Reforming Saudi Foreign Direct Investment Laws: The Legal Impact, Challenges and Prospects

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The thesis is submitted in partial fulfilment of the requirements for the award of the degree of Doctor of Philosophy of the University of Portsmouth.

MARCH 2012
Dedication

To my Mother, to HRH Prince Turki AL Faisal, my family and to Professor A.F.M Maniruzzman for their unfailing support over the years.
Abstract

The purpose of this study is to critically examine the legal ramifications of Foreign Direct Investment (FDI) in Saudi Arabia, its connection with the energy sector, and to suggest techniques to bring about a reform in the implementation of FDI from a legal perspective. Saudi Arabia has the world's largest oil reserves. This fact presents the Kingdom with unprecedented opportunities for growth, development and technological, social and economic breakthrough. Oil, its production, sale, regulation and the investment opportunities it affords therefore, is central to any meaningful examination of the future of the Saudi State and indeed the sub region. It is the contention of this thesis that despite the importance of oil and the investment it attracts to the Saudi Arabian economy the country's long and short-term policies remain in a state of underdevelopment. The central task of this thesis, therefore, is to identify the many shortcomings of the Saudi Arabia regulatory system in the area of energy law and international laws as well as international relations and place them in the context of doctrinal analysis that reflect the growing demand for progressive, meaningful and drastic changes. The thesis attempts a holistic diagnosis of the pertinent areas of law, politics and international relations and suggests a drastic root and branch transformation of Saudi Arabia's national policies and even constitutional reforms. The hypothesis that was tested is that there are a long list of identifiable and necessary regulatory framework changes which will enable Saudi Arabia to progress and move the country forward to an enviable status in the international society but that this can only take place when Saudi Arabia ensures that its constitutional and other laws allow it to meaningfully comply with international laws (broadly construed) and practice.

The thesis adopts the doctrinal framework of critical legal studies and socio-legal scholarship in taking positions across a host of crucial reform areas including environmental, human rights, foreign direct investment law and resource exploitation. Specifically the thesis critiques the perceived negative aspects of Saudi Arabian law as well as the inadequacies and inequities of international foreign direct investment law and practice but, on the whole, the thesis takes the bold position that it is more in line with the true national interest and profitable development of the Saudi Arabian state when dealing with matters of international trade and investment to embrace a liberalised legal system free from the religious influence and which is compatible to pertinent international norms.
Principal solutions advanced include the need for constitutional changes in the direction of better democratisation and liberalisation of the polity as a means of further unlocking the potentials of the populace and to facilitate wider participation in business and investment. The scope for massive improvements in professional training and skill developments in areas such as investment law, arbitration and dispute resolution is discussed as well as recommended changes to specific legal regimes of law which will guarantee respect for rights of the ordinary citizens and of investors. The thesis thus provides a blueprint for the transformation of the country in order to attain holistic development and transform Saudi Arabia into a favourite investment destination in numerous sectors but particularly in oil and gas.
Declaration

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

Signed:  
1-June 2012

Farhan AL-Farhan.
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<tbody>
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<td>AMINOIL</td>
<td>American Independent Oil Company</td>
<td>8</td>
</tr>
<tr>
<td>ARAMCO</td>
<td>Arabian American Oil Company</td>
<td>8</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
<td>31</td>
</tr>
<tr>
<td>B2B</td>
<td>Business to Business</td>
<td>129</td>
</tr>
<tr>
<td>CF.</td>
<td>Cost and Freight</td>
<td>44</td>
</tr>
<tr>
<td>CIF.</td>
<td>Cost Insurance and Freight</td>
<td>44</td>
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<tr>
<td>CMA</td>
<td>Capital Market Authority</td>
<td>159</td>
</tr>
<tr>
<td>CSID</td>
<td>Centre for Settlement of Investment Disputes</td>
<td>129</td>
</tr>
<tr>
<td>ESCWA</td>
<td>Economic and Social Commission for Western Asia</td>
<td>153</td>
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<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
<td>1</td>
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<tr>
<td>FOB</td>
<td>Free on Board</td>
<td>44</td>
</tr>
<tr>
<td>GATT (obsolete)</td>
<td>General Agreement on Tariffs and Trade</td>
<td>61</td>
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<tr>
<td>GCC</td>
<td>Gulf Co-operation Council</td>
<td>2</td>
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<tr>
<td>Acronym</td>
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<tr>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
<td>3</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
<td>65</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre of Settlement of Investment Disputes</td>
<td>22</td>
</tr>
<tr>
<td>IP</td>
<td>Intellectual Property</td>
<td>3</td>
</tr>
<tr>
<td>KACST</td>
<td>King Abdul-Aziz City for Science and Technology</td>
<td>145</td>
</tr>
<tr>
<td>KAFD</td>
<td>King Abdullah Financial District</td>
<td>159</td>
</tr>
<tr>
<td>M-bpd</td>
<td>Million barrels per day</td>
<td>150</td>
</tr>
<tr>
<td>MIGA</td>
<td>Multilateral Investment Guarantee Agency</td>
<td>22</td>
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<tr>
<td>MNC</td>
<td>Multinational Corporation</td>
<td>24</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
<td>138</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
<td>9</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-governmental organization</td>
<td>24</td>
</tr>
<tr>
<td>OAPEC</td>
<td>Organization of Arab Petroleum Exporting Countries</td>
<td>19</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development.</td>
<td>154</td>
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<tr>
<td>OIC</td>
<td>Organization of the Islamic Conference</td>
<td>2</td>
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<tr>
<td>OPEC</td>
<td>Organization of Petroleum Exporting countries.</td>
<td>2</td>
</tr>
<tr>
<td>R&amp;D</td>
<td>Research and Development</td>
<td>145</td>
</tr>
<tr>
<td>SAMA</td>
<td>Saudi Arabian Monetary Agency</td>
<td>159</td>
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<tr>
<td>SAGIA</td>
<td>Saudi Arabia General Investment Authority</td>
<td>18</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade And Development</td>
<td>153</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
<td>2</td>
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Petroleum Development Limited v Sheikh of Abu Dhabi (1951), 18 ILR, 144, 149

The Ruler of Qatar v International Marine Oil Company Ltd. (1953), 20 ILR 534

Cameroon v Nigeria ICJ Rep. 2002


Nichols v Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931)

Sheldon v Metro-Goldwyn Pictures Corp., 81 F.2d 49, 55-56 (2d Cir.), cert. denied, 298 U.S. 669 (1936)

Saudi Arabia v American Oil Co (1963) Vol 27 ILR ‘Aramco’

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)

Texaco v Libyan Arab Republic 17 ILM (1978), 59.

Fogleman v Aramco USCA 920 F.2d 278, 285 (5th Cir.1991).


Borealis AB (Respondents) v Stargas et al (Defendants) House of Lords. [2001] UKHL 17
### Glossary of Arabic Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Quran</td>
<td>Also as Koran, Al-Quran, Muslim Holy Book</td>
</tr>
<tr>
<td>Sunnah</td>
<td>Also as Sunna, the tradition of Prophet Muhammad</td>
</tr>
<tr>
<td>Hadith</td>
<td>Also as Hadism an authenticated saying of the Prophet Muhammad</td>
</tr>
<tr>
<td>Hadood</td>
<td>Islamic Penal Code</td>
</tr>
<tr>
<td>Ijma</td>
<td>Consensus of Muslim religious leaders on an issue which has not been clearly defined in either the Quran or the Sunnah.</td>
</tr>
<tr>
<td>Israf</td>
<td>Wasteful consumption of productive resource</td>
</tr>
<tr>
<td>Mudarabaha</td>
<td>Islamic instrument of conducting interest free business</td>
</tr>
<tr>
<td>Riba</td>
<td>Prohibition of usury</td>
</tr>
<tr>
<td>Qiyas</td>
<td>Analogy by reason</td>
</tr>
<tr>
<td>Sharia</td>
<td>Also as Shari’ah, Muslim law system</td>
</tr>
<tr>
<td>Shi’l</td>
<td>Also as Shi’ite, the dominant Muslim sect in Iran</td>
</tr>
<tr>
<td>Sunni</td>
<td>Also as Sunnite, the dominant Muslim sect</td>
</tr>
<tr>
<td>Ummah</td>
<td>Muslim community in general</td>
</tr>
<tr>
<td>Wahhabi</td>
<td>Islamic puritan movement after Ibn-Wahhab</td>
</tr>
<tr>
<td>Zakat</td>
<td>Muslim religious tax</td>
</tr>
</tbody>
</table>
Major Schools of Muslim Jurisprudence

Shaafii  After Imam Muhammad Al-Shafi (767-820 AD)
Maliki  After Imam Malik Ibne Anas (710-795 AD)
Hanafi  After Imam Abu Hanifa (700-767 AD)
Hanbali After Imam Ahmad Ibne Hanbal (780-855 AD)
Chapter 1: INTRODUCTION: RESEARCH QUESTIONS, METHODOLOGICAL APPROACH AND CONCEPTUAL FRAMEWORK

1.1 Statement of the Problem

The purpose of this study is to critically evaluate the legal regime regulating FDI in Saudi Arabia and to determine if it is fit for purpose in light of its domestic realities, its quest for economic development and its international commitments.\(^1\) There is a presumption that the reason why the Saudi Arabian government's efforts to preside over the most advanced investment environment in the Middle East at least in the energy sector has not yielded the full benefits it deserves is because of an inherent tension between a conservative if not moribund system of government and a misunderstanding of the demands of an international investment law. It therefore, becomes important to resolve the question of whether the problems and limited successes of Saudi Arabia as a destiny for investment even with its much envied position as the country with the largest oil reserves is internal or whether there is an inherent incompatibility between its interests and that of its rich investors.\(^2\)

Specifically, the study considers the connection between the pertinent FDI rules and the challenges and prospects of the energy sector which is the main source of the Saudi economy. It is the position of this thesis that oil is the foundation of any future development. Yet, both investor and the national interests cannot be secure if the country is unprotected by advanced legal structure which encourages foreign investors not only in the oil sector, but other fields of investments. Furthermore, can true development be attained without attempts to develop the society holistically at home?\(^3\) It is a truism that the hydrocarbon riches and potentials of the Saudi Arabian


\(^3\) It is worth noting, that the Saudi courts are currently being reorganised. The Saudi Arabian Judiciary Law provides in part for the creation of a new Commercial Court, while a new Grievances Board Law enacted in 2007 has reduced the scope of the Grievances Board's jurisdiction primarily to the resolution of administrative disputes and the enforcement of foreign judgments and foreign arbitral awards. While the Judiciary Law does not specify the precise jurisdiction of the new Commercial Courts, it appears likely that such courts will be the Competent Authority for commercial arbitrations.
state have been central to its economic fortunes for at least the last six decades. Yet, it is possible to argue that economic progress has not translated into technological progress nor has it improved social justice.\(^4\)

Thus, this thesis seeks to identify and critique those issues and factors that may have hampered the socio-legal development of Saudi Arabia, particularly as they may relate to lapses in legal regulation or policy directives. The assumption is that once the law and politics of FDI in oil production and transactions is fine-tuned, giving full regard to the position of Saudi Arabia as a developing state, genuine and sustainable development will emerge. In other words, this work will seek to identify the crucial lessons that must be learnt in light of current realities and international best practices, particularly among other successful developing states. The thesis will identify and evaluate Saudi Arabia’s long and short-term policies in the FDI sector and in relation to its proposed constitutional and on-going constitutional reforms. It is, therefore, admitted *ab initio* that there are complex tasks of internal changes. These would range from internal constitutional reforms to significant changes in dispute resolution processes particularly in international commercial arbitration. One of the most recent cases proving this point in Saudi Arabia is *Emaar and Jadawel*.\(^5\) It is, however,

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\(^5\) One of the most recent cases proving this point in Saudi Arabia is *Emaar and Jadawel*. It has been suggested that the role of one of the most senior member of the royal family acting as lawyer to a party -Jadawel could raise some serious points relating to the whole issue of fair trial under the Diwan Almazalem (Saudi Arabian Board of Grievances). This is because in a traditional monarchy like Saudi Arabia the influence of a Prince in such close connection may have had an impact on the ends of justice. A company owned by Saudi billionaire Mohammed Bin Issa Al Jaber failed in its bid to claim $381m in damages from Emaar, marking the end of a long-running and complex legal battle. Saudi Investment Support Centre, “Dubai’s Emaar, Saudi’s Jadawel settle dispute” available at http://www.sisc.info/category/announcements/ visited 1 February 2012. Thus, although Saudi Arabia is a signatory to the New York Convention since 1994 (Done at New York, 10 June 1958; Entered into force, 7 June. 1959. 330 U.N.T.S. 38 (1959).) and is also party to other multi-lateral treaties, there remains much suspicion about its indigenous arbitral practice which provide for the recognition and enforcement of foreign arbitration awards. Moreover, it can be an indication of the lack of transparency of the legal system since there are no official references from the court or the authorities.
realised that there are also significant problems in international investment law and international economic relations that make the Saudi Arabian effort very difficult.⁶

While the problem the thesis aims to resolve will require adherence to the best traditions of intellectual analysis, and particularly the need to be critical and evaluative, the thesis is certainly not aimed at disapproving or undermining past or present governments of Saudi Arabia.⁷ If anything the thesis aims at a balanced critique of both the Saudi government’s efforts and the external forces (such as multilateral institutions and multinationals) that appear to perpetuate a relationship of exploitation in relation to Saudi Arabia. In this way the thesis will critique the contents of international laws and the actual practice of some investors (including their uncompromising posture) that actually work against the interests of Saudi Arabia and by extension many developing states in similar circumstances.⁸ Hence, the thesis will necessarily examine the role of power relations on investment law, as well as the strength, and limitation of international law widely defined in acting as a channel to provide innovative strategies specific to economic progress of developing states.

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⁷ Western societies took hundreds of years to develop their societies. They colonised and enslaved people all over the world to achieve their development. Nonetheless, even their legal and political systems took a long time in order to reach this stage, unlike other nations or cultures. Yet, countries like Saudi Arabia did not follow the West in its actions in order to achieve its development. Saudi citizens have to appreciate the actions of the authorities that promote the progress of national development. Some may disagree with this argument but it is perhaps better understood from a Saudi citizens’ viewpoint and those living in a developed country. See further Harold J. Berman, *Law and Revolution II* (Harvard University Press, 2003) p. 19. Also see, Samia Satti Osman Mohamed Nour. *Arab Spring: Will more freedom boost knowledge transfer?* 2011, United nation university. Available at: http://unu.edu/articles/science-technology-society/knowledge-transfer-in-arab-world.

