet non-application towards Israel does not improve the legal status of the secondary and tertiary Boycott since it coercively distorts the "third-country" firms' choice of trading partners.³⁶ Thus the remainder of this Article leaves the primary Boycott to one side to focus on the compatibility of the Boycott's secondary and tertiary rings with WTO obligations.

³⁰ GATT art XXXV, ¶ 1(b) (cited in note 21).

³¹ Lei Wang, *Non-Application Issues in the GATT and the WTO*, 28 J World Trade 49, 60 (Apr 1994) (observing that non-application is automatically a "two-way street").

³² See id at 49–50.

³³ See Lowenfeld, 3 *Trade Controls* at 322 (cited at note 8); Ariel M. Ezrahi, Note, *Opting Out of Opt-Out Clauses: Removing Obstacles to International Trade and International Peace*, 31 L & Poly in Intl Bus 123, 138 n 65 (1999).

³⁴ Wang, 28 J World Trade at 54–55 (cited in note 31) (stating that the non-application clause was put into GATT to allow India and Pakistan to join although they had no diplomatic relations with South Africa because of the apartheid policy).

³⁵ Walter Henry Nelson and Terence C.F. Prittie, *The Economic War against the Jews* 28 (Random House 1977).

³⁶ See Broude, 32 J World Trade at 156 (cited in note 16) ("[N]on-application towards Israel cannot provide legal relief for secondary and tertiary boycott practices, as they constitute barriers to trade with Members with which Saudi Arabia will apply the WTO agreements in full.").

2. The Illegality of the Secondary and Tertiary Boycotts

The existence of the non-applicability provision reinforces the conclusion that GATT applies in full to secondary and tertiary boycotts adopted for foreign policy purposes. GATT provides a mechanism for primary boycotts within the free trade system. The lack of such a mechanism for the broader class of boycotts suggests that these were regarded as entirely incompatible with the free trade system. This conclusion is reinforced by the general hostility nations have towards secondary and tertiary boycotts: they are looked upon with disfavor because they attempt to impose one nation's laws extraterritorially. Given the extraterritoriality problem, one would expect that if GATT tolerated such measures, the tolerance would be made explicit.

Article XXXV was specifically designed as GATT's safety-valve for foreign policy motivated measures.³⁷ This suggests that foreign-based restrictions do in fact fall within the purview of GATT. If GATT was not seen as applying to restrictions adopted purely for reasons of foreign policy—like the Indo-Pakistani boycott of South Africa—then there would be no need for the opt-out clause in the first place.

The opt-out clause was made narrow³⁸ “to restrict the invocation of the non-application clause and to minimize its effect, as the clause was regarded as an exception to the rule of most-favoured-nation.”³⁹ The narrowness of the clause shows that a broad foreign policy exception goes against the spirit of GATT, which attempts to minimize the intrusions of foreign policy considerations into the sphere of international trade. Also, the specific limitations on Article XXXV support the view that secondary boycotts are entirely incompatible with the GATT structure. Article XXXV requires that opt-outs be declared with respect to particular nations: it does not authorize blanket opt-outs. Similarly, it does not authorize opting out with respect to specific firms, in the manner of the Arab League blacklist but only with respect to countries. For example, an opt-out styled a “declaration on non-applicability to any firms that trade with firms that trade with Israel” would be ineffectual under Article XXXV.

³⁷ This is generally how it has been used in practice: the clause has been relied on many times by nations that do not recognize or have profound political disagreements with other signatories. See Nelson and Prittie, *The Economic War against the Jews* at 56–58 (cited in note 35) (discussing examples and causes of Article XXXV invocations).

³⁸ For example, non-application must be declared at the time of accession; once a nation enters GATT, it cannot invoke Article XXXV when it deems it convenient. See GATT art XXXV, ¶ 1(b) (cited in note 21).

³⁹ Nelson and Prittie, *The Economic War against the Jews* at 55 (cited in note 35).

