Regional Agreements and Regulatory Barriers to Trade in Services: Building Blocks to the Multilateral Foundation

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I. Market Access in Services

Jordan agreed to extensive liberalization undertakings under the General Agreement on Trade in Services ("GATS") that would open some sectors that were previously closed or restricted to foreign suppliers and investors.[1] It undertook horizontal commitments in cross-border movement of individuals and commercial presence covering all types of services. For example, in cross-border movement of individuals, Jordan attached requirements related to duration of stay, pre-employment conditions, recognition of professional qualifications, economic and labor market needs tests, and work permits.[2]

Sectorally, Jordan made specific commitments in 11 major service sectors and 128 sub-sectors and activities. For example, in the business sector, Jordan agreed to eliminate restrictions on market access and national treatment in legal services in the four modes of supply.[3] Thus, Jordan eliminated its rules, if any, which could restrict the rights of Jordanian and foreign lawyers to enter into partnership or which could impose restrictions on the nationality of a foreign law firm.

However, legal services of foreign law firms are limited to "advise" on "foreign law" only.[4] For example, a foreign law firm can advise or consult on international or U.S. law but cannot advise on Jordan's home law. To put it differently, a foreign law firm can advise or represent Jordan in its accession to the WTO since its international

[1] In addition to GATS, WTO members negotiated sectoral agreements such as the Agreement on Basic Telecommunication Services of 1997 and the WTO Financial Services Agreement of 1997. The detailed undertakings of Jordan for trade in services are included in a 39-page report. See Working Party Report on the Accession of Jordan, Part II-Schedule of Specific Commitments on Services, Dec.3, 1999, WTO Doc. No. WT/ACC/JOR/33/Add.2, WT/MIN(99)/9/Add.2.
[2] Id. 3-6 (paragraph references not avail.).
[3] *Id*. 5. The four modes of supply are: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.
[4] *Id*. 6.

law but cannot do the same regarding domestic family law in Jordan. Other fields of legal services such as domestic litigation are not open.[5] In other words, only Jordanian lawyers are allowed to litigate or plead before local courts. This limitation might seek to protect the public from incompetent foreign lawyers. Moreover, Jordanian practitioners have special and full knowledge of the local language, Arabic, and the legal system, civil law.

To sum up, it seems at first glance that Jordan opened its legal service sector to foreign lawyers, but closer scrutiny tells otherwise. Most legal activities will remain off shore to foreign law firms. Two reasons may help interpreting such scheduling; either Jordan desired to preserve the integrity of the legal profession in Jordan by prohibiting the entry of unqualified foreign lawyers or protect the domestic legal bar against global law firms.[6]

Jordan granted limited market access to foreign auditing firms.[7] Auditing of financial records or verification reports of domestic companies by foreign auditors is restricted. It must be performed by resident Jordanian auditors who pass qualification tests. However, foreign accounting firms may give opinions on company results, open representative offices, or invest in joint ventures. This could help enhance transparency and improve accountancy standards.

In the service areas of architectural, engineering, urban planning, and landscape architectural services, Jordan imposed limitations on foreign ownership in the form of a 50% ceiling on foreign shareholding.[8] As such, foreign firms do not enjoy full ownership rights. Moreover, foreign firms are required to train and upgrade the

[5] *Id*.
[6] See INTERNATIONAL TRADE IN THE 21ST CENTURY 227-228 (Khosrow Fatemi ed., 1997) (the United States leads the world by a wide margin on the total number of lawyers and lawyers per million. It is also very interesting, or perhaps frightening, to further note that 35 percent of the lawyers in the world in 1992 lived, and presumably practiced law, in the United States).
[7] *Id*. 6.
[8] *Id*. 7.

technical and management skills of local employees. This seems as an offset requirement for undertaking commitments in these service areas. In the construction market, ownership in domestic firms is limited to 50% foreign shareholding.[9]

In social services such as medical services and health care, Jordan took some changes to the state-run medical system provided through state-owned enterprises or directly from the state. Now, foreign-owned medical services could offer medical services without foreign equity restrictions.[10] Jordan's population has a choice between subsidized medical care for the poor who cannot afford any medical care and the private sector which specializes in rich clients and high-end services.

Jordan provided barrier-free access to its market of computer services that would accord foreign and domestic suppliers equal access.[11] This is a step forward in Jordan's trend to open to technology. Additionally, Jordan permits cross-border transactions in research and development services.[12] However, it imposes limitations on participation of foreign capital in the form of 50% foreign equity limit and requirements of local hiring as the director of a research center must be a Jordanian.

Trade in real estate services is an area that does not include deregulation of foreign agent's access to the Jordanian real estate service market. Barriers include the form of business and nationality.[13] Jordan undertook commitments on a range of business services including rental/leasing services, management consulting services, publishing services, and other business sectors.[14]

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[9] *Id*. 17.
[10] *Id*. 8, 25.
[11] Computer services include data processing, computer maintenance, and database services. *Id*. 9.
[12] *Id*.
[13] *Id*. 10.
[14] Jordan sheltered its publishing industry from foreign competition by imposing restrictions on the type of legal entity allowed for commercial presence, foreign capital limits, and nationality requirements. *Id*. 10-13.

Jordan provided liberal market-opening commitments in telecommunication services.[15] It would open its telecommunications system, which was until recently controlled by a national telecommunication company, to unfettered competition and foreign telecommunications companies.[16] Finally, Jordan undertook obligations contained in a regulatory reference paper.[17]

In the audio-visual and related delivery services, Jordan made commitments, regarding market access and national treatment, in motion picture and videotape productions services, motion picture projection services, and sound recordings.[18] Jordan imposed foreign ownership restriction and nationality requirement for distribution services in this sector.[19] It is unclear whether the commitments scheduled by Jordan in this sector cover radio and television services.