1.2. Scope of the study

The centrality of access to energy, and the equitable use of the proceeds from the sale of natural energy resources to the domestic and economic fortunes of developing states is well-understood. This study, therefore, concerns itself solely with the evaluation of the challenges facing and affecting investments in the hydrocarbon resources sectors (i.e. oil and gas) of Saudi Arabia. Thus, although it focuses on Saudi Arabia it considers cross-disciplinary scholarly literature in law, politics, international relations, and economics, especially as it affects developing states in relation to energy investment law and by extensions international environmental security. The study includes within its scope issues of socio-legal relations between and among developing states inter se, and looks at the shared peculiarities with Saudi Arabia in their relations with developed states. It, therefore, includes within its field of enquiry pertinent issues of the critical legal tradition and those of the so-called law of development as it applies generally to developing states.

'Socio-Legal Studies' in the UK has grown mainly out of the interest to promote interdisciplinary studies of law and it is our position that this approach will prove very useful in analysis of the internal factors militating progress in the Saudi state and which have a serious effect on its chances as a choice investment destination.9 We are not referring to Max Travers's, view of Socio-Legal Studies as a subfield of social policy, 'mainly concerned with influencing or serving government policy in the provision of legal services'.10 Neither are we necessarily referring to that aspect that deals with social scientific methods, including qualitative and quantitative research techniques.11 By socio-legal enquiry in this thesis we concentrate on the idea that for a fuller understanding of the topic there is need to go beyond the legalistic or positivistic aspects of Saudi Arabia law alone but we must understand law in its socio context and its interactions with other social sciences including the history and sociology of the people. In other words the relationship of the law, in its many aspects to a social situation should be considered a necessary part of the

understanding of that situation. Critical legal studies refer to an intellectual movement whose members argue that law is neither neutral nor value free but are in fact inseparable from politics. Thus, the critical legal philosophy which we will embrace within the scope of this thesis it is hoped will prove useful in exposing any possible bias in the international legal system which militate against the inclusion of Saudi Arabia among the fast developing economic successes in the international system. Thus, by critical legal scholarship we refer to the widening of our analysis to cover and to critique, aspects of the actions of multinational corporations in developing states, the condemnable practices of investors and the general international investment climate, the subjectivity of international courts and arbitral tribunals and the particular vulnerability of Saudi Arabia to negative international media coverage. These issues are all crucial to understanding the problems and prospects for FDI in Saudi Arabia and in formulating meaningful programs of reform.

14 For instance, allegations that the Royal Dutch Shell committed grievous crimes in furtherance of the corporations activities in the Niger delta area of Nigeria. AJIL, "Contemporary Practice of the United States Relating to International Law" American Journal of International Law, Vol. 103, Issue 3 (July 2009), p. 593. The pertinent issues and connections between economic development and universal human rights will be discussed so as to indicate the imperative directions that will assist the government of Saudi Arabia to usher in an era of genuine and lasting national development. The phenomena of globalization and its strong connections to Westernization and the prevalence of the ideology of economic and societal liberalisation will be considered to the extent that it explains the peculiar challenges faced by Saudi Arabia and other leading developing states. In relation to national law and politics, this thesis will examine efforts of the reigning Saudi King’s or government and its aspirations as well as potentials to implement necessary reforms.
15 Warnke, G., Justice and Interpretation, Cambridge: Polity Press, 1992, 63. It can be said, in some cases, that the judges are mainly restricted and mobilised by their laws and personal political prejudices. Judges are not like international lawyers, who look only to what is rational and applicable to reality; See also Powell B., “Don’t Mess With the Saudis,” FORTUNE, Monday, 28 April 2003, Available at: www.fortune.com/fortune/articles/0,15114,447134,00.html.
1.3. Research Methodology

The methodology used in this work is primarily that of a pertinent literature review. It adopts a socio-legal approach to the analysis of the regulation of FDI in Saudi Arabia. The methodology therefore, attempts to fuse a socio-legal approach with a critical legal approach, whilst not abandoning the realism of international economic relations. Thus, this thesis describes, analyses, and advances solutions to the prescriptive rules governing FDI and the operations of multinational corporations within the Saudi legal system. This study combines international norms and standards with comparative and empirical approaches. Incursions are made both to the fields of public international law as well as international commercial law.

The methodology aims to reveal the injustices of the current system of international trade and investment law which appear to be the causative factors of old wars, assist in the maintenance of an unequal world order, and uphold gross inequities within the Saudi Arabian state. It aims to reveal how trade can be regulated under a new global legal system such as the United Nations, to assist the developmental instincts of developing states. Therefore, the law and practice of the leading international and regional organizations are considered to reveal their role in the development and/or underdevelopment of weaker states. To this extent the treaties and conventions relating to and emanating from the work of the United Nations given that it embodies the relations of the “organised world community” will be discussed. A significant

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16 Some references related to the Saudi government in the thesis are from classified and confidential government records. Thus it is not available to the public or to most researchers but may be available on file with the author.


challenge that besets any enquiry of this nature is the relative dearth of critical legal scholarship (at least in the West) that is specifically related to the Saudi legal system. The result of this is both exacting just as much as it is rewarding. This explains much of the inspiration and desire of the present writer to embark on significant research and engage in original thinking in order to make useful and pertinent connections regarding the relationships between socio economic development of the Saudi people and foreign direct investment, on the one hand, and the interaction between the following.

a) Local or National laws;

b) Cultural Norms and traditions;

c) Islamic law e.g. Shari’ah;

d) Regional laws e.g. EU, GCC;

e) International law e.g. UN, WTO;

f) Bilateral and international treaties.
1.4. Significance and Justification of the study

This study is significant for a number of reasons. In view of various tensions in the Arab world especially in this era of the so-called Arab spring it is necessary to critique the position that there is an inherent contradiction between Saudi law (shari'ah) and modern international laws.\textsuperscript{19} Such enquiry will of course as explained earlier have to be both inward and outward looking. Many decades after the celebrated cases \textit{Saudi Arabia v. ARAMCO}\textsuperscript{20} and \textit{Kuwait v. AMINOIL},\textsuperscript{21} it is important to understand how the cases continue to explain the attitude of the Saudi Arabia state to international investment law and how the reaction to the case continue to define the attitude of investors to development law and practice. These cases are evaluated from different perspectives to give credit to the international dispute settlement mechanisms, such as the International Centre for Settlement of Investment Disputes (ICSID),\textsuperscript{22} The Multilateral Investment Guarantee Agency (MIGA),\textsuperscript{23} and the role of arbitration.

The calls for reforms not only in Saudi Arabia but elsewhere in the Arab world makes it timely for us to revaluate investment laws including arbitral practice and the result of judgments of international courts and to place them in the context of global trends. It is only as a result of such academic enquiry that meaningful reforms may be suggested.\textsuperscript{24} The focus on oil and gas issues is indeed justified because investment in

\textsuperscript{19} The Arab Spring refers to the pro-democracy uprisings currently sweeping the Middle East and North Africa. As a writer put it "In reality, the movements that are shaking the Arab world are profoundly different from the revolutions that ended the Soviet empire. The Arab spring is about justice and equity as much as it is about democracy, because societies in which millions of young men and women have no jobs — and millions live with less than two dollars a day — crave justice as much as democracy". See Jean-Marie Gunenno, "The Arab Spring Is 2011, Not 1989", \textit{The New York Times} April 21, 2011 available online at http://www.nytimes.com/2011/04/22/opinion/22iht-edguyenno22.html accessed 06 February 2012; Lisa Anderson, "Demystifying the Arab Spring Parsing the Differences Between Tunisia, Egypt, and Libya" 90 \textit{Foreign Affairs} 2 (2011) p. 2.

\textsuperscript{20} \textit{Saudi Arabia v Arabian Am Oil Co (Aramco)} (1963) 27 ILR 117.

\textsuperscript{21} \textit{Kuwait v. AMINOIL} 21 ILM 976, 1000 ( 1982).


\textsuperscript{23} Information and material about the MIGA are available at http://www.miga.org/ accessed 12 March 2012.

\textsuperscript{24} Chui, J, “Legal Reform in Japan at the Dawn of the 21st Century,” 7, Available at http://international.calbar.ca.gov/LinkClick.aspx?fileticket=2Qmb9eFItM%3D&tabid=919 accessed
the energy sector tends to create economic advancement just as much as they produce serious tensions and complications in global commercial relations. Since oil and gas transactions are the main tools for economic development of Saudi Arabia it is important for scholars from the country to analyse and evaluate various aspects of the law and practice in this important area in order to formulate the right method for speeding up the country's integration into the globalization of international opportunities. The case for reform is manifest and new policies and methods must be brought into existence in order to create prosperity at home and an atmosphere conducive to peace for all states. This dissertation thus focuses on analysing and evaluating issues related to energy supply and foreign direct investment and how diplomacy, law, and economy can achieve the goal of peace in the end.

A study like this will of course, also highlight dangers in the horizon of an Environmental nature and therefore will contribute to international discussion on how to avert serious mistakes. Similarly, the focus on internal constitutional and social reforms will hopefully increase the chances of the Saudi Arabian state to attain holistic development in a short period of time rather than later. In addition, the thesis will contribute to literature that can influence development and progress. International organizations, authorities, multinational corporations (MNCs), non-governmental organizations (NGOs), and intergovernmental organization (IGOs) will be afforded reliable and recent academic commentary in relation to a country that is of significant interest to the entire world. The issues and areas of law treated in a thesis like this are not only topical but will increasingly become more important. As such, they have ramifications in future energy and natural resources projects. Given these developments, it becomes imperative for these issues to be studied and solutions


In addition to this thesis' focus, the environment is also a vital issue to discuss, and as such, an investigation and consideration of the methods it can be protected through international and regional organizations is additionally presented. Prof. A.F.M. Maniruzzaman, "The pursuit of stability in international energyinvestment contracts: A critical appraisal of the emerging trends," Journal of World Energy Law & Business, Vol. 1, No. 2, 2008.

to be sought in order to find the right balance between concerns for these issues and the development of energy and natural resources.

Furthermore, although the primary area of focus is Saudi Arabia the findings of this thesis will transcend the country and help in understanding issues of law and development as well as social change in developing states. This is because the political, economic, and legal challenges that a developing state like Saudi Arabia faces are in many ways similar to that of many other states in the region. As a result, credible solutions may also within reason provide a blue print for other developing states in overcoming challenges. It is our hope that this thesis will contribute to the search for new bridges of communication between developed and developing states and will dispense the myth that the Islamic legal system and Islamic civilization at large is incompatible with modern international economic relations and diplomacy. Accordingly, the study will be useful to understanding some of the difficulties surrounding Saudi Arabian development. Perhaps most importantly, this thesis will establish the proper role of international lawyers in the creation of a fair and equitable international legal system, which will allow for a developing state such as Saudi Arabia to thrive.27

The thesis reflect upon the limited successes of the Saudi government so far in attracting FDI and aims at advancing cogent arguments in the direction of the core and imperative socio-legal reforms necessary for outstanding economic growth in the 21st century. If the thesis further helps in raising sufficient debate and in exposing the internal and external problems that beset the state of Saudi Arabia, which also militate against its progressive assimilation into the international investment community it would have succeeded in its task. It may, therefore, also succeed in playing a vital role towards building a solid foundation for future development of Saudi Arabia.

27 Alston P., "The Myopia of the Handmaidens: International Lawyers and Globalisation," *European Journal of International Law*, vol. 8 no. 3, 1997. International lawyers are likely to be more flexible than local Saudi judges whose viewpoint can be narrow-minded, due to the limitations in their respective jurisdictions. Therefore, international lawyers are able to evaluate the goals and benefits of globalisation on a more lateral level. As a long-term policy, the Saudi authorities should be equipped with expertise in such fields to ensure that if any disputes in the future should arise, they will be confident of the outcome. See further A.F.M. Maniruzzaman, "The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends" *Vol. 1 Journal of World Energy Law & Business* (2008) No. 2.
Chapter 2: SAUDI ARABIA AS A CASE STUDY

It is perhaps important to set the thesis in context by providing some discussion about the monarchical, theocratic state that is Saudi Arabia. This chapter therefore introduces the importance of the traditional heritage of Saudi Arabia as an Islamic State and the sit of some of the holiest sites in the Islamic world to all aspects of its national and international life. The schools of Islamic law also play a role in the political life of many Islamic states. Therefore the particular nuances of the predominant school of Islam which prevails will be explained as a means of explaining the legitimacy of some of the proposed reforms we will be discussing as well as a providing explanation for some of the difficult choices facing the government of the Kingdom. It is important to note that further exploration of these issues will be made in Chapter eight of this thesis in relation to the constitutional design of the Saudi State as a monarchy (with a focus on the scope for reforms and democratisation of the institution). This chapter also sets the discussion of trade and investment in jurisprudential perspective. It endeavours to link international trade and investment and the concepts of ownership and property to their philosophical underpinnings in law.

2.1. Background of the Study: The Kingdom of Saudi Arabia

The Kingdom of Saudi Arabia is the largest country in the Arabian Peninsula. Its population of 28 million includes 5.6 million foreign residents according to a 2010 census. The Kingdom's political system is rooted in rich Islamic traditions and culture. This foundation mandates a commitment to peace, justice, equality, and respect for the rights of the individual. 21st Century Saudi Arabia has adopted enthusiastic developmental programs spanning areas such as education, transportation and communications infrastructure. In pursuance of these laudable goals the attraction of Foreign Direct Investment (FDI) in the energy fields among others has become imperative. The country has a monarchical system of government and is run under Islamic law. The Islamic state is based on principles prescribed by the Quran (Islam's

28Saudi Arabia's 2010 population was estimated to be about 28 million, including about 5.6 million resident foreignershttp://www.state.gov/r/pa/ei/bgn/3584.htm#people
Holy Book) and the Shari'ah (Islamic system of jurisprudence), Provincial Council, a Consultative Council (Majlis Al-Shura), and a Council of Ministers.