IV. PRECEDENTS FOR A FOREIGN POLICY EXCEPTION

This Part examines whether state practice under GATT reveals an explicit or tacit endorsement of the foreign policy exception in general or the Arab League Boycott in particular. The legality of such measures has never been adjudicated by WTO or GATT dispute-resolution panels.⁴⁰ Most foreign policy-motivated trade restrictions have either been imposed by non-GATT members (such as the Arab states) or by the United States against non-GATT members. Such restrictions would not raise an issue under GATT, whose obligations only run between *signatory* states. Still, there have been some instances where the Arab League Boycott and US trade restrictions motivated by foreign policy have come under GATT scrutiny. Under the international law doctrine of “state practice,” the conduct of nations can itself provide informal precedents.⁴¹ If over some period of time, nations consistently repudiate certain actions, this suggests that those actions do not comport with international law. However, GATT has been in force for over fifty years and has gone through the domestic ratification processes of the individual signatory states. Because the treaty has so many parties, one must be careful not to infer too much from interpretations made by just a few signatories.

A. STATE PRACTICE AND THE ARAB LEAGUE BOYCOTT

The United States has always vociferously opposed the Arab League Boycott, and Israel has naturally expressed the same view.⁴² The European Economic Community and European Parliament have also expressed the view that the secondary and tertiary Boycott is an unjustified violation of GATT.⁴³ Furthermore, Saudi Arabia at one point agreed to “suspend” its secondary and tertiary boycott to ease its accession.⁴⁴ This implies recognition—at least on the

⁴⁰ See Spanogle, 27 Stetson L. Rev at 1328–32 (cited in note 1).

⁴¹ See Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (cited in note 2) (observing that the “general and consistent practice of states followed by them from a sense of obligation” creates binding “rule of international law”).

⁴² Uruguay Round Trade Negotiations Committee (Marrakesh, Morocco Apr 13, 1994) in Doc No 94-0146, TN.TNC/MIN(94)/ST/44 (statement by Micha Harish, Minister of Industry and Trade) (“We believe that the boycott is incompatible with the notion of free trade discussed here and to oppose it is the obligation of the whole world trading system and mainly of those parties which enjoy an extensive volume of trade with Israel.”).

⁴³ See Nelson and Prittie, *The Economic War against the Jews* at 223–24 (cited in note 35) (observing that EEC also declared compliance with the boycott a violation of the non-discrimination principles of the Treaty of Rome, the constitution of the Common Market).

⁴⁴ See World Trade Organization, *Accession of the Kingdom of Saudi Arabia*, WTO Doc No WT/ACC/SAU/6 at Q38–39 (cited in note 16) (requesting Saudi Arabia to “confirm” removal of boycott).

part of the WTO members who requested the move, if not on the part of the Saudis—that the Boycott contravened WTO rules.

One contrary precedent exists. The legality of the Arab League Boycott was raised explicitly during the negotiations in 1970 over the accession of Egypt, which at the time called itself the United Arab Republic. Egypt refused to end its participation in the Boycott despite the “concerns” of some contracting parties.⁴⁵ The Boycott supposedly did not contravene GATT obligations because it “was considered a political decision and not trade-related,”⁴⁶ though some nations rejected this view.⁴⁷ At least one commentator has argued that Egypt’s accession demonstrates that trade restrictions motivated by foreign policy concerns alone pass GATT muster.⁴⁸

While Egypt’s accession may lend some support to Saudi Arabia’s candidacy, a single, thirty-year old informal precedent—itsself controversial at the time—can hardly establish a broad principle legitimizing any foreign policy restrictions. Moreover, Egypt could have plausibly invoked the national security exception to justify the primary boycott, though commentators doubt this can ever authorize secondary boycotts. Indeed, while not formally invoking the exception, Egypt explicitly referred in its accession documents to the “state of war” with Israel.⁴⁹ In 1970 Egypt and Israel were engaged in constant and open hostilities during the so-called War of Attrition and had three years previously fought an all-out war in which Israel conquered Egypt’s Sinai Peninsula. Such a situation plainly falls within the war-related exception of Article XXI(b)(iii). But Israel, as noted above, is not fighting Saudi Arabia and has never attacked that nation or given any sign of an intention to do so.

B. STATE PRACTICE AND US-IMPOSED SECONDARY BOYCOTTS

In the 1990s, the United States enacted several laws that, among other things, establish secondary and tertiary boycotts: the Cuban Liberty and Democratic Solidarity Act of 1996 (known as the “Helms-Burton” Act) and the Iran and Libya Sanctions Act (“ILSA”). The US justified these measures by reference to the national security exception, and it also invoked the purported

⁴⁵ See Spanogle, 27 Stetson L Rev at 1322 n 46 (cited in note 1).