In distribution services, defined as commercial agency, wholesaling, retailing, and franchising services, Jordan imposed several restrictions. Some of the restrictions include commercial presence requirements for cross-border trade, restrictions on the type of corporate entities that could be established, and foreign ownership restrictions.[20] Despite these restrictions, foreign wholesalers and retailers, through joint ventures, would be able establish outlets, chain stores, and wholesale operations in Jordan in which they would sell their goods.

[15] All restrictions on market access would be phased out by the end of 2004. *Id*. 13-16.
[16] Jordan commitments cover basic services which include mobile and wireline voice and data services, local and long distance domestic telephony, mobile radio (cellular, paging and personal communications services), international telecommunications, satellite services, private leasing services, network carrier and network access business and value-added services defined as email, voice mail, online information database storage and retrieval, online data processing, internet access service, internet content service, and videoconferencing services. *Id*.
[17] The reference paper outlines conditions under which foreign based providers can enter the telecommunication industry. It sets forth general principles for a pro-competitive and transparent regulatory environment for new entrants, including competitive safeguards, fair interconnection policies, publishing of licensing criteria, fair allocation of scarce resources, and the creation of an independent regulator. *Id*. 14, 33-35.
[18] *Id*. 16.
[19] *Id*.
[20] *Id*. 18.

Education reform is one of the most important areas for Jordan. Jordan removed and reduced obstacles to the transmission of educational services across national borders or to the establishment of facilities such as schools and offices.[21] Thus, it created favorable conditions to suppliers of higher education and adult education services. Additionally, education consumers can purchase education abroad. Education liberalization could help lure branches of foreign universities.

One must say that education in Jordan is, and must be, a government function. Liberalization of educational services should not erode the government ability to regulate education. Private education services ought to supplement, not displace, public education. For example, private education could offer services that are not currently offered by government schools. Permitting private and public education to coexist in Jordan could help inject competition in the education system. However, universities should not act more like commercial firms than academic institutions.

Jordan liberalized environmental services such as cleaning of exhaust gases, sanitation, and sewage. It eliminated barriers dealing with market access and national treatment.[22] For example, Jordan eliminated restrictions on investment and establishment of foreign suppliers. However, it could maintain regulatory practices such as those related to entry and stay of environmental service providers.

Financial services are important for the development of many sectors in the Jordanian economy such as agriculture and tourism. Jordan scheduled several commitments that cover areas such as life and non-life insurance services (e.g. transport, aviation, and accident insurance) and banking and other financial services (e.g. derivative trading and the provision and transfer of financial information).[23] Liberalization of financial services would allow suppliers to supply certain financial

[21] *Id*. 18-19.
[22] *Id*. 19.
[23] *Id*. 20-25.

services on cross-border basis in reinsurance and retrocession, insurance intermediation, and services auxiliary to the provision of insurance.

Although Jordan undertook commitments in the financial sector, it imposed several restrictions. These restrictions include the type of establishment allowed.[24] Therefore, suppliers do not have the freedom to choose a preferred form of commercial presence whether as branch, subsidiary, or joint venture. Other restrictions include level of equity participation and permitted business lines.[25] Other than these restrictions, there are no limitations on the number of service suppliers (in the form of quotas, exclusive providers, or economic needs tests), local currency lending restrictions, restrictions on geographical expansion, and capital requirements.

In tourism and travel-related services, Jordan imposed several market access restrictions that include exclusivity, citizenship requirements, and foreign equity participation.[26] In recreational services, Jordan offered substantial market-opening concessions.[27] In transport services, barriers exist for establishment of a commercial presence.[28]

Under article II of GATS, MFN treatment means measures should be applied to all service transactions without discrimination among countries. However, members are permitted to list MFN exemptions in the service sector. Currently, Jordan listed 12 MFN exemptions.[29] Four exemptions are cross-sectoral exemptions related to movement of natural persons (e.g. work permit fees) or investment (e.g. preferential measures and purchase of land). Eight of the exemptions are sector-specific exemptions. These sector-specific exemptions related to professional services,

[24] *Id*. 20.
[25] *Id*. 22.
[26] *Id*. 26-27.
[27] *Id*. 28.
[28] *Id*. 29.
[29] *Id*. 36-39.

audiovisual services, travel-related services, press services, and land-based transport services.

The twelve MFN exemptions apply indefinitely. Therefore, Jordan may not need to phase out these exemptions. However, in future trade negotiation rounds, Jordan could eliminate MFN exemptions. It is unclear to what extent some of these exemptions are applied in reality or have substantial significance.

Jordan made market-opening commitments across whole range of services from business and telecommunications to education and transportation. The service sector coverage is relatively complete. However, there are differences in service sectors with broad liberalization as well as full bindings in education, telecommunications, and recreational services while imposing limits on financial services, auditing services, and architectural and engineering services. Most of Jordan's limitations on market access are in the form residency limits, form of legal entity, foreign equity, and nationality.

It is obvious that GATS provided Jordan some flexibility in scheduling its commitments to liberalize trade in services. However, this flexibility could be challenged by recent WTO dispute settlement cases such as Mexico's telecom case and the U.S. gambling case.[30] Therefore, Jordan must take care in scheduling future commitments. Jordan could liberalize sectors but without being written in its schedule of specific commitments. Jordan could modify or withdraw some of its commitments under GATS but other countries would seek compensatory trade concessions. Jordan is building a new economy based on knowledge-based industries. Trade in services may offer Jordanian service providers, many of which are small and medium-sized businesses, great potential of opportunities.

[30] See Report of the Panel on Mexico-Measures Affecting Telecommunications Services, April 2, 2004, WTO Doc. No. WT/DS204/R. See also Report of the Panel on United States-Measures Affecting the Cross-border Supply of Gambling and Betting Services, Nov. 10, 2004, WTO Doc. No. WT/DS285/R.