It is a common assumption that Saudi Arabia would be a difficult place to do business, given that it is a traditional society and an Islamic state. It, however, is the case that the country does not do too badly in the World Bank’s rankings of states and the ease of doing business there. Saudi Arabia currently ranks 12th on the World Bank’s league table and are down just two notches from 10th ranking which it occupied in 2011. It is also a common perception that reforms may be impossible or at best difficult to achieve because the state’s social and governmental institutions are viewed as anachronistic in the modern world. Embedded in these assumptions is the question of whether the Kingdom of Saudi Arabia can meaningfully engage in international diplomacy and intergovernmental affairs to ensure the state’s economic success. However, the ability to conduct international diplomacy appears not to be the problem. In fact, the Kingdom was one of the founding members of a number of international organizations, including the Gulf Cooperation Council (GCC), the League of Arab States, the Organization of the Islamic Conference (OIC), and the Organization of Petroleum Exporting Countries (OPEC). It is also a member of many international organizations, including The United Nations, The World Bank (WB), The International Monetary Fund (IMF), and the World Trade Organization (WTO), as well as a signatory of the Nuclear Non-Proliferation Treaty (NPT). It also has meaningful diplomatic relations with the European Union (EU), and the

31 Information and material about the Arab League is available at the official website www.arableagueonline.org.
32 Information and material about the OIC is available at the official website http://www.oic-oci.org/
33 Information and material about OPEC is available at http://www.opec.org/opec_web/en/
34 Information and material about the IMF is available at http://www.imf.org/external/index.htm
36 The European Community was established by the Treaty of Rome (1957) and is also called the European Union (EU). The 27 members of the EU formed a customs union, which aims for eventual economic and political unity.
North American Free Trade Agreement (NAFTA). Yet, in spite of its involvement in these international organizations, the Kingdom still has not achieved its full potential in the economic and commercial sense. The vast majority of the country's citizenry still live below the poverty line and, on the whole, the country ranks low on the indicators of socio-economic development.

It may be argued that the authorities of the Kingdom are slowly coming to the realization that to lift its population out of poverty and to enjoy the full potential of its oil wealth—it must embark upon massive socio-legal and socio-economic reforms. In recent years, the government of Saudi Arabia has implemented a number of reforms to encourage political participation, promote economic growth, increase foreign investment, and expand employment opportunities. The Kingdom has held municipal elections as part of a comprehensive plan to streamline and strengthen local government. In addition, the Kingdom is promoting free market economy by privatizing major state enterprises, such as the Energy Companies that provide electricity and the national airlines. Many regulatory authorities are being established to carry out reforms, improve foreign investment laws, revise a broad range of commercial laws and implement intellectual property (IP) rights to foster innovation.

Of particular relevance to the thesis is the fact that Saudi Arabia became a member of the World Trade Organization (WTO) in December 2005 aiming to liberate the market and lead to legal reforms in accordance with the global norms.

This wave of reform is remarkable and much of our discussion in this thesis will evaluate the potentials for actual legal implementation. It suffices here to mention that the goal of any reform must reflect a nation's ambition for development and social justice. Slowly but inexorably the Saudi government is beginning to marshal a

37 Information and material about NAFTA is available at http://www.nafta-sec-ala.org/.
the current development is an attempt to modernize its academic curricula, and monitoring its religious schools. Saudi Arabia's first municipal elections were held in 2005. Elections for members of the municipal councils were held in three phases; the Riyadh region voted on February 10; the Eastern and Southern regions voted on March 3; and the Western and Northern regions voted in the final phase on April 21. A total of 592 representatives were elected.
comprehensive vision of where it wants to take the state within this century. For instance in 2003, the Kingdom of Saudi Arabia presented a new initiative, the so-called "Charter to Reform the Arab Stand.\textsuperscript{40} Under this initiative the Arab states would implement unified tariffs and duties within 10 years. It was hoped that this development would in time serve as the basis for the entrenchment of a Common Arab Market (CAM).\textsuperscript{41} This initiative is important not because it has created much success but it does establish an important aspect of any discussion about the future of the Saudi states. This is that any strategy to rescue the economic fortunes of the Saudi Arabia is somewhat inextricably linked with the fate of the region it is situated. This agreement also encourages members of the League of Arab States to modernize local economies, privatize government-owned industries, and open economic development opportunities to outside investment and participation.\textsuperscript{42}

Perhaps it may even be said that any discussion about reforming Saudi foreign direct investment laws must examine developments in the field at the global level and particularly the fate of other comparative developing state. It is indeed true that:

\begin{footnotesize}
\begin{enumerate}
\item The Charter For Reform of Arab Condition stated \textit{inter alia}: "The Arab heads of state, after surveying the current situation in the Arab World, ...believe it is high time to urge for an awakening of the Ummah [Islamic community] to solidify its will and to demonstrate its resolve to prove its vitality and its ability to face the threats and challenges of the latest developments and the consequences they entail... resolve to adopt a new Arab Charter. ... ensure the protection of lawful Arab interests and needs, it must build the structure of joint Arab action on the basis of the strongest and not the weakest of links, and it must direct both inter-Arab and international relations and guide the Arab World in its relations with the international community. All that would necessitate specific mechanisms and clear programs to guarantee unequivocal and sincere implementation of Arab summit proclamations". [Unofficial translation, courtesy 'Arab News']. See the Saudi Arabian Embassy website http://www.saudiembassy.net/PressLink/03-ST-Arab-Reform-Charter-Jan03.aspx. Accessed 29 February 2012.
\item The idea of a common Arab is a longstanding one. The CAM was founded in August 1964 on the basis of a resolution passed by the Council of Arab Economic Unity (CAEU). The long-term goal of the ACM was to establish a full customs union that would abolish amongst its members trade restrictions, trade quotas, and restrictions on residence, employment, labour, and transportation. These aspirations have however fallen short of reality although some customs duties and taxes were eliminated in gradual stages between 1965 and 1971. For a history of this development see Abdel Hamid, Abdel El Motaleb, "Reformation of an Arab Common Market." \textit{Research and Arab Studies Magazine}, July 1996; El-Agraa, Ali M. \textit{Economic Integration Worldwide} (New York: St. Martin's Press, 1997).
\item Ibid, 4,5. Recent milestones include the 16th Arab Summit in Tunis, May 22-23, 2004, Saudi Arabia along with the other 21 members of the Arab League issued the 'Tunis Declaration' and pledged to carry out political and social reforms, promote democracy, expand popular participation in politics and public affairs, and reinforce women's rights. This resolve was reiterated at the 17th Arab Summit held in Algiers, Algeria, March 22-23, 2005, and at the 19th Arab Summit held in Riyadh, Saudi Arabia, March 28-29, 2007. Available at; http://www.saudiembassy.net/PressLink/03-ST-Arab-Reform-Charter-Jan03.aspx
\end{enumerate}
\end{footnotesize}
“a global consensus has emerged in support of South-South and triangular cooperation, with renewed commitments on the part of States, non-State actors and regional and international organizations to harness emerging opportunities to meet the internationally agreed development goals, including the Millennium Development Goals. New partnerships, innovative funding and support mechanisms have been established to address a range of social and economic challenges at the global, regional and local levels”.

Indicators of Saudi Arabia’s economic growth are strong, but it is indisputable that the state could do much better.

In terms of inward looking developmental strategies a host of initiatives and strategies have been explored in the last decade and most of these will be evaluated below but it suffices to mention specifically here the foreign investment law, enacted by Saudi Arabia General Investment Authorities’ (SAGIA), which was set up to allow foreign investors to own property, transfer capital and profits, claim full ownership of their

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projects, and enjoy a reduction in tax rates. The law protects foreign investors from confiscation of property without a court order or expropriation of property, except for public interest, against an equitable compensation.

Furthermore, Saudi Arabia established the Supreme Council for Petroleum and Minerals (SCPM) to handle oil exploration and production investment in January 2000. This body is responsible for policymaking on the exploitation of petroleum, gas and other hydrocarbon materials. The SCPM passed the Gas Initiative to develop natural gas fields, transmission pipelines and petrochemical projects in cooperation with international and national companies. The body’s tasks are central to the hopes and aspirations of the Saudi government to attain genuine economic progress using the natural resource that has become central to its economic destiny.45

The council was set up to operate for four years renewable by royal decree. The Council has the final word on all affairs of petroleum, gas and other hydrocarbon Materials. Other important tasks include the following:

1 - Fixing and deciding the policies and strategies for petroleum, gas and other hydrocarbon materials in light of national circumstances and interests. This includes determining the size of production, deciding the pricing plans of different fuel sources in the Kingdom.

2 - Setting the general policy for the Saudi Aramco Company, particularly:

a) Endorsing the company's five-year plan including its program to produce crude oil and its program for exploration for new reserves of hydrocarbon materials and developing them.

b) Endorsing the company's five-year program for capital future investments

c) Appointing the company's chairman upon a nomination by the board of directors

d) Appointing an auditor and fixing his financial compensations

e) Reviewing the auditor's report and endorsing the company's budget and profit and

loss accounts

f) Accrediting the annual report of the board of directors and acquitting the board of directors for the year in question

g) Deciding whether to increase, decrease the capital of the company or allow others to contribute to it.

h) Fixing the salaries of the chairman and members of the board of directors

i) Appropriating any increase in the net value of the rights and assets of the company either to increase its capital or transfer it to the company's reserves.46

2.2. Saudi Arabia and Islam in the Twenty-First Century

It can be argued that any attempt to understand Saudi Arabia's effort to project itself as a serious player in the competitive world of investment destination in the 21st Century must be based on an understanding of its Islamic past. The trend towards Saudi Arabian legal and economic modernisation is another manifestation of "law-in-action" -a well-recognised aspect of socio-legal and critical jurisprudence.47 For this reason, we must at this stage present some fundamental concepts in Islamic jurisprudence and political history of the Kingdom. Understanding the concepts of rights and ownership from all the Islamic schools of thought will, for instance, not only place our later discussions in the context of Islamic law, in general, but it will make it possible to dispel arguments that Islamic traditions may render impossible complex modern, economic and investment arrangements.

Ownership is a critical incentive for engaging in economic activity, given that the owner has the right to utilize or dispose of whatever they may own. In the Islamic system absolute ownership rests with Allah (God), and a Muslim or any person is merely an owner by proxy, as stated in the Holy Quran:

Unto Allah belonged whatsoever is in the Heavens and whatsoever is in the Earth.

46Saudi Embassy, ibid. p. 146.
There is also the concept of collective ownership, where according to Ibne Qudamah, the Prophet of Muhammad (PBUH) stated:

*Muslims are partners in three things: water, green herbage and fire.*

With regard to ownership of natural resources of a people or country, all four major schools of Islamic jurisprudence agree to the same fundamental principles which proceed from the premise that there is a possibility to own resources, to alienate such property in exchange or for sale. Yet, it must be admitted that there are some differences in conceptualisation. It is essential to study these differences in order to understand the specific approach of Saudi Arabia's towards its most valuable mineral resource.48

The Hanafi School of Muslim Jurisprudence:
The ownership of a mine discovered in land that is already owned belongs to the surface landowner. On the other hand, if the discovery is made in land that has not been captured, the mine belongs to the surface owner subject to him/her paying one fifth of the proceeds to the Sovereign, who represents the Muslim community. If a mine is found in a public domain, then it belongs to the public and cannot be exploited by an individual under a concession unless the Imam rightfully grants the concession.

The Shafi School of Muslim Jurisprudence:
According to the Shafi School, oil belongs to the surface owner subject to him/her paying the relevant taxes. If petroleum is found in a dead land or public land, it is for the state to grant a concession to an individual for its exploitation. 49

The Hanbali School of Muslim Jurisprudence:

The predominant view in Saudi Arabia, a follower of the Hanbali School of Muslim Jurisprudence, is that petroleum belongs to the community as a whole, and as such should be managed by the state. The state can confer rights to mine and own these minerals to an appropriate investor. There is another view that recognises the right of the owner of the land to own the petroleum by analogy to crops and solid minerals.\(^{50}\)

**The Maliki School of Muslim Jurisprudence:**

Irrespective of ownership of the land, all minerals whether hidden or unhidden belong to the Ummah, and, therefore, are under the direct control of the state.\(^{51}\)

It may be helpful at this point to present a table that attempts to compare the schools of Islamic thought on ownership of resources in order to reveal the interesting differences but the essential unity of the schools that indeed permit modern commercialisation of mineral resources.

<table>
<thead>
<tr>
<th>Country</th>
<th>School of Jurisprudence</th>
<th>Constitution Vintage</th>
<th>Article</th>
<th>Ownership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Azerbaijan</td>
<td>-</td>
<td>1995</td>
<td>Article 14</td>
<td>Natural resources belong to Azerbaijan Republic</td>
</tr>
<tr>
<td>Iraq</td>
<td>Hanafi</td>
<td>1990 (interim)</td>
<td>Article 13</td>
<td>Natural resources are owned by people</td>
</tr>
<tr>
<td>Kuwait</td>
<td>Maliki</td>
<td>1962</td>
<td>Article 21</td>
<td>Natural resources and all revenues are property of the state</td>
</tr>
<tr>
<td>Libya</td>
<td>Maliki</td>
<td>1969/1992 (proclamation)</td>
<td>Article 8</td>
<td>(Private property is non-exploitative) Public</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Country</th>
<th>School</th>
<th>Year</th>
<th>Decree/Article</th>
<th>Ownership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oman</td>
<td>Ibadi</td>
<td>1996</td>
<td>Royal Article 11</td>
<td>Natural resources are property of the state</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Hanafi</td>
<td>1973</td>
<td>Article 172(1)</td>
<td>Minerals belong to the federal authorities</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>Hanbali</td>
<td>1993</td>
<td>Royal Article 14</td>
<td>Natural resources are property of the state. The state is to exploit, protect and develop natural resources in the best interest of people.</td>
</tr>
<tr>
<td>Syria</td>
<td>Hanafi</td>
<td>1973</td>
<td>Article 14</td>
<td>Natural resources are under public ownership. The State undertakes to exploit and supervise the administration of this property in the best interest of the citizens.</td>
</tr>
</tbody>
</table>

Data compiled from various primary and secondary sources.52

The differing views of Muslim scholars on petroleum ownership can be categorised into two groups: those restricting ownership to the state, and those allowing private ownership of petroleum resources. Many intellectuals of Muslim theologies in oil-producing countries hold the former view. They believe that ownership lies with the state, and it is only the state that can wield it in trust for the people.53 It may be noted that this ties with the position of many federations that have petroleum resources.54

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The Islamic economic principles of ownership are concurrent with legislative schemes found in most developing countries. The state has title to the minerals in the ground irrespective of private rights over the surface, whether freehold, leasehold or customary. The present day oil and gas agreements that have developed since the commencement of the last century shall be briefly outlined below.