⁴⁶ Id at 1331.

⁴⁷ GATT Secretariat, *Uruguay Round, Group of Negotiations on Goods, Negotiating Group on GATT Articles, Article XXI*, WTO Doc No MTN.GNG/NG7/W/16 (Aug 18 1987), available online at <<http://docsonline.wto.org/DDFDocuments/t/UR/GNGNG07/W16.RFT>> (visited Oct 9, 2003) (hereinafter *Uruguay Round Negotiations on Goods*).

⁴⁸ Spanogle, 27 Stetson L Rev at 1332 (cited in note 1).

⁴⁹ Id at 1322 n 46.

foreign policy exception.⁵⁰ Washington has argued that since the measures were taken for foreign policy reasons, a WTO tribunal would not even have jurisdiction to determine the legitimacy of the secondary restrictions.⁵¹ No nation has supported the legitimacy of the secondary boycott elements of these laws. They have been denounced by many nations and commentators as repugnant to a wide variety of treaty obligations, customary international law, and WTO rules.⁵²

Indeed, the EU filed a complaint with the WTO challenging the secondary boycott provisions of Helms-Burton. The United States settled the matter “out-of-court” immediately before the first submissions were due with the panel.⁵³ President Clinton promised to use his waiver authority under the statute to prevent enforcement of the secondary restrictions.⁵⁴ The consensus among commentators is that were the matter to come before a WTO dispute resolution body, the secondary boycott provisions would be struck down.⁵⁵ Of course, this is provided that the panel would not rule that the exception is self-judging—many commentators believe the language of Article XXI makes a nation’s determination of its essential security interests authoritative and not subject to WTO review.

Yet it is also clear that Helms-Burton and ILSA have more to do with US national security than the Boycott has to do with the security of Algeria or Saudi Arabia. After all, shortly before the passage of Helms-Burton, Cuba shot down two American aircraft (this probably does not rise to the level of “essential national security” as required by GATT, but it is *something*), and Iran and Libya have sponsored terrorist attacks on Americans. Moreover, the American laws’ secondary provisions have a very limited scope, far narrower than the provisions

⁵⁰ See Robert S. Greenberger, *Washington Will Boycott WTO Panel*, Wall St J A2 (Feb 21, 1997) (quoting Commerce Department undersecretary Stuart Eizenstat as declaring that the “WTO was not created to decide foreign-policy and national-security issues”).

⁵¹ See *id.*

⁵² See Lucien J. Dhooge, *Fiddling with Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996*, 14 Ariz J Intl & Comp L 575, 584 (1997); Timothy S. Dunning, Comment, *D’Amato in a China Shop: Problems of Extraterritoriality with the Iran and Libya Sanctions Act of 1996*, 19 U Pa J Intl Econ L 169, 194–95 (1998) (“Although referencing a legitimate concern over terrorism, ILSA, if brought before a WTO panel, likely will not warrant an exemption under the national security escape clause in Article XXI.”).

⁵³ See Browne, 86 Georgetown L J at 408 (cited in note 28).

⁵⁴ See *id.* at 407–08 n 14, 409 n 19.

⁵⁵ See, for example, C. Todd Piczak, Comment, *The Helms-Burton Act: U.S. Foreign Policy toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U Pitt L Rev 287, 317, 326 (1999) (arguing that WTO panel would reject GATT exceptions urged by US to justify its secondary boycotts); Klinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States under the GATT National Security Exception*, 11 Fla J Intl L 559, 566–68 (1997).

of the Arab League's secondary and tertiary boycotts. Helms-Burton applies only to those foreign nationals who use "confiscated property" in Cuba that was taken from US nationals. The statute is enforced through civil damages actions by the owners of the property and by visa restrictions on the foreign nationals, remedies far short of barring the foreign nationals from doing business in the US and similarly penalizing other foreigners who do business with them. The Arab Boycott applies to almost every sector of commerce and every transaction regardless of its size. ILSA, by contrast, only imposes secondary boycott measures on companies with investments of over \$40 million in Iranian and Libyan oil industries (sanctions also apply to those who sell military material, in the case of Libya). The Boycott against Israel is far broader, extending to any business with any contacts at all with Israel, even those that simply open an office there. Thus if, as scholars and WTO members agree, the secondary elements of Helms-Burton and ILSA violate WTO obligations, the Boycott does so *a fortiori*.⁵⁶