II. Trade in Services in the US-JO FTA

The multilateral trading system of the WTO does not cover only trade in goods but it also covers trade in services. Parallel to the WTO discipline on trade in services, the US-JO FTA includes a provision for trade in services in article 3. As the report of the Office of Economics within the USITC indicated there is low level of trade, including trade in services, between the U.S. and Jordan.[31] However, as the two parties expect that the FTA would expand trade, it was important to insure that trade in services flows freely between the two countries. Therefore, this provision will serve to insure that the current trade barriers faced by the services suppliers of either party in the market of the other will be reduced, any new barriers will not be instituted, and the preferential treatment afforded to the service suppliers of the other party, if any, will be secured. The FTA might spur the exports of services by Jordanian firms. In addition, it might encourage joint ventures between U.S. and Jordanian firms, thus it will increase foreign direct investment ("FDI") through commercial presence.

In the US-Israel FTA, article 16 covers trade in services. It provides a general rule, rather than a detailed provision. It states "the parties recognize the importance of trade in services and the need to maintain an open system of services exports which would minimize restrictions on the flow of services between the two nations. To this end, the parties agree to develop means for cooperation on trade in services pursuant to the provisions of a [Declaration] to be made by the parties".[32] This short language reflects the still not yet developed comprehensive coverage of trade in services before the launch and conclusion of the Uruguay Round.

[31] See *supra* note 795.
[32] See US-Israel FTA, 24 I.L.M. 657,664 (1985).

The "declaration" between the U.S. and Israel for trade in services, made according to article 16 of the US-Israel FTA, is not legally binding.[33] The rules in the declaration of trade in services are "best endeavors". This means that any violation of rules of the services declaration will not be subject to the dispute settlement mechanism under the US-Israel FTA. Moreover, the declaration is limited to one mode of supplying services. It defines trade in services as a trade that takes place when a service is exported from the supplier nation and is imported into the other nation.[34] Moreover, the commercial banking services, under the US-Israel FTA, are limited to the activities of representative offices. Thus, it excludes commercial presence by establishing branches, agencies, or subsidiaries. The declaration encompasses national treatment whereby no preferential treatment will be afforded to domestic supplier of services but not extended to foreign supplier of services. It also encompasses transparency whereby all domestic laws and regulations affecting trade in services will be made public and notified to the other party and each party will provide to the nationals and companies of the other party reasonable access to established domestic review and judicial proceedings relative to regulations on trade in services.[35]

On the other hand, the US-JO FTA provides for a legally binding commitment in the four modes of supply identified in article 1 of GATS in terms of market access and national treatment.[36] These modes of supply are cross-border supply, consumption abroad, commercial presence, and temporary presence of natural persons. According to subparagraph 2.a of article 3 of the US-JO FTA, each party will

[33] The preamble of the declaration states "that, although the principles set forth below shall not be legally binding, they shall endeavor to the maximum extent possible to conduct their policies affecting trade in services between them in accordance with those principles". *Id*. 679.
[34] *Id*.
[35] *Id*. 680.
[36] US-JO FTA, *supra* note 810, art. 3.2.a.

accord to the service and service suppliers of the other party treatment no less favorable than it agreed to in its services schedule. Moreover, no limitation will be imposed on the service supplier of the other party, unless such limitation is reserved in its services schedule. These quantitative and qualitative limitations are inscribed in article XVI.2.a-f of GATS related to the number of service suppliers, the total value of service transactions, total number of service operations, total number of natural persons, measures that restrict or require specific types of legal entity, and limitation on the participation of foreign capital. In other words, these limitations must be recorded in either Jordan or the U.S. service schedule, otherwise either party cannot impose such limitations later on time.

The purpose of the service provision in the US-JO FTA is to prevent discriminatory treatment between foreign suppliers of services and like domestic suppliers of services.[37] Moreover, it ensures that there is a minimum threshold of treatment below which a party cannot treat the service provider of the other party. In other words, a U.S. firm will operate in Jordan by marketing its services under the same conditions required for a Jordanian firm that market like services. The national treatment principle does not cover only measures taken that on "their face" treat services and service suppliers of the other party no less than its own services and service supplier. It covers also measures that on their face might seem neutral but on the subsurface they discriminate against the other's party services and service suppliers. For example, trade officials in Jordan might devise a scheme in which at first glimpse seems origin neutral but closer examination reveals that the scheme in question discriminates against U.S. service suppliers. Moreover, it does not matter whether the measure has trade effect on the U.S. service supplier or not. The purpose

[37] " each party shall accord to services and services suppliers of the other party, in respect of all measures affecting the supply services, treatment no less favorable than that it accords to its own like services and service suppliers". See US-JO FTA, *supra* note 810, art. 3.2.b.

of the national treatment sacred principle is to protect the opportunities or expectations of a competitive relationship.

The first sentence of article 3 reads "This article applies to measures by a Party affecting trade in services between the Parties".[38] It does not define what these measures are. However, the word "measures" should be read as broadly as possible so as to cover any measure taken by either party that may run afoul of its obligation under article 3 of the FTA. Of course, such a violation will depend on whether that the party invoking such a measure has taken a commitment in the service sector in question and in what mode of supply it is committed. This reading of article 3.1 of the FTA is supported by the subparagraph 3.4.a.[39] Since subparagraph 3.4.a makes clear reference to GATS, our guide is article XXVIII (Definitions) of GATS. Measure, in article XXVIII of GATS, is defined as "any measure" by a member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form. Moreover, the phrase "measures by members affecting trade in services" is defined to "include" measures in respect of the purchase, payment or use of service, the access to and use of, in connection of with the supply of a service, services which are required by those members to be offered to the public, the presence, including commercial presence, of persons of a member for the supply of a service in the territory of another member. This list is exemplary and is not meant to be exhaustive as the use of the word "include" hints. Additionally, subparagraph 3.1 of the FTA does not define "services". However, the determinative factor on which one should judge how to define this term is by examining the services schedule of the party to see whether it has taken commitment in the service sector in question.