The first half of the last century saw a steady progress of various legal arrangements between oil companies and authorities. Large colonial style concessions were common during the initial stages of oil exploration in the Middle East. A concession is defined as:

An agreement between authorities and a company, that grants the company the right to explore for, develop, produce, transport and market hydrocarbons or minerals within a fixed area for a specific amount of time. The concession and production and sale of hydrocarbons from the concession are then subject to rentals, royalties, bonuses, and taxes. Under a concessionary agreement the company would have the title to the resources that are produced.

The concessions granted to the Iraqi Oil Company and American Arabian Oil Company in Saudi Arabia are very similar.

Production-sharing agreements are not found to be most favourable in upstream petroleum arrangements in most Muslim countries. Yet, the fiscal composition of production-sharing agreements may not be in harmony with the Islamic legal principles. All these agreements contain an element of interest (Riba) and

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57The Middle East (ME) from the perspective of this Thesis is geographically made up of Bahrain, Iraq, Iran, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates (UAE) and Yemen. Other scholars have indicated that Palestine, Israel and Turkey are also technically part of the description of the Middle East. Emilia Onyema, "Developments and Enforcing Arbitration Awards in Middle East and African Countries", Paper delivered at the 2nd Annual Cross Border Arbitration and Dispute Resolution Conference, Melia White House Hotel on 16 November 2010 p. 1. Available at www.transnational-dispute-management.com accessed 13 March 2012.
uncertainty, which is forbidden under the Islamic legal system. Muslim law is also averse to commercial operations encompassing risk, which could violate the rule in the Quran against gambling and causing disorder. The Quran states:

O ye who believe! Intoxicants and gambling, dedication of stones and divination by arrows, are an abomination, of Satan’s handiwork: Eschew such abomination, that ye may prosper.  

Hence, all speculative contracts offend the Islamic legal system.

By supplying most of the world’s oil, the Middle East becomes part of OPEC by default. As such, it is a key policy for countries to uphold and enlarge their role within OPEC and OAPEC in particular. Searching for a new cultural and political identity as a result of younger leadership and the encouragement of reforms in the Islamic world can cause political instability, which in turn can interrupt supply. It is important to illustrate the potential impact of this on oil production and distribution.

There is nothing in Islam that prohibits the supply of oil to non-Muslims; in fact, the Holy Quran encourages it:

O ye who believe! Eat not up your property among yourself in vanities: but let there be amongst you traffic and trade by mutual good will.

Islamist groups with an anti-West agenda can manipulate certain facets of religion to challenge the status quo. There is a negative view of oil in Saudi Arabia, as its wealth has been restricted to a minority, and the majority have not received any monetary benefit. Those at the extreme end of the spectrum support the destruction of oil related facilities as they consider the Western-dominated oil companies to be in support of the ruling elite. This view is impractical and these actions self-destructing, as oil is the foundation of the economy. A more practical remedy would be to limit

60 The Holy Quran, Sura II, Verse 219  
61 The Holy Quran, Sura IV, verse 29  
sales to Western countries, however not all Muslim oil countries can afford to do this, as not all Gulf countries have developed alternative revenue sources.\textsuperscript{63}

Saudi Arabia, like any other country, is obligated to work under the accepted universal norms developed and followed by the major industrial states over the past two centuries. It cannot enforce any of its domestic rules upon the international community. The following chapter will illustrate more facts and reasons why Saudi authorities should govern the state using internationally accepted rules and regulations and not according to the current system of Islamic law.

To conclude, it can be seen that such legal and religious applications are suitable for monetary transactions, which have existed since 700AC, but are no longer suitable in the twenty-first century. Arguments such as those from Bunter demonstrate that the Islamic applications are not fit for modern legal practice when related to trade and international commercial transactions.\textsuperscript{64} Is it convincing in the context of trade and international commercial transactions, as in the case of Riba, that all businesses incur certain amounts of risk anyway, which certainly Islam does not prohibit? Due to the lack of legal development in the last 500 years, Islamic literature leads to gaps in the legal interpretation, which allows for Islam to be within the internationally acceptable competence and interpretation of the advanced Western legal applications and norms. The main point of this chapter is to present reasons for the need for reforms within the Islamic laws. The following chapter will explore the lack of legal reforms and judicial developments in Islamic states.


\textsuperscript{64}M. Bunter, "Petroleum Contracts in Islamic Law: the Concession (Equity) and Contractor (Production Sharing) Agreements," \textit{Oil, Gas & Energy Law Intelligence}, Vol. 3 No. 3, 2005.
2.3. The philosophical and theoretical basis of Trade and Investment

Professor Sornarajah observed quite rightly that, "few areas of International Law excite as much controversy as the law relating to foreign investment." This area of study has, therefore, produced several schools of thought, theoretical approaches, and different margins of appreciation of the law and practice of foreign direct investment, particularly in relation to developing states. This thesis works upon the assumption that the entire international system is based upon a delicate network of economic interests, all of which must be respected and allowed to flourish in an international environment of cooperation and compromises. It may be argued that global trade networks such as the World Trade Organization (WTO) already work on the basis of this realization, and this is why they tend to enjoy a wider buy-in from the international society, both in capital-producing and capital natural resource based economies. It is, however, worthwhile to consider how the instinct of trade and the desire to enter economic relations runs deep in international practice and through time and space in the human experience.

The philosophical schools of thought in law are, therefore, a good place to start the enquiry. This enquiry will complement our earlier discussion relating to how freedom to contract and right to ownership is just as compatible with much of Islamic thought as it is in the most sophisticated legal systems.

Investment and trade in oil and gas, therefore, has a long and noble history. The trend has only increased over time to the extent that writers now talk about a problem of acceptability of trade and investment in oil. A writer states: "the acceptability of oil is becoming more important than its availability, and that the issue is particularly acute in developing countries with weak governance".

It is indeed important to note that each epoch since antiquity and even beyond has produced its own cross boundary transactions based upon what is traded in at the period. In a sense investment in foreign lands has also developed according to various

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levels of sophistication. Charles Darwin in his Voyage of the Beagle denoted the truth of the fact that international trade and the zeal to do business in other lands is a human instinct. He described travels and trading with natives of Tierra del Fuego as primitive, yet he noted: "[t]hey had a fair idea of barter. I gave one man a large nail (a most valuable present) without making any signs for a return; but he immediately picked out two fish, and handed them up on the point of his spear."67 It has, however, been argued that even through such accounts we may see the tensions between traders and the various interests that meet on a commercial level. As one writer stated "we will indeed argue about the sufficiency of the value of a large nail in exchange for two fish and point to accounts like this evidence of the lop-sidedness and unfairness of much of the trade in the colonial era".68

The merchants of Europe were clearly not one of the first sophisticated traders to engage in significant transnational trade or to invest in other lands. Letters of credit, for instance, existed among the black civilisations along the Nile including ancient Egypt. In time it spread to the ancient Greeks and to Roman civilisation. Indeed there is real evidence of a Babylonian clay promissory note dating back to about 3000 BC and there are accounts of bills. Eventually, merchants driven by economic goals began to speak in a common language. Perhaps the culmination of this age-long reality is the development of the so called lex mercatoria.69

Scholars like Chia-Jui Cheng are a bit more charitable and discern a first stage in the development of lex mercatoria.

...ancient, primitive commercial usages and practices which dominated the acts of Chinese, Indian Persian, Arab, Phoenicia, Greek and Roman traders in the different trading ports and trading markets of the Persian gulf, the Middle east, the Eastern Mediterranean coast and the vast lands of Central Asia, along the 'Silk Roads' between the East and the West. This was truly cosmopolitan trading based on a variety of primitive customs. Yet all these local customs involved the same category transaction in the different places;

It is indeed true that the development of international trade has gone through several different stages but its development is so immemorial that it is neither possible nor worthwhile to sensibly assert authorship of the concept to any given era or strictly to certain parts of the world unless, of course, one speaks only in terms of inherent subjectivity and unhelpful chronology. The recognition and respect for practice and custom among merchants as a source of commercial legal obligations is one that can be traced even in the Biblical book of Genesis and beyond. Abraham is recorded to have agreed to a land transaction on the terms offered by Ephron. Thereafter, he "weighed out for him the price he had named ... four hundred shekels of silver, according to the weight current among the merchants" (emphasis added). This shows that merchants of that period were as much a coherent group with common understandings just as much as their counterparts today. The Islamic Sharia law as we have shown certainly recognises the exclusivity of commercial law. It is even asserted that where commercial custom is inconsistent with general custom, then the former will supersede the latter in order to protect the interests of the public and render a decision that is closer to the realities of their daily transactions. The only instances where the exclusive mercantile custom will not supersede the general custom are where the general custom is also under a Qur'anic obligation to do or abstain from a course of action.

Examples of the coming to maturity of investment law include the modern sophisticated tools of investment such as the Multilateral Investment Guarantee Agency (MIGA) which promotes foreign direct investment by providing political risk insurance to investors and lenders against losses caused by non-commercial risks.

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71 For instance, a mercantile custom which suggests or permits the giving or taking of usury would be in direct conflict with both the Qur'an and the Islamic Sunnah. See Z. Ibraheem Alashbah wa Annatha'r (Beruit: Dar Alfekr Letba'ah Wa Annaher BeDemashq, 1983), 105; A. Qutah, Alorf (Beruit: Almaktahab Almakeah, 1997), 242.

72 MIGA promotes foreign direct investment by providing political risk insurance to investors and lenders against losses caused by non-commercial risks. Its mission includes providing political risk insurance to investors and lenders against losses caused by non-commercial risks.
It, therefore, appears that trade and investment arise out of the recognition of peoples and states of their mutual interests in participating in the enterprise. One of the most sensible places to begin drawing up reforms for any legal system, therefore, is to recognise that there is always the need to ensure that trade and investment must produce mutual benefit.

Yet, to recognise the mutuality of interests in international trade and in investment law and practice is not to disregard the possibility that there is and perhaps will always be power relations at play. Mutuality of interests certainly may not be tantamount to equality or fairness. The classic legal philosophers and jurists have in some ways addressed this point. Hans Kelsen’s promulgation that the “law is not only a dynamic system of norms, but also a coercive order” is also useful to our analysis. His submission, however, raises the question: whose coercive order is investment law? Kelsen also applied the sanction theory of legal norms to develop the Pure Theory of Law. This view allows us to immediately treat with suspicion irrational prejudices that have found themselves integrated into the international legal ordering of international economic law. In other words: to whom belongs the ‘big stick’ to apply sanctions in international economic law? And is there a normative process of determining when sanctions such as refusal to invest in any particular territory fairly or even validly withheld? There is also the strong pull to examine the need for new

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insurance guarantees to private sector investors and lenders. MIGA’s guarantees protect investments against-non-commercial risks and can help investors obtain access to funding sources with improved financial terms and conditions. It is a member of the World Bank Group and is structured as an international organization with shareholders including most countries of the world. Since inception in 1988, MIGA has issued more than $24 billion in political risk insurance for projects in a wide variety of sectors, covering all regions of the world. MIGA also conducts research and shares knowledge as part of its mandate to support foreign direct investment into emerging markets. For materials about the MIGA see http://www.miga.org/index.cfm. Accessed 12 March 2012.


74 Kelson’s theory criticisms are many but in this respect, there is some affinity with John Austin’s ‘command’ theory of law. But Kelsen's approach is quite different from Austin's. For Kelsen, legal norms are addressed primarily to officials. Officials are directed to apply sanctions to individuals when the individuals' behaviour does not conform to a pattern specified in the norm. It is anticipated that individuals, in choosing how they will behave, will take into account the possibility that an official will apply the sanction. In that way, norms and the orders to which they belong can be effective. However, most if not all jurists now accept H.L.A. Hart's point in The Concept of Law, though directed principally against Austin, that not all legal norms are coercive - some, and some of the most important, are facilitative. The Pure Theory of Law can accommodate this by accepting that what matters most is not whether particular legal norms are coercive but whether, by containing coercive norms, the legal order as a whole is coercive - which Hart does not deny. D.Mahajan, Jurisprudence and Legal Theory, (Lucknow: Eastern Book Company, 2006) p. 45; Pure Theory of Law, M. Knight, trans., (Berkeley: University of California Press, 1967); H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961) See particularly chapter 3.
methods and legislation – "coercive laws" – to govern international economic activities, and in some special cases, reshuffle the system itself when it can become out-dated. To this extent it is necessary to enquire into the processes of change at the decision making level in the WTO and even at the ICSID. It is notable that Kelsen urges us to separate pure laws from extra legal considerations such as morals, fairness and other subjective criteria. The separation between legal and other types of norms in Kelsen's theories is only useful in our case study in so far as it aims to give the law superiority over any other field of knowledge, in order to create a rational atmosphere for all parties to start a new era of development interactions.\(^{75}\)

The following Kelsenian view remains relevant to the understanding of the international economic law and the investment relation law.

...Statements of law are hypothetical judgments asserting that, according to some-national or international-legal order of which we have legal cognisance, certain conditions defined by this legal order being given, certain consequences defined by this order are to follow. Legal norms are not judgments, i.e., statements about an object given to cognition.\(^{76}\)

This thesis will to a large extent draw upon the Kelsenian invitation to legal experts to maintain a clear understanding of the pivotal role of power to the concept of law. This is especially true in relation to economic matters in the world's system. However, to maintain the ideas of the right of property possession and justice in their original forms, we must not follow the interests and policies outside the nature of legal science. Therefore, it seems that the reason why Kelsen's "sanction theory" has not been successfully challenged is because of its continuous observance as universal reality. Identification of evidence of this reality in relation to the Saudi Arabian experience in international economic relations will follow over the next few chapters.