V. PEACE AND FOREIGN POLICY RECONCILIATION AS GOALS OF THE FREE TRADE SYSTEM

Text, structure, and state practice show the incompatibility of the foreign policy purpose exception with WTO rules. This Part shows that the WTO has foreign policy goals that would be defeated by the purported exception, and in particular, by the use of broad boycotts as instruments of foreign relations. The WTO has the very non-economic purpose of creating conditions that would reduce the likelihood of war between nations. Of course, arguments from purpose and intent are not dispositive when statutory text is clear. But when text, purpose, and usage all point in the same direction, one need not address the relative importance of these interpretive criteria.

Implicit in the view that the WTO only prohibits trade restrictions motivated by protectionism is the assumption that the WTO seeks to secure a free and open trade regime *solely* to secure the economic benefit of lower prices through comparative advantage and broader competition. Certainly the economic benefits of the GATT system are the ones most commonly

⁵⁶ The US's opposition to the Arab Boycott has, not surprisingly, lead to accusations of hypocrisy. See, for example, Bhala, 19 U Pa J Int Econ L at 271 n 24 (cited in note 4). Thus some commentators have suggested that at least one reason to jettison the Cuba boycott is that it "undercuts the traditional U.S. opposition to secondary boycotts and makes it harder for the United States to take a principled stand against the Arab boycott of Israel (and to push Arab governments to drop the secondary and tertiary elements of that embargo)." Theodore C. Sorensen and Richard S. Elliott, *Cutting the Cord against Dictators: U.S. Embargoes Challenge Business Community*, NY L J 7 (Nov 20, 1995).

discussed,⁵⁷ probably because most improper trade restrictions are in fact motivated by economic (protectionist) considerations.

However, the WTO also has other purposes that are directly frustrated by the use of boycotts as instruments of foreign relations. Free trade has always been understood to be an important method of discouraging war and promoting more amicable relations among nations. John Stuart Mill argued that “the economical advantages of [international] commerce are surpassed in importance” by its effects on international political relations.⁵⁸ According to Mill, trade is “the principal guarantee of the peace in the world.”⁵⁹ Leading contemporary scholars echo this view.⁶⁰ Indeed, fostering the conditions for international peace was as much in the minds of GATT’s architects as was reaping the benefits of comparative advantage.

The retaliatory tariff increases of the 1930s, in the view of many scholars, “helped transform a trade war into actual military conflict.”⁶¹ The global depression created by trade barriers was particularly hard-felt in the already-impooverished Germany, and thus helped the National Socialist Party win popularity and elections. This bitter history informed the historic Bretton

⁵⁷ See Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at “Peace in Our Time,”* 24 Fordham Intl L J 217, 226 (2000) (pointing out that the most common argument for free trade rests entirely on its economic benefits and thus is incomplete). See, for example, John O. McGinnis and Mark L. Movsesian, *The World Trade Constitution*, 114 Harv L Rev 511, 521–22, 529–30 (2000) (assuming that WTO’s only goal is the creation of wealth and thus its primary opponents are protectionist groups within nations).

⁵⁸ John Stuart Mill, *Principles of Political Economy* 581 (Longmans 1909).

⁵⁹ Id at 582.

⁶⁰ See Friedrich A. Hayek, *Individualism and the Economic Order* 255 (Chicago 1948) (arguing that “the abolition of economic barriers” is an “indispensable condition” for “prevent[ing] war . . . by eliminating causes of friction” between nations); Robert W. McGee, *A Trade Policy for Free Societies* 24 (Quorum 1994) (“[T]here is substantial evidence to suggest that lack of free trade is a threat to peace.”); John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 135 (MIT 1989) (“MFN can serve the functions of lessening tensions among nations and of inhibiting temptations for short-term *ad hoc* government policies which could be tension-creating in a world already too tense.”); Ezrahi, 31 Law & Poly in Intl Bus 123–24 (cited in note 33) (arguing that WTO and GATT system is crucial to improved international relations, and particularly reconciliation between Arab states and Israel, and thus trade rules that impede such rapprochement, like GATT’s opt-out clause, should be narrowly interpreted or abolished).