[38] *Id*. art.3.1.
[39] Article 3.4.a of the FTA reads "Unless they are specifically defined in this Article or in the Services Schedules to Annex 3.1, terms used in this Article and such Services Schedules that are also used in the GATS shall be construed in accordance with their meaning in the GATS, *mutatis mutandis*".

Any commitment taken by Jordan or the U.S. in market access and national treatment will give rise to rights and obligations as if that commitment was inscribed under GATS.[40] The subparagraph then proceeds to specify which GATS' article is incorporated within the FTA that give rise to rights and obligations. These are GATS article III *bis* (disclosure of confidential information), VI (domestic regulation), VII (recognition), VIII (monopolies and exclusive service suppliers), IX (business practices), XI (payments and transfers), XII (restrictions to safeguard the balance of payment), XIII (government procurement), XIV (general exceptions), XV (subsidies), XVI (market access), XVII (national treatment), XX (schedule of specific commitments), and XXVII (denial of benefits).[41] This affirms the legally binding nature of the services commitments under article 3 of the US-JO FTA. However, this subparagraph has a footnote in which both parties agree that the U.S. commitments in the financial services sector are the same as the commitments taken under the WTO understanding on commitments in financial services. It seems that the U.S. did not want to liberalize further its commitments in the financial services sector.

Jordan, in its GATS service schedule, exempted certain countries from the MFN treatment based on reciprocity.[42] The possibility for derogation from MFN treatment under GATS was perceived as necessary because, perhaps, there was lack of reciprocal concessions in specific commitments. However, the U.S. meets these

[40] *Id*. art. 3.2.c.ii.
[41] Article XXVII (denial of benefits) of GATS is of particular importance for purpose of this section. It resembles rules of origin, but for services. It states that a WTO member may deny the benefits of GATS if a service is supplied from non-member. Therefore, the focus is on the nationality of supplier. If the service provider is a natural person, article XXVIII.k of GATS provide that a natural person of a state is generally one who is a national. In some cases, permanent residency is sufficient. A juridical person is defined as one that is either constituted or otherwise organized under the law of the other state "and" is engaged in substantive business operations in the state of "any" WTO member. However, in the context of the FTA, the latter definition might be problematic to administer. For example, a corporation organized under U.S. law, on paper, but has substantial business operations in EC might be considered a U.S. supplier for purposes of the FTA, even though it might be U.S. on paper only. In this case, it might be appropriate to require that the corporation have substantial business operations in the U.S. to benefit from the FTA.
[42] *Id*. art. 3.3.

reciprocity requirements and thus it will be eligible for the special treatment for its services and service suppliers by Jordan.[43]

Article 3.4.b of the US-JO FTA refers to GATS provisions as they are on the date the FTA comes into force. Thus, any further developments through negotiations under the WTO that could liberalize further trade in services or adopt new disciplines on services will alter the U.S. and Jordan's commitments under the FTA "only" if it is appropriate to do so and after consultations. In other words, the FTA states that it was drafted in 2000 and at that time it did not take into account any future WTO negotiations in services that might occur.

Jordan, in the US-JO FTA, made further liberalization commitments of trade in services more than it made in its accession to the WTO. As such, it gave U.S. suppliers of services preferential treatment in many sectors. For example, Jordan made new commitments in veterinary services.[44] In addition, it took further liberalization in research and development subsector where no limitation on commercial presence in market access is imposed, while under its schedule of specific commitments of the WTO it imposed a 50% foreign equity limitation.[45]

Furthermore, Jordan permits full ownership regarding leasing and rental services of ships without operators as of January 1, 2002 as compared with its service schedule in the WTO where it imposes 50% foreign equity limitation.[46] Jordan opened its advertising service subject to 50% foreign equity.[47] It took also further liberalization

[43] Jordan, perhaps, judged that the U.S. made equivalent concession in its services schedule based on a number of factors. For example, type of service sectors that the U.S. opened, size of service sectors, or economic impact of opening services sector. Also, Jordan, perhaps, crossed different sectors to measure that the U.S. made equivalent concession in its service schedule. For example, Jordan might required greater market access for its textiles products in return for opening its telecommunications market.
[44] See US-JO FTA, Jordan Schedule of Specific Commitments, annex 3.1, page 7, at <http://www.ustr.gov/regions/eu-med/middleeast/ann31Jor.pdf >.
[45] *Id*. at 9.
[46] *Id*. at 10.
[47] *Id*. at 11. This is compared with a majority of ownership be Jordanians as required in its WTO service schedule

commitments regarding public opinion polling services, services incidental to agriculture, manufacturing, services incidental to fishing, services incidental to energy distribution,[48] and convention services.[49] It even opened placement and supply services of personnel.[50] In other words, Jordan permits the establishment of employment offices subject to 50% foreign equity limitation which may exacerbate the brain drain phenomenon in Jordan!

Jordan did not impose limitation on cross-border supply or consumption abroad concerning printing and publishing. However, it imposed 60% of foreign equity limitation regarding commercial presence of printing and publishing houses.[51] This could be interpreted as an attempt by Jordan to protect its cultural services. Now, under the US-JO FTA, U.S. suppliers of courier services will have 100% ownership as of Jan. 1, 2002 while under the WTO foreign suppliers will have 100% ownership no later than Jan.1, 2004. This would be considered a boon for Federal Express and USPS that are already doing business in Jordan.