\(^{75}\)The Pure Theory of Law ignores, though it does not deny, the law's connection with the facts of psychology, sociology, morals and politics, but insists emphatically on purity in the avoidance of any syncretism of methods, "which obscures the essential character of legal science and erases the boundaries set for it by the nature of its subject-matter."

Other philosophical theories support the trend towards international governance of investment. This arguably includes the functional approach\textsuperscript{77} and the legal realist view, which especially grapples with the existence of manifest injustices.\textsuperscript{78} This theory is fundamentally: (1) a descriptive theory about the nature of judicial decision, according to which, (2) judges exercise unfettered discretion, in order (3) to reach results based on their personal tastes and values.\textsuperscript{79}

Beyond enquiries into the future of economic relations with the West a central focus of our discussion will also be on the question whether oil and hydrocarbon resources have so far benefited the people of Saudi Arabia, or if the system benefits only the oil producing states and their industries. This thesis will engage with literature that suggests oil exploitation has not yet delivered the best results for the Kingdom – especially after the oil embargo of 1973.\textsuperscript{80} As one writer put it “The dismal economic performance of Arab countries in comparison with other developing countries has rekindled interest in the relationship between resource abundance and economic growth”.\textsuperscript{81}


\textsuperscript{78} Mitchell Aboulafia, Myra Bookman, Cathy Kemp, Habermas and Pragmatism, (London: Routledge, 2002) pp.83-139. American legal realisms have reached two crucial theses that merge with Frank’s argument: first, by nature, rules cannot control decisions by courts and other officials: second, the overriding function of law is the settlement of disputes. Yet this leads us to argue that due to development the law needs to adopt new ideas and settlement systems based on the nature and circumstances of conflict. If the idea is new, it means this is a healthy development in a legal system that needs to grow and develop in the long term in order to survive.

\textsuperscript{79} B. Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence", \textit{Tex. L. Rev.}, 1997 p. 48.

\textsuperscript{80} Such conclusions have been reached not only by political commentators (e.g. Nicholas M. Guariglia "Of Women and Wahhabism: The Strange Backwardness of Saudi Arabia" - 7/7/2008 available at http://globalpolitician.com/25010-obama-elections-black-nationalism accessed 06 February 2012. 6/18/2006) but also majority of those within the “Dutch disease” literature. That is those that believe that the phenomenon of vast oil wealth does not bring real progress but is explained from the perspective of a reallocation of resources across sectors and structural transformation, rather than as a dynamic growth process. Majid Al-Moneef, “The Contribution of the Oil Sector to Arab Economic Development” Paper presented at the High-level Roundtable Partnership for Arab Development: A Window of Opportunity held at OFID on May 5, 2006 OFID (Pamphlet Series 34 Vienna, Austria September 2006).

\textsuperscript{81} Moneef Ibid. p. 15, Most of the literature on the relationship between resource abundance and economic growth draws from the neo-classical “Dutch disease” analytical framework, which describes
Indeed the law and practice of the United Nations (UN), the World Trade Organization (WTO), the North America Free Trade Agreement (NAFTA), the European Union (EU), the Gulf Co-operation Council (GCC), the Energy Treaty Charter (ETC), and the Organization of Petroleum Exporting Countries (OPEC) are all in many ways geared towards maintaining a balance of interests in international trade. These agencies play an important role not only in regulating trade through various agreements and treaties but by maintaining the sanctity of trade.

Finally, in terms of chronological development the phenomenon of globalisation and its philosophy of liberalisation of trade and investment has had a particular impact on the law and practice of resource management and energy relations. Yet this reading of international society must not fail to admit the possibility that Saudi Arabia, like other developing states, may really be lesser participants in an equal field and more of victims of a game strategy\textsuperscript{82} adopted by the developed, richer Western states.\textsuperscript{83} In the final analysis our reading of the existing philosophical models including those of Jurgen Habermas, Kelsen, critical legal scholars and developmental law theorists, must, however, remain that they in many ways prepared the ground for the cooperation and coordination that typifies much of International investment law.

The lesson in this for Saudi Arabia is to recognise that the theoretical and philosophical basis for modern investment law is somewhat universal. A separate and completely peculiar legal regime based on anachronistic laws and legal culture is not desirable. The unique quality of a network and its success is likely to be based upon the synchrony of its parts. The role of those tasked with incorporating the Saudi kingdom into the global economy for its own continuous and beneficial development

how a sudden surge in an export activity can be expected to cause a retardation of traded sectors compared to non-traded sectors. The term Dutch disease is derived from the experience of the Dutch economy following the development of gas in The Netherlands in the 1970s. Allen Gelb, \textit{Oil Windfalls}, (Oxford: Oxford University Press, 1988).

\textsuperscript{82} Game theory is a major method used in mathematical economics and business for modelling competing behaviours of competitors. This model has been used by scholars like Oduntan to explain similar occurrences in international relations and International law. Gbenga Oduntan, "International Law and the Discontented: How the West Underdeveloped International Laws," in Parashar, Archana and Dhanda, Amita, Decolonisation of Legal Knowledge in India, Routledge, (2009) pp, 109-113.

is to ensure that the state's membership in the global network is enhanced by an increase in its ability to tap into other members of the international network, particularly those more closely associated with the oil market.

It is, therefore, possible at this stage to pre-empt much of what may be knee jerk reactions of the religious forces in Saudi Arabia to modernisation in favour of investment by showing as we hope we have done that trade and investment are not necessarily western but they are universal concepts. Thus, much of the religious philosophy, which jeopardizes the nation's development for the last 40 years as preached by some clerics is unsupportable and has only slowed down progress needlessly. The proposed paradigm of mutual benefits as watchword and strategy also works on the assumption that international lawyers from the Saudi state, as well as bureaucrats and government officials will acquire the knowledge and skills of their global counterparts and utilize these tools as they work in concert with other comparable states to remove major obstacles to their progress.

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2.4. Conclusion

Saudi Arabia is an important investment destination in the Middle East that currently ranks 12th on the World Bank's Investment league table and are down just two notches from 10th ranking which it occupied in 2011. The Kingdom was one of the founding members of a number of international organizations, including the Gulf Cooperation Council (GCC), the League of Arab States, the Organization of the Islamic Conference (OIC), the Organization of Petroleum Exporting Countries and is a major player on the diplomatic stage in the region and internationally. The country aims to lift its population out of poverty and to enjoy the full potential of its oil wealth. It is becoming clear that the country must embark upon massive socio-legal and socio-economic reforms to sustain current growth and achieve even more successes. To do this Saudi foreign direct investment laws must examine developments in the field at the global level and particularly the fate of other comparative developing state. The strategies to be developed will ideally include creation of new-dedicated institutions and good support for existing ones such as the Supreme Council for Petroleum and Minerals (SCPM) to handle oil exploration and production investment in January 2000.

It is important to add that any attempt to understand Saudi Arabia's effort to project itself as a serious player in the competitive world of investment destination in the 21st Century must be based on a thorough understanding of its traditions, culture and its special Islamic inheritance. Thus nearly all-relevant factors in the discussion of reform must at least grapple with the test of compatibility with Islamic principles and doctrines. Islamic law is, however, not totally unready or unhelpful to the task of modernisation and can cope with complex jurisprudential concepts and issues.

Ownership is a critical incentive for engaging in economic activity, is also recognised as a concept in Islamic law. Indeed with regard to ownership of natural resources of a people or country, all four major schools of Islamic jurisprudence agree to the same fundamental principles, which proceed from the premise that there is a possibility to own resources and to alienate such property in exchange or for sale. There is also a danger that certain conservative Islamist groups with an anti-West agenda can
manipulate certain facets of religion to challenge the status quo. There is a negative view of oil in Saudi Arabia, as its wealth has been restricted to a minority, and the majority have not received any monetary benefit.

The benefits of international trade and investments are, and ought to be, mutual. This has been the case from time immemorial. It is indeed true that the development of international trade has gone through several different stages but its development is so immemorial that it is neither possible nor worthwhile to sensibly assert authorship of the concept or its usefulness to any particular geocentric origin. Yet, to recognise the mutuality of interests in international trade and in investment law and practice is not to disregard the possibility that there is and perhaps will always be power relations at play. Mutuality of interests certainly may not be tantamount to equality or fairness. These realisations make it useful to further enquire in this thesis into how best the country may respond to its inherent advantages and challenges in the international arena in terms foreign direct investment.
CHAPTER : 3  INTERNATIONAL INVESTMENT CONTRACTS UNDER SAUDI LAWS

3.1. Introduction

To understand the case for reform of saudi Investment laws it is important to put the present situation into historical context. This chapter discusses the events and facts leading to the celebrated ARAMCO, AMINOIL and Abu Dhabi v Qatar cases that have become locus classicus internationally in relation to regulation of FDI. The chapter offers a critique of the strengths and weaknesses of the arguments of the parties in both cases and their relative positons in terms of political power. The significance of Saudi Arabia’s position as a state that is bound under its own constitution (Article 45) and by its history to operate under the Holy Quran and the Sunnah shall be discussed in order to evaluate the impact this has in relation to the realities of international investment treaties and arbitration law. The chapter also provides commentary on the alleged inadequacy of Islamic law (Shari’ah) to deal with modern commercial affairs. An attempt is made to show that the position is caused in equal measure by the ignorance of the Western jurists and scholars the power-politics in the international system and an unduly conservative interpretation of Islamic Law without adequate elaboration and utilisation of the Ijma and Qiyas by Muslim jurists and scholars. The chapter highlights the glaring inequities in the early concessions. The suggestion that international courts and arbitration panels have been deliberately under-developing international law through biased jurisprudence is considered. It also considers the legality of expropriation and nationalisation and the imperatives of the so called Hull formula upon which international laws demand that expropriation or nationalisation must be followed by prompt compensation.
3.1. Saudi Arabia Investment Contracts Disputes: Lessons from the Past

Thus far we have sought to argue that Islamic jurisprudence is not necessarily unsuitable for modern trade and investment agreements. We have also tried to show that trade and investment practice emanate from a common heritage of civilisation based on mutual benefits of the parties. We now need to instruct our understanding of the shortcomings of existing law and practice by examining the experience and history of Saudi Arabia in investment practice as may be seen through the lenses of past disputes and development law generally. The rationale for doing so using particularly arbitral awards is that past disputes expose lapses in political and legal judgment and may be used I predicting areas of possible future disagreements. Any effort at reforms must therefore, be informed by the experience of disagreements over usual pitfalls. The common areas of disagreement between states and commercial entities include: Disagreements over Production Sharing Contracts (PSA); resource rent calculation formula; stabilisation clauses; tax law and tax assessments; renegotiation clauses; indirect expropriation; bribery, grafts and grease payments; competition issues, intensive regulation; straddling resources; territorial disputes and boundary disputes and maritime disputes.87

86 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)
The Sherman Anti-Trust Act of 1890 (15 U.S.C.A. § 1 et seq.) is the basis for antitrust law, and many states have modelled their own statutes upon it. As weaknesses in the Sherman Act became evident, Congress added amendments to it at various times through 1950. The most important are the Clayton Act of 1914 (15 U.S.C.A. § 12 et seq.) and the Robinson-Patman Act of 1936 (15 U.S.C.A. § 13 et seq.). Congress also created a regulatory agency to administrate and enforce the law, under the Federal Trade Commission Act of 1914 (15 U.S.C.A. §§ 41–58). In an on-going analysis influenced by economic, intellectual, and political changes, the U.S. Supreme Court has had the leading role in shaping how these laws are applied.
In 1911, the Supreme Court ordered the dissolution of the Standard Oil Company and the American Tobacco Company in landmark rulings that brought down two of the most powerful industrial trusts. But these were ambiguous victories. In Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619, for example, the Court dissolved the trust into thirty-three companies, but held that the Sherman Act outlawed only restraints that were anticompetitive—subject, furthermore, to a rule of reason. Critics of all stripes jumped on this decision. Some feared that conservative judges would now gut the Sherman Act; others predicted a return to lax enforcement; and businesses worried that in the absence of specific unlawful restraints, the rule of reason gave courts too much freedom to read the law subjectively. Available at: http://myweb.clemson.edu/~maloney/424/alcoa.pdf accessed 05 February 2012.
The early arbitration cases centred on many of these important issues. For illustrative purposes we will highlight immediately below two arbitrations that are in many ways *locus classicus* both of which reveal many salient points about the Arab experience in oil and gas investment law and practice. They are the cases of ARAMCO\(^88\) and AMINOIL.\(^89\) The relevance of these cases continues till present and must inform our analysis as they reveal problems of law and practice that arguably still persist nationally and internationally. Relevance of such an exercise has been attested to by Maniruzzaman when he submitted: “The issue of damages or compensation for breach of contract and for that matter expropriation or nationalisation in international investment law still remains as enigmatic as ever”.\(^90\)

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\(^88\) *Saudi Arabia v American Oil Co (Aramco)* (1963) Vol 27 ILR.


3.2. Saudi Arabia – The New and Inexperienced State

3.2.1 The ARAMCO case

This thesis will first consider the context of ARAMCO and the Saudi Arabian Authorities. In 1933, the authorities of Saudi Arabia entered into an oil concession with the Arabian American Oil Company (ARAMCO). The agreement provided for ARAMCO to explore and drill for oil reserves within the Kingdom of Saudi Arabia for a term of 60 years. At that time, there was no history of commercial oil production within the Kingdom, and ARAMCO undertook a venture of considerable risk and financial cost. Prior to granting the concession to ARAMCO in 1923, King Ibn Saud granted an oil concession to the Eastern and General Syndicate, a British company. The attempts to find and recover oil from the Kingdom were unsuccessful and the grant lapsed. Ten years later (November 8th, 1933) the authorities signed an exclusive concession assigning Saudi oil rights to ARAMCO The Royal Decree no. 1135 issued in Riyadh on July 7th, 1933 ratified this concession.  