⁶¹ Chen, 24 Fordham Intl L J at 226 (cited in note 57). See also, McGee, *A Trade Policy for Free Societies* at 24–25 (cited in note 60) (arguing that trade barriers such as tariffs and the American embargo of Japan helped cause World War II, and that “[m]any other wars were caused, at least in part, by trade restrictions, which are often used as economic weapons—a substitute for military action”).

Woods meeting from which GATT emerged.⁶² “Trade, in a rules-based system, would promote economic interdependence among nations, making another global war improbable As one US observer . . . put it at the time: ‘economic freedom for all is the basic American foreign policy for the prevention of war.’”⁶³ Still, some of those involved in the creation of GATT saw a narrower role for the organization, one consistent with the foreign policy exception. Indeed, some representatives to the subcommittee that originally drafted Article XXI in 1948 proposed inserting a foreign policy exception into that Article. They argued that GATT “ought to make provision for economic measures which are closely linked with political questions . . . in the sense of excluding them, because they believed that an economic measure taken for political reasons was not properly speaking an economic measure but a political measure.”⁶⁴ But while this position was endorsed by several representatives, the subcommittee did not in fact “make provision” for such an exception, and the nations that joined the agreement signed it without such an exception. The political leaders of the signatory states saw GATT as having “an unequivocal mandate to keep the peace.”⁶⁵

The free trade system promotes peaceable foreign relations in several ways. First, the cross-border ties formed by businessmen and the exposure to foreign cultures during business deals can increase transnational understanding. As a country grows more prosperous, it stands to lose more through conflict and thus develops a greater distaste for war. Finally, and perhaps most importantly, free trade creates groups of people within potentially hostile nations that have a strong interest in maintaining peace, because they trade with the potential enemy. These groups can pressure their domestic governments to avoid actions that might lead to conflict. Trade barriers between nations have the opposite effect.⁶⁶

As the successor to GATT, the WTO is also concerned with creating the necessary conditions for international peace.⁶⁷ The WTO itself proclaims that

⁶² See Andreas F. Lowenfeld, 6 *Public Controls on International Trade* 15 (Matthew Bender 2d ed 1983) (noting that the creators of GATT were informed by the “perception” that trade restraints had contributed to the outbreak of World War II).

⁶³ WTO Director-General Renato Ruggiero, *From Vision to Reality: The Multilateral Trading System at Fifty*, Address to the Brookings Institution and the World Affairs Council Forum “The Global Trading System: A GATT 50th Anniversary Forum,” San Jose, California (Feb 26, 1998), available online at <http://www.wto.org/english/news_e/spr_e/sanjos_e.htm> (visited Sept 26, 2003).

⁶⁴ GATT Secretariat, *Uruguay Round, Group of Negotiations on Goods* ¶ 12 (cited in note 47).

⁶⁵ Chen, 24 *Fordham Intl L J* at 227–28 (cited in note 57).

⁶⁶ Hayek, *Individualism and the Economic Order* at 257 (cited in note 60).

⁶⁷ Chen, 24 *Fordham Intl L J* at 225 (cited in note 57) (arguing that the WTO was “consciously designed to keep the peace and remain[s] quite effective in this role”).

“peace” is one of its principal benefits: “[I]f trade flows smoothly and both sides enjoy a healthy commercial relationship, political conflict is less likely.”⁶⁸ Renato Ruggiero, then-Director General of the WTO, has declared that economic prosperity and political tranquility are just two sides of the same GATT coin.⁶⁹ And former US Trade Representative Charlene Barshefsky has said that Washington’s trade policy seeks to end the Boycott specifically to cultivate the conditions for peace:

The region is deeply fragmented, most of all because of the boycotts and isolation Israel’s neighbors imposed on it fifty years ago To reduce these barriers and promote a greater degree of integration . . . would be to strengthen the stake that Middle Eastern governments would have in peace and regional stability.⁷⁰