Perhaps one of the most sensitive areas where Jordan further liberalized its service sector is the audiovisual sector. Jordan opened its audiovisual sector to U.S. Hollywood industry. It did not impose limitations, such as quotas, on cross-border supply and consumption abroad of movies and music.[52] However, it imposed 50% foreign equity ownership regarding commercial presence in film theatres and retail establishments. The audiovisual sector is of great importance for the U.S. which, by

[48] Energy does not occupy specific chapter within the US-JO FTA, as compared with NAFTA chapter 6 on energy, but it was included in the services provisions. This is could be interpreted that the U.S. is not interested in the energy sector of Jordan, which is limited in scope. Even though, Jordan committed to energy distribution, it imposed a limitation on commercial presence by requiring approval from the Cabinet and the number of service providers can be restricted. This could be interpreted so as to mean that Jordan's government will play a role in the energy sector and it will exercise control over this vital sector. Hence, Jordan can refuse to issue a license to operate an energy distribution services.
[49] *Id*. at 12.
[50] *Id*. at 11.
[51] *Id*. at 13.
[52] *Id*. at 16.

and large, the world's largest exporter of such services. A related sector is primary, secondary, and higher education whereby Jordan did not impose limitations on consumption abroad and commercial presence.[53] These commitments might promote privatization of services in the education sector for example.

Jordan took new commitments related to the so-called environmental services concerning collection and treatment of solid waste excluding collection and treatment of hazardous waste.[54] It imposed a 50% foreign equity limitation on commercial presence for clean-up environmental services. However, it did not change its already agreed upon commitments concerning sanitation, cleaning services of exhaust gas, and noise abatement services. The U.S. may deliver machinery and expertise to help Jordan in improving its environmental services especially that the US-JO FTA has an article concerned with the environment.

Jordan locked in its commitment to liberalizing trade in banking and insurance.[55] Moreover, it made new commitments in this sector. It opened its agency service, money brokering, all payments and money transmission services, credit charge and debit cards, travelers cheques and bankers drafts. Jordan is committed to market access and full foreign ownership of financial entities, including for the first time credit card companies which may invigorate tourism.

Regarding health related and social services, Jordan would no longer require foreign equity limitation as of 2002, while under the WTO until 2004.[56] This means that there might be privatization in this public sector. In the tourism sector, Jordan

[53] *Id*. at 18.
[54] *Id*. at 20.
[55] It may be difficult for U.S. banks to lend money in Jordan, especially for start-up manufacturing projects, because of different lending laws and practices in the U.S. and Jordan. Lending system in the U.S. is a system in which loans are secured by personal property instead of real property. In case of default, a bank in the U.S. may seize the collateral for a loan without court intervention. It is based on self-help enforcement. Therefore, a U.S. bank may sell off the collateral while waiting the final judgment. In Jordan, by contrast, a bank must go through lengthy and complex judicial proceedings before it can seize on the collateral in case of default.
[56] *Id*. at 24.

opened its meal serving services and beverage serving services subject to 50% foreign equity in case of commercial presence, except if such services are offered in hotels, motels, or tourist's classified restaurants.

Jordan made new commitments in the maritime transport services including passenger and freight transportation services.[57] However, it imposed limitations on the delivery of these two services through requirement to appoint a local port agent, nationality requirements for ownership and registration of vessels under the national flag of Jordan, 50% foreign equity ceiling, and 1/5 of the crew on Jordan's ships must be Jordanians.[58] These limitations serve the purpose of protection labor. In maritime auxiliary services, Jordan made specific commitments maintenance and repair services, with 60% foreign equity, in addition to the already committed services with regard to storage and warehousing, freight agency and freight forwarding, and food supply catering. This means that Jordan has opened its port to the U.S. service providers. Moreover, Jordan opened its internal water transport to the U.S. service suppliers.

In the air transport sector, Jordan opened its maintenance and repair of aircrafts with regard to commercial presence subject to 60% foreign equity limitation.[59] As such, Boeing, the U.S. giant aircraft company, can deliver repair services to Jordan's national airline. Finally, Jordan opened its rail transport system to U.S. service suppliers.[60] However, with regard to commercial presence, Cabinet authorization is required.

[57] Jordan did not take new commitments with regard to use of port facilities such as towing, pushing, and tug assistance.
[58] *Id*. at 28.
[59] *Id.* at 31.
[60] The Jordanian government must own the infrastructure and the number of service providers may be limited. *Id*. at 32.

Of particular importance to Jordan, where its comparative advantage may exist, regarding U.S. services schedule is movement of natural person (Mode 4). As it stands today, most temporary entry into the U.S. is limited to executives, managers, or specialists of a foreign company that has physical presence in the U.S. in the form of branch, subsidiary, or affiliate.[61] Temporary entry is limited to three years with one-time two years extension. Therefore, U.S. commitment covers intra-corporate movement of senior personnel but not to other categories of workers. Moreover, a corporate employee cannot move across the border to the U.S. unless there is a commercial presence for example through a subsidiary for a Jordanian firm in the U.S. This would make it difficult for Jordanians to meet this commercial presence condition.

To practice law, a natural person has to be a "qualified U.S. lawyer" and maintain in-state office in some states.[62] Therefore, local licensing arrangements govern who can and cannot practice law in a certain jurisdiction. Local bar associations in the U.S. determine market entry. Admission into the U.S. legal market is often conditioned upon satisfaction of certain educational, residency, and citizenship requirements.[63] Consultancy is permitted on the law of jurisdiction where the service provider is qualified as a lawyer. Lawyers may also serve as "foreign legal consultants". In this case, practice as a foreign legal consultant is based on objective criteria such as registration, experience, good standing in home-country bar, and competence and ability to provide the service in question. In some states, such as California, a foreign

[61] See U.S. Service Schedule, 4, at <http://www.ustr.gov/regions/eu-med/middleeast/ann31US.pdf>.
[62] Qualified lawyer means that a natural person must meet bar association and other requirements of each state in the U.S.
[63] U.S. citizenship is required for practice before the U.S. Patent and Trademark office. There are certain states that require in-state office or U.S. residency. See U.S. Service Schedule, 17-34, at <http://www.ustr.gov/regions/eu-med/middleeast/ann31US.pdf>.

legal consultant cannot practice U.S. law.[64] He/she is permitted to practice foreign law only. Jordan permits consultancy on foreign law only. U.S. and Jordan commitments concerning legal services reflect the fact that practice of law is locally based and, as a result, it may be more difficult to establish free mobility for legal service providers.