In the course of their commercial relationship, the parties negotiated and made several amendments and supplements to the original concession agreement ("The Principal Agreement"). It stated that all amendments and supplemental agreements are to be read together and form one agreement. The concession granted to ARAMCO covers a vast area (all of eastern Saudi Arabia, inclusive of islands and territorial waters, from the eastern boundary to the westward edge of the Dahana, and from the northern boundaries to the southern boundary of Saudi Arabia) over which the company has exclusive rights. The company soon discovered oil and enjoyed an annual increase in production that far exceeded the expectations of either party. This was not at no initial cost. ARAMCO embarked on tasks that included exploring and drilling in a country that did not have the infrastructure, or specific expertise to support such an

endeavour. ARAMCO was responsible for providing the technical know-how and engineering support necessary to find, drill, and transport the oil they were drawing. In turn, they received the understanding and support of the Saudi Arabian authorities, who were fully aware of the benefits. The Saudi State was in turn afforded benefits of technical know-how and revenue.

In order to distribute the oil, ARAMCO constructed a refinery on the Bahrain Island, which was connected to the mainline by the country's first oil pipeline in 1945. In that same year, a large refinery was constructed in Ras Tanura. In 1950, an additional pipeline was opened to transport Saudi oil to the Mediterranean. The most important factor to consider in regard to the export of the refined oil is the shipping arrangements. ARAMCO did not itself own, or charter, any of the tankers that exported its product. Instead, it utilized the different forms of contract of sale available in maritime law, concluding Cost, Insurance, and Freight Contracts (C.I.F.), Cost and Freight Contracts (C.F.), and Free on Board Contracts (F.O.B.). A common aspect in all of these contracts is that the seller has to enter into a contract of carriage with the ship owner for the transportation of oil. The main benefit of this stipulation is that ARAMCO does not have to undertake distribution and marketing, as these will be taken care of by the buyers. This has enormous benefit to both ARAMCO and Saudi Arabia in as much as it opened up a huge market for Saudi oil with minimal effort required from either party.

In accordance with the 'Principal Agreement,' ARAMCO agreed to make loans to the authorities and pay a royalty on the crude oil produced. Over time, and in response to the volume of production, the authorities began to insist on bigger returns, which

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93 'Cost, insurance, freight (CIF)' contract. Means that the seller delivers when the goods pass the ship's rail in the port of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination. But the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. However, in c.i.f. the seller also has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. See Charles Debattista, "Incoterms and the contract of Carriage" in Incoterms in Practice C. Debattista ed. (Paris: ICC Publishing S.A., 1996) p. 10-15; Schmittoff Export Trade: The Law and Practice of International Trade, Eleventh ed. London Sweet and Maxwell, 2007) pp. 7-57.

94 'Cost and freight (CF)' contract

95 'Free on board (FOB)' contract: means that the seller delivers when the goods pass the ships rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the FCA term should be used. Schmittoff ibid.
resulted in a further agreement (signed on October 30th, 1950) that required ARAMCO to pay the authorities an income tax. When taken into consideration alongside the other payment arrangements, by 1950 ARAMCO was paying the authorities 50 present of its net operating income.

3.2.2. Facts to the Legal Disputes

The first two decades saw no disputes stemming from the partnership between ARAMCO and Saudi Arabia that were not easily resolved by agreement between the parties. The authorities were often obliging, and did not put any obstacles in the way of ARAMCO, and did not fetter the activities of the company. Both parties indeed prospered greatly under the agreement, and Saudi Arabia enjoyed a veritable period of accelerated financial and economic growth.

Matters came to a head when the authorities entered into an agreement with Mr. A.S. Onassis ('the Onassis Agreement') on January 20th, 1954. This agreement was ratified by the Royal Decree, and gave permission to Onassis to form a company (SATCO) in Saudi Arabia with the express purpose of transporting oil. SATCO was bound by the terms of the agreement to maintain a fleet of tankers under the Saudi flag and bearing Saudi names. As with all Saudi companies, SATCO enjoyed the protection of the Saudi authorities and would, under the terms of the Onassis Agreement, have a right of priority for the transport of oil for a period of 30 years from the date of the agreement.

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In 1933 The Government hereby grants to the Company an the terms and conditions hereinafter mentioned, and with respect to the area defined below, the exclusive right, for a period of sixty years from the effective date hereof to explore, prospect, drill for, extract, treat, manufacture, transport, deal with carry away and export Petroleum asphalt, naphtha natural greases, ozokerite and other hydrocarbons and the derivatives of all such products. It is understood, however, that such right does not include the exclusive right to sell crude or refined products within the area described below or within Saudi Arabia. Available at: http://jwelb.oxfordjournals.org/content/early/2010/09/28/jwelb.jwq012.full accessed 04 February 2012.
Thereafter, the authorities invited ARAMCO to abide by the terms of this agreement. Preference was to be given to the SATCO tankers for the transportation of oil and petroleum products produced by ARAMCO. On February 8th, 1954, the President of ARAMCO's Board of Directors communicated that the company could not accept the terms of the 'Onassis Agreement' on the basis that it infringed upon exclusive rights that were granted to ARAMCO in the 'Principal Agreement.'

Central to the Saudi argument for this new proposal was that it was exercising its sovereign powers in entering into the SATCO agreement, and could competently introduce any new legal restrictions it wished. Furthermore, it was asserted that ARAMCO, like any other Saudi citizen or entity, was obliged to abide by the laws introduced by the state, and that the concession agreement in no way precluded ARAMCO from being subject to the sovereign powers of the state, and furthermore, the laws that it introduced in accordance with the SATCO agreement.

The authorities contended that the concession agreement made no explicit mention of the arrangement for distribution and transportation of the oil, and that as such the authorities were free to grant the concession, or priority to any party they choose. In any event, to prevent them from doing so would be to deny them sovereignty over their own national affairs. The authorities further argued that the state had enjoyed good relations with ARAMCO and that it did not seek to "change, modify or deprive the company of any of its rights under the concession,"97 stressing that it was not in dispute with the terms of the original agreement, but that the state's actions were distinct and separate from the original agreement. Rather, Saudi Arabia was merely exercising its prerogative as a sovereign state over its own natural resources. Furthermore, the issue of transportation had to be explicitly agreed.

The Government of Saudi Arabia both challenged the jurisdiction of the ad hoc arbitral Tribunal and sought to expand it. The Government took the position that it could withdraw from arbitration any act done by it in the exercise of its sovereign power. The first finding of the tribunal is that they are competent to determine the dispute. It held that it was authorized to be the judge of its own competence, as

97Saudi Arabia v American Oil Co (Aramco) (1963) Vol 27 ILR.

The tribunal found that, "by reason of its sovereignty within its territorial domain the State possess the legal powers to grant rights (by) which it forbids itself to withdraw before the end of the concession". Therefore, the agreement that it had entered into with SATCO was found to be in violation of the ARAMCO concession, and the authorities were bound by their agreement with ARAMCO.

It is apposite at this stage to make the preliminary conclusion that the major shortcoming of the Saudi Arabian state in relation to this case, at least from the perspective of the Arbitrator, was an inadequate appreciation of the rules of engagement with multinationals as encapsulated in the state's own contractual agreements. In other words, the crucial issue was not about state sovereignty, but rather what the state has chosen to do with its sovereignty. The *pacta sunt servanda* principle, which means that agreements must be honoured, was therefore an operative basis for the decision. It may be said at this stage that there is nothing about *pacta sunt servanda* that is incompatible with Saudi Law based as it is on the Sharia. We have indeed made allusion above to the principle that Sharia law itself permits that agreements of a commercial nature even with non-believers must be kept sacrosanct. We will, however, address many of the salient observations in relation to this case below, as our analysis will be incomplete until the overall lessons of the AMINOIL case are also considered.

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98 Bishop op.cit. *supra* note
3.3. Investment Arbitration: Regional Expectations and Dimensions

3.3.1 The AMINOIL Case

The Aminoil case involves another Arab state but also succeeded in raising just as much questions and disaffection as in the Aramco case on the part of the territorial state. We shall, thus, briefly discuss the background of the AMINOIL dispute.

In 1948, the Kuwaiti authorities entered into a concession agreement with AMINOIL that made clear provisions for the adoption of arbitral processes in the determination of related legal disputes. Article 18 of the agreement refers all disputes to arbitration. Under the agreement, production began in 1954, seven years before Kuwait gained independence from the United Kingdom. Under the terms of the agreement, AMINOIL was obliged to follow "good oil field practice" and, in the year of the Kuwaiti independence, AMINOIL was further required to accept a supplement to the agreement that increased the taxes and royalties due to the authorities. These dues were payable to the authorities and further increased by way of a draft agreement negotiated by the parties in 1973. In addition to increasing the taxes, the draft agreement contained a new arbitration agreement and defined the applicable law to the agreement between the parties as the principles common to the laws of Kuwait and the State of New York, USA. In the event that no such common ground exists, the "principles of law normally recognized by civilian States in general, including those which have been applied by international tribunals" applied.\(^{100}\)

The explicit benefit to AMINOIL was that the draft agreement stipulated that they "should not be denied a reasonable opportunity of earning a reasonable rate of return (having regard to the risks involved) on the total capital employed."\(^{101}\) In addition to this undertaking to secure the revenues of the company, the authorities also agreed to enact a new income tax law that would enable AMINOIL to take advantage of the United States double taxation immunity.\(^{102}\) The draft agreement was to be ratified by the Kuwaiti Parliament; however at the request of the authorities, AMINOIL agreed

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\(^{99}\) Kuwait obtained full independence from the United Kingdom in 1961.
\(^{102}\) Aminoil was incorporated in Delaware, USA.
to abide by the agreement as if it had been ratified and was in force. As from 1973, AMINOIL began duly paying the authorities in accordance with the terms set out in the draft agreement. The Kuwaiti authorities failed to ratify the draft agreement and failed to pass the new income tax law. In October 1975, the authorities informed AMINOIL that they were introducing the so-called ‘Abu Dhabi Formula,’ with retroactive effect as from November 1974. During 1976, the parties negotiated and AMINOIL agreed to the application of the formula, but not to its retroactive effect. AMINOIL also negotiated for an increase of profits to what was considered a reasonable rate, and for further changes to the financial arrangements.

In the course of these negotiations, AMINOIL proposed to substitute the concession agreement with a service contract. With this proposed change, AMINOIL would hand over all of their assets and rights within the concession area to the Kuwaiti authorities, and in return they would receive a payment for the value of the assets and from thereon function as the authorities’ contractor. The authorities approved the suggestion and agreed to the changes in the nature of the agreement and relationship between the parties.

Despite both parties agreeing to the proposal, the agreement faltered over the amount of compensation that AMINOIL would receive for the assets that were to be transferred to the authorities, and the amount of money that was due to the authorities from AMINOIL under the implementation of the ‘Abu Dhabi Formula.’ On September 19th, 1977, the authorities enacted Decree Law no. 124, which terminated the concession agreement and nationalized all of AMINOIL’s assets in Kuwait.

Law 124 made provisions for the calculation of compensatory payments due to AMINOIL for the seizure of their assets and the appointment of a committee on behalf of the authorities to determine the amount outstanding to Kuwait. AMINOIL objected to the enactment of Law 124, and invoked the arbitration provisions of the concession agreement. The arbitration concluded in favour of the nationalization arrangement, stating that compensation should be paid to AMINOIL, and AMINOIL had become the

authorities' contractors. This clearly reflected the nature of the partnership that the parties had prior to the Kuwaiti authorities terminating the agreement.

Clearly, the intention to assert sovereignty rights lies at the heart of Kuwaiti actions. It was appropriate that the arbitration procedure was adopted, and in this way the Kuwaiti authorities are able to enjoy the dispassionate consideration outside of the public glare. At the heart of this dispute was AMINOIL's decision to act on an interim agreement that was never ratified. Furthermore, the reciprocal actions required by the Kuwaiti authorities in respect of their side of the agreement were never fulfilled. AMINOIL felt comfortable enough, following their negotiations, that the authorities could formalize the interim agreement, and obligations and duties would follow and become enforceable. The agreement was manifestly legitimate and was duly negotiated by officers of the company authorized to enter into negotiations and to agree upon terms. On the side of the Kuwaiti authorities, the Minister of Finance and Oil was similarly authorized. There would appear therefore to be no reason that the intentions of the parties to be bound by the agreement should not have been respected.

Following the agreement, the Kuwaiti authorities served a letter on AMINOIL, which required the company to fulfil its obligations under the agreement. AMINOIL did so, although they would later complain to the tribunal that they were acting under duress. The tribunal rejected this argument on the grounds that none of the required legal principles were present to satisfy a claim of duress.

104 See, P. Sanders, International ArbitrationLiber Amicorumfor Martin Domke (The Hague: Martinus Nijhoff Press, 1967) pp. 330-337. Also see Hersch Lauterpacht, International Law (Cambridge: Cambridge University press, 1970) pp. 314-315. In my view this analysis demonstrates the power of the autonomy of parties and to some extent the flexibility of international law. Also, the role of other aspects that can shape universal understanding among nations; when they interact with each other under peaceful and mutual respect, even when dispute evolves.
3.4. The Many Lessons of the Arbitral *Locus Classicus* on Investment Regulatory Readiness

3.4.1 State Sovereignty and the Autonomy of the Contracting Parties

It is notable that the period between ARAMCO and AMINOIL was one in which nationalisation and expropriation was rampant. State sovereignty was used to assert control over national resources in the dawn of an inevitable era of foreign direct investment practice. Arguably, the AMINOIL case presents an aggressive assertion of sovereignty where the authorities put AMINOIL in such a position that they felt they must proceed with the contract even though it was not formally concluded. The company was going through lean times, and was no doubt conscious and aware that nationalization was an imminent threat, having witnessed the piecemeal nationalization of oil production and refinement within the Saudi Arabia. AMINOIL had also watched profits slide and were the last of the oil concession holders left in Kuwait. From this arguably difficult position, AMINOIL was prepared to negotiate vigorously to preserve some commercial legacy in Kuwait in respect of the industry the company had helped build.

The tribunal acknowledged the company’s need for stability and considered the issue of duress. The tribunal examined constituent parts of the agreement and the complaints of AMINOIL. The failure of the authorities to ratify the agreement was interpreted as a consequence of the authorities having to consider their position in regard to other oil interests (the Kuwait Oil Company and OPEC) and the effects that ratification may have on them and the global instability in economic petroleum relations.