Given that the WTO system is not limited in its purposes to securing economic gains, it would be incongruous to interpret GATT as applying only to measures adopted for economic purposes. Amicable relations between nations is also a goal of the WTO, and the Arab League Boycott is designed to frustrate this goal. Indeed, as UN Secretary-General Dag Hammarskjöld put it, the Boycott is “deadweight” on regional peace prospects.⁷¹ It is an economic form of warfare, standing in the way of the peace the WTO seeks to promote.⁷²

VI. IMPLICATIONS FOR SAUDI ARABIAN ACCESSION

The previous sections of this Article have shown, through an examination of GATT’s text, structure, usage, and goals that the agreement does not excuse discriminatory trade restrictions simply because they are designed to advance foreign policy goals rather than to protect domestic industry. Since, aside from the purported foreign policy exception, the secondary and tertiary boycotts are *prima facie* violations of GATT obligations, they are illegal under WTO rules. This should obviously raise doubts about the merits of the accession bids of Saudi Arabia and other Boycott enforcers. The practical question is whether the Boycott should be an absolute bar to Riyadh’s accession or whether Saudi Arabia could be allowed to accede (assuming it satisfies other requirements) and the Boycott dealt with within the WTO system. This Article contends that an

⁶⁸ World Trade Organization, *10 Benefits of the WTO Trading System*, available online at <www.wto.org/english/res_e/doload_e/10b_e.pdf> (visited Oct 22, 2003).

⁶⁹ Ruggiero, *From Vision to Reality* (cited in note 63).

⁷⁰ US Trade Representative Charlene Barshefsky, *Bridges to Peace: American Trade Policy in the Middle East*, Address to Hadassah, St. Petersburg, Florida (Feb 26, 2000) available online at http://www.ustr.gov/speech-test/barshefsky/barshefsky_64.pdf (visited Nov 3, 2003).

⁷¹ Lindesay Parrott, *U.N. Chief Assails Boycott of Israel*, NY Times A1 (Aug 9, 1957).

⁷² See Lowenfeld, 3 *Trade Controls* at 321 (cited in note 8) (“The Arab boycott is an expression of belligerency without actual war, and of a deep-seated resentment, fear, and hatred of Israel, and everything and everybody that has helped or would help Israel.”).

end to the secondary and tertiary Boycott should be an absolute prerequisite to accession. Given the Boycott's incompatibility with WTO obligations, allowing a nation to join WTO with the Boycott in place would be an irreparable mistake.

There is no adequate procedure for dealing with the Boycott within the WTO framework. Saudi Arabia might invoke Article XXI(b) to justify the secondary and tertiary Boycott. As has been noted above, commentators have been concerned about the potential for bad faith and abusive invocations of Article XXI(b). For while commentators uniformly believe that the national security exception could not justify a secondary and tertiary Boycott, many also view the national security exception as self-judging: the Article can be read as explicitly leaving it to each nation to conclusively determine whether the national security exception is appropriate, with no possibility for review by a WTO dispute-resolution panel. Many observers believe that the reason that abusive and opportunistic invocations of Article XXI(b) have not been more common is that nations want to be seen as playing by the international trade rules.⁷³ But the secondary and tertiary Boycott is so repugnant to elementary free trade norms that it calls into doubt the boycotters' concern for their reputation in this regard.

In the Helms-Burton controversy, the United States invoked Article XXI(b) to justify trade restrictions that were widely regarded as motivated by general foreign policy concerns, not "essential national security," and Washington refused to recognize the jurisdiction of a WTO panel over the question. The American position jeopardized the authority of the WTO tribunals, and was regarded as imperiling the organization itself. If Saudi Arabia were admitted to the organization with its half-century-old Boycott intact, the stage would be set for another showdown that could undermine the WTO's authority and efficacy. Washington ultimately withdrew the challenged practices, but it is far from clear that Riyadh would back down in the face of a legal challenge by a member state. The Saudis could see their accession as evidence of the present member nations' tacit consent to the Boycott. The Saudis have enforced the Boycott for more than five decades, while the Helms-Burton provisions had been in place for only a few years: this suggests the Saudis will be even less inclined to abandon the Boycott if a challenge were brought before a WTO panel than the US was.