In telecom, the U.S. ensures access to the provision of value-added telecommunications services such as telex, telegraph, and facsimile.[65] The financial services sector, among other commitments, some states in the U.S. for example impose a 3/4 citizenship rule for the directors of depository financial institutions.[66] The U.S. audiovisual sector is open.[67] However, it is doubtful if the film industry in Jordan, if there is one, might be able to export its films to the U.S. since there might be lack of demand on such films. The U.S. carved out from its service schedule passenger air transportation and maritime transportation. On the other hand, Jordan opened its port facilities for U.S. service providers.

Against this background, it is clear that the US-JO FTA permits trade in a wide range of services offered by U.S. institutions. For example, Jordan made new commitments that cover veterinary, audiovisual, health and education, and maritime transportation services. The U.S. service schedule in the FTA is its GATS schedule with no modifications.[68] This might reflect that the U.S. maintains a relatively open service sector. Therefore, there was no need to take new commitments. The U.S. GATS schedule does not contain commitments in a core sector such as maritime. Whatever the rationale, it is clear that Jordan made further commitments than that of the U.S.

[64] *Id*. at 18.
[65] *Id*. at 45.
[66] *Id*. at 78.
[67] *Id*. at 50.
[68] Indeed, the U.S. services schedule of the US-JO FTA makes reference to liberalization dates for certain sectors such as road transport as of 1997 knowing that the US-JO FTA was concluded in 2000. *Id*. at. 90. For comparison, see U.S. Schedule of Specific Commitments, April. 15, 1994, WTO Doc. No. GATS/SC/90.

Thus, the US-JO FTA service sector can be dubbed "GATS-Plus", it is true for Jordan, since it goes beyond what commitments were undertaken in GATS.

Trade in services is a major trade issue for the U.S. It is the reality one must recognize is that the U.S. is a major service exporter in areas such as motion picture, banking, and franchising, just to mention few. Indeed, the U.S. was among the leaders to recognize the importance of trade in services and to push hard for its inclusion in the Uruguay Round. It might be virtually impossible to analyze precisely what effects these commitments will have on Jordan's marketplace and its infant service sector.

It seems that the US-JO FTA adopted a negative list (full box) approach meaning that all service sectors are included in the parties' service schedules by default, unless positively excluded. This approach allows for wider coverage of service sectors compared with GATS positive list approach. The positive list approach means that GATS' parties list the service sectors they wish to be covered with non-listed service sector considered excluded.

The US-JO FTA does not address rules of origin of service suppliers.[69] It seems that the FTA leaves to each party the right to determine rules of origin for trade in services. However, since the FTA uses the word "of" in article 3.2.a it could be said that it adopts the nationality criteria. Nationality would be based on citizenship for natural person such as in the case of professional services. Moreover, nationality could be based on ownership or control for juridical person such as in the case of financial services such as banks.

Compared with the very low level of trade in services between the U.S. and Jordan, the North American services market is sizable one, estimated to be as large as

[69] Article 3.2.a states "each party shall accord services and service suppliers "of" the other party …". See US-JO FTA, *supra* note 810, art. 3.2.a.

$4.2 trillion in 1993.[70] As such, it is no surprise that NAFTA has multiple chapters that are related to the service sector in comparison with one article that is concerned with trade in services in the US-JO FTA. NAFTA liberalizes trade-related services, in chapter 12, by applying the basic principles of national treatment and MFN treatment to the service sector.[71] Under NAFTA, each party must accord "the better" of national or MFN treatment to the other NAFTA countries.[72] Additionally, NAFTA eliminates the requirement that a service provider must establish a local presence before provision of services.[73] Even though NAFTA liberalizes trade in services, a party can still impose some restrictions on service including federal, state, or provincial reservations, non- discriminatory quantitative restrictions, licensing and certification requirements, denial of benefits to specific firms, and exclusions.[74] Some of these limitations resemble the limitations of article XVI of GATS such as limitation on the number of service providers.

Chapter 12 of NAFTA does not address telecommunication and financial services since chapter 13 and 14 of NAFTA respectively cover these two sectors. Moreover, chapter 12 of NAFTA does not apply to energy and petrochemical service sector since chapter 6 governs it. Chapter 12 also does not apply to investment since chapter 11 is concerned with investment. Article 1201.3 (b) might be read to exclude law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health and child care from

[70] The U.S. services sector employs about 79% of the U.S. work force and accounts for about 52% of the U.S. GDP. See Harry G. Broadman, *International Trade and Investment in Services: A Comparative Analysis of NAFTA*, 27 INT'L LAW. 623, 624 (1993).
[71] It provides that each party treats another party's service provider with a treatment not less favorable than it accords it own. Moreover, it states that each party has the obligation to accord no less favorable treatment to another party's service provider than accorded to another arty or non-arty. See arts. 1202, 1203, *supra* note 830.
[72] *Id*. art. 1204.
[73] *Id*. at 1205. In the past, Mexico has made the ability to provide various services explicitly contingent on establishment of a commercial presence in the local market. See Broadman, *supra* note 895, at 637.
[74] See *supra* note 830, arts. 1206, 1207, 1210, 1211.

the coverage of chapter 12 of NAFTA.[75] On the other hand, Jordan for example opened its education sector to any service provider of the U.S.