The tribunal also considered the other obligation agreed to by the authorities, which is the issue of the adoption of a new tax law that would have given AMINOIL the benefit of avoiding double taxation. As no such law was forthcoming, the already precarious finances of AMINOIL were beset further. The company appealed to the tribunal for damages for the loss it suffered by virtue of the authorities’ failure to implement the law. Ultimately, the tribunal indirectly found in favour of Kuwait. It
would appear that the failure of the company to adequately quantify the extent of its loss, and the damage, it felt was due, led the tribunal to the finding that they could not consider the issue in any more detail. Arguably, had this been presented in greater detail the company would have fared better by the tribunal's decision. The tribunal had indeed recognized that there had been some financial suffering borne by the company.

In both these cases, the composition of the tribunal and the selection of the applicable law proved to be a complex procedure with significant impact upon the eventual awards. In AMINOIL, as opposed to the situation in ARAMCO there was a clear choice of law within the arbitration agreement. Both parties agreed that the concession agreement would be decided and interpreted in accordance with the laws and principles common to both Kuwait and the State of New York. In the event that no common principles existed, then the issues would be decided in accordance with the laws recognized by civilized states in general, with particular reference to those applied to international tribunals and arbitral proceedings. The arbitration agreement provided for the tribunal to decide on the applicable law "having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world." The tribunal was careful to interpret this as meaning that it should "decide according to law, signifying here principally international law which is also an integral part of the law of Kuwait." The law that was to govern the substantive issues was essentially to be Kuwait's law. This may be contrasted to the findings of the tribunal in the ARAMCO dispute.

The nature of the substantive issues at hand dictated that the law of Kuwait was the predominant legal system to be applied. This was bolstered by the assertion of the authorities that Kuwaiti law was highly evolved and that "established public international law is necessarily a part of the law in Kuwait." It is important to note that similar agreements entered into by the Kuwaiti authorities bore the hallmark of

this standard approach to the choice of law.\textsuperscript{107} This explicit agreement between the parties was underlined by their statement in the arbitration agreement that, "the law governing the substantive issues between the parties shall be determined by the tribunal, having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world."\textsuperscript{108}

Clearly, the tribunal had an element of discretion, or flexibility in the choice of law through which it could determine issues. While there was clearly a choice that could have been made, or at least a discretion that could have been exercised, the very fact that the parties were clear as to the choice of governing law, the tribunal was put in a position to satisfactorily deduce the intentions of the parties in the context of the law of Kuwait was the fundamental starting point, and since it reflected international law with all its associations to a rich history of oil concessions; the sovereignty of Kuwait was asserted, and, perhaps at the same time, reinforced.

In the ARAMCO\textsuperscript{109} case it was agreed between the parties that the tribunal would apply Saudi law, as far as matters within the jurisdiction of Saudi Arabia were concerned, and that the tribunal has the power to determine the applicable law to those other areas of dispute. This decision was complicated by the fact that the laws of Saudi Arabia were to be applied in accordance with the Muslim law taught by the school of Imam Ahmed Ibn Hanbal. The tribunal held that both the parties were aware that different laws would have to be applied to the different matters arising from the dispute, and that gaps in Saudi law would need to be supplemented. Furthermore, as the agreement was between a company in the private sector and a state the application of rules of public international law could not be applied, as they would if the dispute had been between states.

\textsuperscript{107} Offshore Concession Agreement of the Arabian Oil Company states that the legal principles common to Kuwait and Japan shall be applied (Article 39, AR Vol IV, Exh 39), the Oil Concession Agreement with the Kuwait national Petroleum Company and Hispanica de Petroleos, 1967 refers to principles common to Spanish and Kuwaiti law. Available at: http://www.biicl.org/damages/aminooil/ accessed 05 February 2012.


\textsuperscript{109} Saudi Arabia v American Oil Co (Aramco) (1963) Vol 27 ILR.
The tribunal, therefore, determined that in the absence of an express choice by the parties, it was for the tribunal to determine what law the parties would have intended to be applied. As this was not clear the tribunal was obliged to determine what law a reasonable person would have chosen and intended to have applied. By comparing the positions of both ARAMCO and AMINOIL in regard to the choice of law, it is evident that a clear choice of applicable law can benefit both parties. It also makes the job for the tribunal much easier when arbitrating the dispute and interpreting the intentions of the parties when they originally agreed on applicable law.

The Saudi Arabia position was clearly based upon supremacy of the Quran and Sunnah over all laws. Article 7 of the Saudi Basic Law (1992) indeed provides that the governmental system of Saudi Arabia derives power from the Holy Quran and the Prophet's tradition, and also, Article 45 provides that the Holy Quran and the Sunnah shall be the main sources of formal legal opinion. The imposition of public policy restrictions within the Kingdom cannot be relied upon to violate Shari'a principles under any circumstances. The Basic Law emphasises that even a temporary state of emergency during turmoil cannot violate Article 7, which renders the Shari'a the only source of regulation in the Kingdom. The fact, however, was that while the Shari'a was quite supervening in all circumstances at home, it was clearly unsuitable for the very complex international transaction the state had entered into with ARAMCO.

In fact, one of the fundamental arguments raised by ARAMCO was the tacit consent demonstrated by the Saudi authorities that suggested to ARAMCO that the authorities were indeed happy for the company to transport their oil, in the absence of an explicit agreement. It was argued by ARAMCO that the authorities failed to raise any question or issue with regard to the shipping arrangements that the company used. In seventeen years of activity, Saudi authorities and ARAMCO had never considered (at least not explicitly) the issue of international shipping of oil products beyond those means undertaken by the off loaders, or ARAMCO's customers. The reservation of shipping rights, that the Saudi authorities argued they had undertaken, was countered by the argument proposed by ARAMCO that the authorities had tacitly agreed to the shipping arrangements that ARAMCO had put in place. In the absence of any interference from the authorities, or insistence that any preferential rights existed, it
was understood that ARAMCO was entitled, by virtue of its concession, to employ whatever means it chose to distribute the petroleum products. 110

The shipping contracts that ARAMCO put in place facilitated effective marketing and distribution enjoyed by both parties to the concession. Significant profits also accrued to the benefit of both parties. In doing this, ARAMCO ensured the flow of Saudi oil around the world at such an exponential rate that not only did they secure their own position as reliable energy suppliers, but they also empowered the Saudi authorities, both in economic and political terms, to sufficiently look beyond the bounty guaranteed by the original concession agreement.

If we compare this with the actions of AMINOIL and their actions in accordance with the subsequently un-ratified draft agreement, there is a parallel in the way that the oil companies behaved. Authorities in both states have used the veil of state sovereignty to attempt to avoid contractual obligations and duties.

In the AMINOIL dispute, the tribunal recognised the sovereign right of Kuwait to nationalize a previously privately owned industry, and referred to the offer that AMINOIL had made to Kuwait to take over their operation and to replace the concession agreement with a service contract. The tribunal found that Kuwait acted lawfully in its nationalization of AMINOIL, and that this did not constitute a breach of any obligations owed to AMINOIL. 111

Looking further to the role that sovereignty plays in these disputes, it can be seen that the issue of the sovereignty of the state over its natural resources is central to both cases. Both cases further reveal a rich mixture of the interaction between commerce, politics, and governance. States such as Saudi Arabia and Kuwait were latecomers to


111 The Tribunal noted that "it is incontrovertible that, though without haste, Kuwait had consistently pursued a general programme aimed at placing the state in control over the totality of the petroleum industry." See, Talal Al-Emadi Joint Venture Contracts (JVCs) among Current Negotiated Petroleum Contracts: A Literature Review of JVCs Development, Concept and Elements. http://www.law.georgetown.edu/journals/gjil/pdf/1_1_al_emadi.pdf accessed 12 January 2012.
the world trade table\textsuperscript{112} and are developing countries. States such as these tend to be considerably more protective (with good reasons) over their natural resources and are, quite naturally, preoccupied with the idea of protecting their natural resources, national interests, and enforcing sovereignty. It is a central feature of developing states that they are sceptical of giving away ‘full’ and ‘exclusive rights’ over natural resources in the face of domestic energy insecurity as well as pressing developmental needs in all areas of their national life. It is indeed a surprising feature that some developing states can suffer a scarcity of the very energy source they should have in abundance. The sovereignty that the Kuwaiti authorities sought to establish over their resources is in a sense inalienable. The point, however, is that they sought to exercise their sovereignty in a way that was incompatible with modern commercial practices. Similarly, Saudi Arabia exercised its state sovereignty in such a way that the introduction of a new law was legal and self-affirming.

The ARAMCO dispute illustrates the emerging commercial challenges to state sovereignty, the changes in the state’s involvement in national economic development, and the modern interpretation of permanent sovereignty that a state has over its natural resources. Saudi Arabia interpreted its sovereign rights over its natural resources and its choice of how best to exploit them as inalienable. Furthermore, any refusal to act in compliance with the state’s wishes, in respect of exercising this right, was seen as a questioning of its sovereignty. The tribunal roundly rejected the claim that Saudi Arabia was entitled to withdraw any sovereign actions from the arbitration. In the later \textit{Texaco Award} (1977)\textsuperscript{113} that dealt with the nationalization of Libyan oil resources it was noted:

Territorial sovereignty confers upon the state an exclusive competence to organise as it wishes the economic structure of its territory and to introduce therein any reforms, which may seem to be desirable to it. It is an essential prerogative of sovereignty for the constitutionally authorised authorities of the State to choose and build freely an economic and social system. International law recognises that a State has this prerogative to determine freely its political regime and its constitutional institutions.\textsuperscript{114}

\textsuperscript{112} Distinct from the point I wish to make, but perhaps illustrative of it all the same, is the long overdue acceptance of Saudi Arabia as the 149\textsuperscript{th} member of the WTO, having taken the world’s largest oil producer 12 years to complete membership negotiations, the second longest accession period behind China, who took 14 years.

\textsuperscript{113} \textit{Texaco v Libyan Arab Republic}, 17 ILM (1978) para 59.

\textsuperscript{114} Ibid. p. 56.
This sentiment was echoed by the tribunal in the *AMINOIL case* when it noted, “many constitutions state that natural wealth and resources are the property of the State.”\(^{115}\) Kuwait claims that the permanent sovereignty over its natural resources could not be interfered with by contract, treaty, or agreement, and that the State is prohibited from giving any permanent rights relating to the natural resources of the country to any other bodies or organizations, or guarantees against the exercising of public authority over its natural riches. Despite this the tribunal found that this “contention lacks all foundation.”\(^{116}\)

However, the tribunal did recognize that the state has made significant efforts in managing and commercially exploiting its own natural resources, as evidenced by the program of nationalization that the authorities had implemented in the years preceding the AMINOIL dispute, and determined that the nationalisation decree, Law 124, was “a necessary protective measure in respect of essential national interests which it (the Kuwait Authorities) was bound to safeguard.”\(^ {117}\) This is further reflected in the statement of the tribunal that the “profound and general transformation in the terms of oil concessions that occurred in the Middle East, and later throughout the world,”\(^ {118}\) by which “the State thus became, in fact if not in law, an associate whose interests had become predominant.”\(^ {119}\) This perspective, and an appreciation of the developing economic position in the Middle East, contributed to the tribunal’s decision to endorse the termination of AMINOIL’s concession of exploring and exploiting oil reserves, that was held to be in itself a lawful ‘right’ in order to enable Kuwait “to take over full ownership of its oil resources and put them under national management.”\(^ {120}\) This finding is also reflected in the United Nations General Assembly Resolution 626 that prescribes that states may exercise their right freely to use and exploit their natural resources.

\(^{115}\) Article 21 of the Constitution of Kuwait states “All of the natural wealth and resources are the property of the State.”


\(^{117}\) Ibid., p. 56

\(^{118}\) Ibid., p. 56

\(^{119}\) Ibid., p. 56

\(^{120}\) Ibid., p. 56
wealth and resources “wherever deemed desirable by them for their own progress and development.”\textsuperscript{121}

Clearly, it appears that the problem for states like Saudi Arabia and Kuwait is not that international law and international relations no longer appreciates the gravity of sovereignty and national jurisdiction. Despite all that has been said about the overwhelming influence of globalization, it has not managed to jettison the central importance of sovereignty. Arguably, the significant issue is the adoption of arbitration as a means to resolve international trade law disputes. By this, it is meant that the means of resolution of business dispute, the forum, and the venue of such resolution may be as much as important (and some will say even more so) as the law that is applied. This recognition of a state’s right to determine the use of its own natural wealth and resources for its own development has become gradually affirmed over time through the oil industry arbitration. If we refer to, and compare, the ARAMCO and AMINOIL cases we can illustrate the business friendly effect of arbitration as a route to trade disputes. The tribunal in the ARAMCO case decided that Saudi authorities had infringed the initial concession agreement entered into with ARAMCO when they entered into the SATCO agreement.

The tribunal states that:

The rights and obligations of the concessionary company are in the nature of acquired rights and cannot be modified without the company’s (ARAMCO) consent.

The tribunal further noted:

Nothing can prevent a State in the exercise of its sovereignty, from binding itself irrevocably by the provision of a concession and from granting to the concessionaire irretraceable rights.\textsuperscript{122}

Conversely, the finding of the tribunal in the AMINOIL dispute makes reference to the changing economic times in respect of the manner in which oil concessions are


\textsuperscript{122}Saudi Arabia v American Oil Co (Aramco) (1963) Vol 27 ILR.
being addressed by developing countries throughout the world, as well as the fact that states are taking a greater role in managing their natural resources so that they can obtain much greater benefits and higher returns on their natural assets, stating:

This concession in its origin a mining concession granted by a State whose institutions were still incomplete and directed to narrow patrimonial ends- became one of the essential instruments in the economic and social progress of a national community in full process of development. This transformation, progressively achieved, took place at first by means of successive levies going to the State in the economic and technical management of the undertaking...and the regulation of works and investment programmes. The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages.\(^{123}\)

Taking this view of arbitral route, it becomes arguable that the decisions in both cases are nearly predictable, if not unavoidable. The \textit{ARAMCO} and \textit{AMINOIL} disputes are according to another possible view indicative of their times. State sovereignty was in recession and it remains severely curtailed both under investment laws and as a result of the development of the concept of international justice.\(^{124}\) The affected states in both cases discussed here had little knowledge and practice of resource exploitation. The agreements initially allowed for small percentages or royalty payments to the right-granting\(^{125}\) authorities in exchange for exclusive rights over vast deposits of natural wealth. The lesson to be learnt here thus is that the pre-eminence of state sovereignty and its attributes such as culture, religion, tradition, national pride must be put aside at the stage of planning investment laws. In place of a strong reliance on

\(^{125}\text{As one writer stated: "The extension of 'international justice' has reflected a widely welcomed decline in the legal weight attached to state sovereignty as a barrier to external judgement and intervention in a state's affairs. State sovereignty, the recognition of self-government and autonomy, is perceived to be increasingly dangerous or inadequate for many states and peoples". David Chandler, \textit{From Kosovo to Kabul and Beyond: Human Rights and International Intervention}, new ed. (Pluto Press, 2006) pp. 123-126.}\)
\(^{126}\text{In this context I am referring to the exclusive rights of oil and petroleum exploration and exploitation granted to oil companies by States.}\)
these, states must plan to engage with international law and the *lex mercatoria*\textsuperscript{126} on the terms of their contemporary development.