Scholars have come up with numerous procedural schemes to police bad faith invocations of Article XXI, as well as other GATT abuses and violations. Indeed, one of the perennial issues in GATT jurisprudence is distinguishing legitimate environmental, cultural, health, and safety measures from disguised

⁷³ See, for example, Jackson, *The World Trading System* at 204 (cited in note 60) ("Because of th[e] danger of abuse, contracting parties have been very reluctant to formally invoke Article XXI, even in circumstances where it seems applicable.").

protectionism. Yet clearly the simplest procedural device is the accession process itself: not to allow likely scofflaws into the WTO until they have clearly forsaken their discriminatory ways. The search for procedural devices, for methods to distinguish between legitimate and illegitimate restrictions, is necessitated by the fact that such measures are usually adopted at some point *after* accession. If they are already in place, preventing accession is the easiest and surest safeguard against such abuses.

Even if the legality of the Boycott could be brought before a WTO panel, adequate relief for the harm imposed could not be secured. The economic losses caused by the Boycott cannot be calculated with any precision.⁷⁴ This is because the Boycott works through intimidation and deterrence. It prevents firms from considering business opportunities in Israel or with non-Israeli entities that have connections with Israel. Because the Boycott has been in place for half a century, there is no basis for calculating the level of foreign trade with Israel that would exist in the absence of the Boycott and thus no measure of the lost business it caused.⁷⁵ Firms that have decided not to consider transacting with Israel or other firms on the blacklist will not step forward to admit it, and it is likely such decisions to avoid exploring trade opportunities with Israel would not always be fully conscious or articulated.

The WTO operates largely on trust and reciprocity, on the understanding of member nations that they all will be better off playing by the rules. And the accession process, especially for nations that have not had long histories of liberal trade policies, is about the aspirant making painful reforms to signal its newfound commitment to free trade as well as about negotiating specific tariff reductions. Such reforms serve as a bonding device, or evidence of intent: they demonstrate the aspirant's seriousness of purpose. As the former Director General of the WTO has said, accession "very often [entails] major changes in national policies in order to be able to sign on to binding commitments across the whole trade spectrum."⁷⁶

Allowing a boycotting nation to accede would set a dangerous precedent. It would grant legitimacy to the foreign policy exception, possibly encouraging its invocation by existing members to justify discriminatory trade policies. And given the blank-check nature of the purported foreign policy exception, this

⁷⁴ *National Trade Estimate Report on Foreign Trade Barriers* at 3 (noting that the harm the Boycott causes US businesses is "difficult to quantify accurately") (cited in note 20); Dan S. Chill, *The Arab Boycott of Israel: Economic Aggression and World Reaction* 23 (Praeger 1976) (discussing the "impossibility of estimating the economic activity that would result were the Boycott rendered inoperative").

⁷⁵ US Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers* at 3 (cited in note 20).

⁷⁶ Ruggiero, *From Vision to Reality* (cited in note 63).

could wreak havoc with the WTO's rule-based approach. As Ruggiero has said, "we must complete these negotiations [with trade 'giants' such as Saudi Arabia] as soon as possible But, equally, enlargement of the WTO must strengthen the system, not dilute it."⁷⁷

WTO rules apply, in the absence of an explicit GATT exception, to trade restrictions adopted out of hatred as much as those adopted out of greed. Saudi Arabia's secondary and tertiary boycotts of Israel constitute facial violations of WTO obligations. If Riyadh accedes without having abandoned these practices, it would be a defeat for the free trade system born at Bretton Woods. It would open up the Pandora's Box of the foreign policy exception. Perhaps most distressingly, it would suggest that WTO members, with whom the accession decision rests, care little more about non-discriminatory trade than does Riyadh. The United States at least—as part of its commitment to free trade, its defense of its own economic interests, and its desire to lay the groundwork for closer relations between Middle Eastern states—should insist that Saudi Arabia discontinue and disavow the Boycott before engaging in any further accession negotiations.⁷⁸

⁷⁷ Id.

⁷⁸ For a discussion of the specific conditions Washington should establish for accession, see E.V. Kontorovich, *Riyadh's WTO Outrage*, NY Post 31 (Dec 26, 2002).