In nutshell, chapter 13 of NAFTA is concerned with telecommunication services. It obliges each party to insure that its public telecommunications transport network or service is accessible to the service suppliers of the other party.[76] Moreover, it obliges that each will ensure that any licensing relating to the provision of value added services is transparent and nondiscriminatory.[77]Finally, each party will ensure that its standards related measures related to the attachment of a terminal to the public telecommunications transport networks are not disguised trade barriers.[78] The telecommunication chapter to a great extent reflects GATS since it covers telegraph, telephone, telex, and data transmission. Chapter 14 of NAFTA covers financial services. It obliges each NAFTA party not to adopt any measure that restrict cross border trade in financial services.[79] It obliges each NAFTA party to accord national and MFN treatment to other NAFTA financial institutions.[80] It has also certain exception whereby a NAFTA country may take reasonable measures for "prudential reasons" such as the maintenance of safety, soundness, and integrity of its financial institutions.[81]

Perhaps one of the most important articles or chapters of the proposed US-Middle East FTA would be the energy sector.[82] Many countries in the Middle East possess a

[75] For example, NAFTA's annex II shields Canada from market access provision ay health care that is considered a "social service" established or maintained for "public purposes".
[76] *Id*. art. 1302.1
[77] *Id*. art. 1303.1.
[78] *Id*. art. 1304.1.
[79] *Id*. art. 1404.1.
[80] *Id*. art. 1406.1.
[81] *Id*. art. 14101
[82] In the context of the US-Canada FTA negotiations, energy was described as perhaps the principal driving force that led to that agreement because of the oil trade war between them that invoked quotas and minimum import and export price restrictions. On the other hand, the energy negotiations in NAFTA started later in time. See Reinier Lock, *Mexico-United States Energy Relations and NAFTA*, 1 U.S.-MEX. L. J. 235, 237-38 (1993). For the U.S., chapter 9 of the US-Canada FTA concerning energy

comparative advantage, if not the only comparative advantage they possess, in this vital sector.[83] Additionally, it is fair to say that the experience of 1973-74 oil price shock has been resurrected, albeit differently, in the political and economic climate of 2001 onward, which makes trade in energy and petrochemical products a central issue. Moreover, at present, the U.S. consumes an average of 19.65 million barrels of oil per day and produces only 8.95 million barrels per day.[84] As obvious, the U.S. is a very large consuming market. The problem in energy trade negotiations is how the trade rules sufficiently intrusive on domestic energy regulation and monopoly structures will apply without causing a political backlash.[85] Therefore, it is important to analyze the experience under chapter 6 of NAFTA.[86]

NAFTA chapter 6 covers the energy sector. It applies to energy and basic petrochemicals. It covers oil, crude oil and refined product, natural gas, electricity, and coal. Basic petrochemicals covers derivative of the oil and gas production

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was to secure a stable supply of energy products, through the creation of a "de facto continental energy market". See Anne Marie Godin, *Canada's International Obligations to Provide Energy under the IEP, GATT, and NAFTA*, 1 GREAT PLAINS NAT. RESOURCES J. 45, 58 (1996)

[83] Those oil-Arab exporting countries run into the "Dutch disease". It is characterized by over-dependence on major commodity, oil, new technologies, and higher prices for this commodity. The large inflows of revenues from oil lead to a stronger local currency. This undermines the export competitiveness of other industries. In other words, strong currency (or one should say expensive currency) make export bill of oil cheap, while export bill for other commodities expensive.

[84] 13% of the U.S.'s total net imports of energy are from the Persian Gulf. See Stacey L. Middleton, *How the Petroleum Addict Negotiates with the Dealer: Challenges to the Bush Administration's North American Energy Policy*, 11 CARDOZO J. INT'L & COMP. L. 177, 178, 184, 209 (2003) (U.S. increase demand on imports is the result of U.S. reservation of its own oil-rich lands for endangered species such as the caribou, polar bears, and other wildlife. At the same time, Canadian corporations are depleting Canada's natural resources to meet U.S. The U.S. may commit to a long-term energy plan of both increased domestic drilling and increased fuel efficiency. It is imperative for the U.S. also to develop a strong energy policy with Canada and Mexico, thus strengthening its economic position against the Middle East by slowing or even halting trade with this volatile region). However, the U.S. is not halting trade with the Middle East. On the contrary, it proposed a free trade area with that region. As such, the FTA would increase interdependence (or dependence) with Middle East for oil not the opposite.

[85] See Lock, *supra* note 913, at 239.

[86] The energy sector will be discussed in the service section since the WTO contains neither an explicit nor an implicit reference or exemption for energy. Many of the issues of international trade in energy are generally addressed in the Organization of Petroleum Exporting Countries ("OPEC"). Moreover, exploration, exploitation, and transportation are considered services.

sector.[87] The NAFTA parties recognize the important role that trade in energy and basic petrochemical "goods" play the free trade area.[88] Since energy and basic petrochemicals are considered "goods", NAFTA parties agreed to apply GATT rules for trade in goods on the energy sector.[89]

Chapter 6 prohibits quantitative restriction on imports or exports of energy and basic petrochemical products and minimum and maximum export or import price requirements.[90] It prohibits imposing tax on the export of petrochemical products unless it is imposed on products for domestic consumption.[91] Moreover, NAFTA permits performance incentives in service contracts, which might be used for activities such as oil drilling.[92] The US-Canada energy sector will continue to be covered by the US-Canada FTA.[93]

NAFTA allows a party to impose restrictions on imports or exports of energy and petrochemical products to non-party of NAFTA.[94] In this case, the NAFTA party that impose such restrictive measures may prohibit or limit the importation of such products from other NAFTA party if these products were originally came from the non-NAFTA party that is subject to trade restriction measures for example oil from Iran. Moreover, the NAFTA party invoking such measures may condition its exports to other NAFTA party that oil products for example must be consumed domestically in the latter's market. It is obvious that the purpose of such article is to prevent, directly and indirectly, the import or export of non-party products.

[87] See art. 602.2, *supra* note 830.
[88] *Id*. art. 601.
[89] *Id*. art. 603.1.
[90] *Id*. art. 603.2.
[91] *Id*. art. 604.
[92] *Id*. art. 608.1.
[93] *Id*. annex 608.2.1
[94] *Id*. 603.3.

A NAFTA party may restrict imports or exports of energy and petrochemical goods on the basis of conservation of exhaustible natural resources, insure domestic supply, and the distribution of such goods in the local market.[95] However, there are three conditions that must be met. First, such restriction shall not reduce the total proportion of such exports relative to the total exports of the importing party for the 36 months preceding the adopting of restrictive measures. Second, the party invoking such restrictions shall not increase the price of its exports than if the products were consumed domestically. Third, the restriction shall not disrupt the normal channels of supply of the exporting country. Mexico is exempted from such provision by virtue of annex 605.

Chapter 6 incorporates national security exceptions as found in GATT. However, these exceptions are narrow in scope in NAFTA. For example, imposing restrictions on imports or exports of petrochemical products is limited to supply a military establishment of fulfillment of a critical defense contract on a NAFTA party.[96] The purpose of limiting national security exceptions is to respond to what was known as the "barn door" policy of 1970s between the U.S. and Canada.[97] In other words, the limitation on the language of national security exceptions serves the purpose of avoiding the abuse of national security exceptions. If a specific chapter or article of the proposed US-Middle East FTA addresses the energy sector the NAFTA approach should be adopted so as to prevent trade restrictive measures from impairing the most important vital industry of these countries.

[95] *Id*. art. 605.
[96] *Id*. art. 607.a.
[97] However, Mexico did not accept the narrower version of GATT national security exceptions. Therefore, annex 607 excludes the application of the narrow version between the U.S. and Mexico. See Lock, *supra* note 913, at 245.

Mexico carved out certain "strategic activities" for certain products from the liberalization commitments of chapter 6.[98] These excluded activities include exploration and exploitation crude oil and natural gas, refining or processing of crude oil and natural gas, production of artificial gas, and basic petrochemicals and their feed stocks and pipelines. It may also exercise its prerogative to manage foreign trade, transportation, storage and distribution of such goods. Mexico may also manage the supply of electricity as a public service and exploration, exploitation and processing of radioactive minerals.[99] These exceptions are tied with the first sentence of NAFTA chapter 6. It states that the parties confirm their full respect of their constitutions.[100] Article 27 of the Mexican constitution of 1917 included a provision, article 27, that natural resources are the property of the Mexican nation.[101] Mexico has a self-pride in oil. It has an old slogan, "nuestro petroleo", translated "the petroleum is ours".[102] Hence, PEMEX will maintain its management of basic petrochemicals as mandated by the Mexican constitution.[103]

It is obvious that chapter 6 of NAFTA is unique to certain extent, which reflects the specific energy situation in the NAFTA region. At the end of the day, every NAFTA party achieved its goal in the negotiations of trade energy. Mexico retained

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[98] See annex. 602.3, *supra* note 830.
[99] However, in annex 602.3 of NAFTA, end-users and suppliers of natural gas and basic petrochemical goods are permitted to enter into cross- border supply contracts.
[100] *Id.* art. 601.1.
[101] Since the natural resources are the property of the nation, Mexico expropriated foreign companies ownership over these resources. The expropriation also resulted in the creation of the state-owned company called Petroleos Mexicanos, also known as PEMEX in 1938. See Richard D. English, *Energy in NAFTA: Free Trade Confronts Mexico's Constitution*, 1 TULSA J. COMP. & INT'L L. 1, 5 (1993).
[102] See Ewell E. Murphy, Jr., *The Prospect for Further Energy Privatization in Mexico*, 36 TEX. INT'L L.J. 75, 76 (2001) (citing and discussing examples of Mexico's self-pride in the expropriation of its oil industry as part of the its culture).
[103] The power over development of basic petrochemicals delegated to PEMEX by the Mexican Constitution was initially intended to return control of a valuable natural resource, oil, from foreign investors back to the people of Mexico. See Kristin Moody-O'Grady, *Natural Resource and Energy management and a harmonized NAFTA Competition Policy: Policy Challenges and Conflict*, 5 TOURO INT'L L. REV 139, 146, 151 (1994).

its control over its natural resources. The U.S. and Canada specifically targeted quotas and minimum and maximum export and import prices.

The US-Middle East FTA should adopt the Mexican approach for trade in energy considering perhaps the same political and economic factors that influenced the drafting of chapter 6 of NAFTA. Many Middle Eastern oil-exporting countries have constitutional provisions.[104] They must maintain their nationalistic sentiments. Also, they ought to maintain their state-owned enterprises for the oil industry. They must insist on carve-out provisions for the energy sector such oil exploration and development.

Additionally, of special interest for Middle East countries is to incorporate a specific and clear provision that would address the problem of tariff escalation that oil exports of the Middle East face. Adopting such approach in the proposed US-Middle East FTA would leave some sort of breathing room for Middle Eastern countries. They will exercise control over their natural resources and at the same time they can liberalize some activities if the need arises. Exercising control over energy activities may require capital and expertise, which Arab countries might lack. Therefore, Arab countries must draft carefully what activities they want to manage or liberalize so as to permit capital inflow to maintain investment for new explorations and upgrading the existing ones through joint ventures. A final caution for trade negotiators of Middle Eastern oil-exporting countries: Watch out, the U.S. maybe going after your oil in the US-Middle East FTA.

[104] By all means, Mexico is not the only exception in which its constitution has a provision that natural resources are for the nation. Constitutions of many countries in the Middle East have parallel provisions. For example, see Bahrain CONST. art. 11, Kuwait CONST. art. 21, and Qatar CONST. art. 29.