Perhaps most importantly the cases do show that current international investment regime compels a state which nevertheless wants to exercise its sovereignty by expropriation or nationalisation to embark upon prompt compensation. Decision makers must assess the discriminatory character of a termination, seizure or expropriation rather than a mechanical consideration of its effect on various groups of foreigners. In other words, exercise sovereignty if you must, but be guided by the requirement that "compensation has to be paid" and the emphasis is on 'prompt', adequate and effective compensation or the so called Hull formula.\textsuperscript{127} As Arsanjani rightly advises: "this element expresses that compensation should be paid either before the taking or within a short time after".\textsuperscript{128}

It is a well-recognised rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation. The "Hull formula" was first articulated by the United States but it has grown to be accepted by most developed countries. The doctrine was endorsed by the Secretary of State Cordell Hull in response to Mexico's nationalisation of American petroleum companies in 1936. Hull posited the view that international law requires "prompt, adequate and effective" compensation for the expropriation of foreign investments.\textsuperscript{129} Developing countries during the 1960s and 1970s, on the other hand, supported the Calvo doctrine. This was as reflected in major United Nations General Assembly resolutions. In 1962, the General Assembly adopted its Resolution on Permanent Sovereignty over natural resources, which affirmed the right to nationalise foreign owned property and required only "appropriate compensation". This compensation standard was considered an attempt to bridge differences between developed and


\textsuperscript{128} Ibid., pp. 307, 309.

developing states. In 1974, the UN General Assembly in fact, decisively rejected the Hull formula in favour of the Calvo doctrine and adopted the Charter of Economic Rights and Duties of States. While Article 2(c) repeats the "appropriate compensation" standard, it goes on to provide that "in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals."

It is the case that the Hull formula is accepted and considered as part of customary international law. No better testament to that fact exists than that, even developing states now also include the Hull formula in treaties between themselves.

It is submitted here that there is nothing about the Hull formula and its variations, which Shari'ah law and Saudi attitude to International law cannot cope with. For instance, it is indeed the case that the Saudi state maintained the concession agreement and honoured it until 1981 whereupon the government acquired hundred per cent interest of Aramco Company and it became a Saudi private company.

In order to do so meaningfully states must be forward looking in protecting their interests. They must sufficiently equip themselves with the much needed expertise to engage in business contractual relations rather than hope to renegotiate by coercive means. They must equally realise that the investment dispute resolution puts the parties at equal reckoning in the determination of rights and duties when courts and tribunals consider the dispute. Some of the tools and strategies of preparation for modern investment and arbitral law and practice will be discussed next.

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130 Ib. id. p. 2.
131 M. Somarajah, The International Law of Foreign Investment, Second edition (Cambridge: CUP, 2010) p. 212. Somarajah, however, thinks this is primarily because the treaties are indeed merely extraction of templates of treaties that are indeed directed at developed states and their multinationals.
3.4.2. Sufficiency of Islamic Law in Relation to Complex Investment Contracts in Light of Aramco, Aminoil and Qatar cases

One commonality that ties the three arbitrations discussed above together is the finding that ordinarily the law applicable to the concession will be the law of the host state. If the ordinary techniques of conflict of laws were applied as the inescapable conclusion would be that the law applicable was the law of the host state. Even the Arbitrators conceded on this point. Sir Alfred Bucknill admitted in the Qatar arbitration that the subject matter of the contract, together with the fact that the state was party to the contract, made Islamic law the applicable law to the contract. In the Abu Dhabi arbitration Lord Asquith’s view was that this is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would, prima facie, be that of Abu Dhabi. In Aramco the arbitration Sasser-Hall observed “...it is generally admitted in private international law that a sovereign state is presumed, unless the contrary is proved to have subjected its undertaking to its own legal system”. Yet in all three cases the learned arbitrators still came to the conclusion that Islamic law, which would otherwise have applied as the domestic law of the host state, was not sophisticated enough to deal with transactions involving exploration for oil. Sornarajah noted that European Arabists who came to the conclusion that Islamic law did not contain principles on petroleum contracts helped them along in this reasoning. Yet there were contrary views even at this time from some Western writers like Anderson and Goulson who ascertained that there was in fact Islamic law on the issue and that Islamic law does indeed support the principle of sanctity of contract.

The implications of the finding that Islamic law was not sophisticated enough are in retrospect a much-criticised one especially by Islamic writers. The decisions on this issue appear to fall into a recognisable pattern in Western relations with Islamic states that has been protested. Alan Godlas writes on this saying “Unfortunately, in their writings on Islam, many Western non-Muslims have been motivated not merely by an

134 (1958) 27 ILR 117
135 Opcit., p. 290.
enlightened desire to understand but rather by desires to dominate and control". 137 It is also seen as the result of an era of "othering" (involving psychological and socio-cultural distancing) is a key step in the downward attitudinal spiral that may be followed by dehumanizing and subsequently demonizing". It is the position of this thesis however that the arbitrators like many scholars of their period were only simply mistaken as to the way Islamic law works and indeed its true contents. Thus the deep suspicion that clouds the discussion of the Aramco may have arisen only because of unfamiliarity with Islamic law rather than any bad faith. The disappointment was so deep that the government forbade all government agencies from resorting to arbitration without prior approval from the Council of Ministers 138

What the arbitrators needed to have understood is that Islamic law does have several mechanisms to help the law out in situations that new and novel situations arise. This may be by resort to any of the Fiqh methodologies. In other words at worst the case should have been decided with the aid of methods like Ijma (consensus) Qiya (Analogy), Istihsan (The Public Interest), Istihab (presumption of Continuity) and Urf (Local custom)). 139 Ijma and Qiyas are principles of interpreting and deciding the Islamic law when when the Qur'an and the Sunnah are silent or absent on certain matters that have to be decided legally. Two of these methods will have been very suitable in coming to a decision under Islamic law in the Aramco case. Ijma is based upon the consensus of the community, which in practice is the community of Islamic scholars, on matters where the first two sources did not suffice. 140 Scholars and arbitrators in that case could also have resorted to the qiyas, which is reasoning by analogy and logical inferences. 141

Islamic law is, thus, flexible enough to allow complex commercial arrangements to occur in Islamic countries. For instance, Shari’a does not directly address finance in its modern meaning; it does incorporate general principles governing the economic

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138 Council of Ministers Resolution No. 58 of June 25, 1963. See also Sayen op.cit.,


140 Herbert M. Kritzer, Legal Systems of the World (ABC-CLIO., 2002) p. 73.

141 Irshad op.cit., p. 32.
behaviour of the Islamic society and specific instruments regulating classic commercial transactions. Thus, Islamic banks are unable to use conventional methods of financing but they are not left unaided because Islamic law permits them to provide Shari’a compliant alternatives to the services rendered by western banks. They also use a different paradigm of financing, namely asset based financing and employ the well-defined structure of nominated contracts in Islamic law. Furthermore Islamic Law may be used to rescue inherent conflicts or deficiencies created by modern commercial transactions and problems of International arbitration. As Mary Ayad describes

International Commercial Arbitration is the preferred method of dispute resolution between parties from different legal jurisdictions precisely because of its flexibility in the choice of law. Yet, that same flexibility poses risks to award enforcement; different jurisdictions perceive ordre public and international public order differently. Empowering arbitral tribunals to decide on questions related to international public ordre by privileging the concept of pacta sunt servanda would go far in reducing these risks. An understanding of the interplay between ICA law and the Sharia would lend to facilitation of ICA award enforcement.

Therefore, impressively Islamic law may come to the rescue of deficiencies in Arbitration rather than becoming a clog in its progress. An understanding of the interplay between ICA law and the Sharia would lend to facilitation of ICA award enforcement. Allowing arbitral tribunals, particularly those in the MENA to employ the Qiya or Ijtihad would circumvent obstacles to award enforcement based on privileging ordre public over pacta sunt servanda. It appears therefore that what was needed in the ARAMCO case was the use of Ijtihad or novel legal reasoning. Ijtihad in the terminology of Muslim legal scholars means that the scholar is to do his utmost to derive a practical legal ruling. There are limitations on this principle. Where the sharia texts are clear in its meaning and definite in its intention then it is not allowed


to deviate from it in determining its intention with the claim of interpreting it allegorically (tawil))\textsuperscript{144}

3.4.3. Protecting Sovereignty and National interests through Legal Protection - Contract Formation Stage, the Dispute Resolution Clause, and Legal Reform.

While allowance may be made for the right to returns for economic investments, it must also be appreciated that there were glaring inequities in the early concessions. As wealth grew and as the technology and infrastructure was incrementally put in place, the need for applicable laws and methods of dispute resolution become increasingly important. While the Western-owned corporations and their diplomatic representations appreciated this phenomenon and sharpened their practice of investment laws and arbitral practice, it would appear that the Saudi Arabian and the governments of many other developing states have not.

Perhaps more alarming is the fact that at least in the case of the Saudi state glaring lapses still exists in terms of arbitral capacity development and legal reform. By capacity development we refer among others to the need for the state to develop reputable arbitral centres and responsive arbitral laws. It has, for instance, been recognised that rather than quickly learning from the experience of ARAMCO and incorporating this into a programme of action towards modernisation the case actually caused a regression in the development of Saudi Arabian arbitration. Certainly it has “slowed down Saudi ratification of New York and ICSID Conventions”.\textsuperscript{145}

It is suggested here that one of the principal conclusions that could be drawn in relation to these two cases is that much more needs to be done by developing states at the stage of formation of contracts in international trade. The contractual formation stages are crucial. The forms that contracts take in terms of substantive provisions are also, of course, crucial. This is particularly true for developing states like Saudi Arabia, which have to be forward-thinking and must envisage developments as much as possible to ensure that their national interests will not be compromised by


developments that ought to have been foreseen. It must be realized that Multinational Corporations and their trading partners are men of business and commercial men who have been conducting business for longer periods and are usually aware of the unusual developments and other providential issues that may arise to distort the fortunes of other parties.

Whereas the companies would have taken care of themselves by mechanisms that may not at first be clear to the developing states, they will not be as forthcoming on the tools that may work to the benefit of the states involved — such as in the ARAMCO case, with the massive increases in fortunes. It is very important that valuable natural resources are not allowed to be wasted or unfairly appropriated by commercial agents of foreign economies or private companies, but it is equally important in the context of contemporary international commercial laws that *pacta sunt servanda* not only applies, but is always clearly seen to be applied. The only way to avoid being short-changed as a state is to give the most serious considerations contractual terms at the drafting stages.

Doak Bishop\(^{146}\) cites the actions of the Mexican authorities\(^{147}\) as being the precursor of the nationalization of the oil industry on behalf of overly generous right-granting authorities. What follows is the awakening of the right-granting authorities to the fact that they could, through the enforcement of their state sovereignty, reassert their ownership and ultimate control over economically profitable petroleum resources. The economically lucrative nature of this proposition was further improved by the rising price of oil and the development of agreements and alliances between oil producing nations and the consuming countries, and OPEC and Non OPEC Members.\(^{148}\)


As a result of the appropriation of rights and assets by right-granting authorities, and the nationalization of formerly private sector oil companies, Doak Bishop argues that a "Lex Petrolea" emerged. The awards and findings of arbitration tribunals that have been made public are generating the source material from which applicable and customary law is emerging. The important enquiry, therefore, is whether the jurisprudence that is collating into existence is one which is Eurocentric, Western-centric, or generally equitable and in the interest of all.

In a sense, whatever the outcome of the two leading cases discussed above would have been, it was expected that they would serve as a clear indication of legal developments and would put to test the use of law before international tribunals. Development scholars have, however, noted quite persuasively that international judicial and arbitral institutions may harbour a certain predisposition toward Western business. Perhaps more importantly, these scholars have further noted that there may be a bias in international commercial laws in favour of developed and richer states.

Indeed, certain aspects of contemporary international laws broadly construed have been revealed as threatening the fairness and equitable conduct of the regulation of international relations. It has also been argued that there is a deliberate stultification of the progressive development of public international law, international commercial law, and indeed nearly all aspects of international regulation by richer and privileged states. It has for long been argued that much of Western law, including international commercial law, has developed in response to requirements of Western trade, business, and politics. Therefore, it is worthwhile for Arabic scholars to engage in the enquiry whether, and to what extent, cases like AMINOIL and ARAMCO expose the means and strategies that have been deployed since the 19th and 20th centuries to manipulate international laws to serve Western interests, and perhaps to permanently work against the interests of the vast majority of resource rich Arab states.


Some writers like Oduntan have indeed suggested that international courts and arbitration panels have been deliberately underdeveloping international law. A particularly convincing description of this problem was formulated,

Whether it be the Trendtex case where the plea of sovereign immunity was held not to avail the Central Bank of Nigeria against a Company in England or recent commercial arbitration such as the recent Greek Cement Company case where Egypt’s revocation of the importation licence of a branch of a Greek owned company was held to be "tantamount to expropriation" developing countries have repeatedly been short changed in terms of the justice meted out to them by foreign courts and international arbitral tribunals. The problem transcends the main international courts and extends to other multilateral platforms for dispute resolution such as General Agreement on Tariffs and Trade (GATT) and the World Trade Organization dispute settlement. Where lex lata law is sufficiently in favour of a developing state as against its Western counterpart, development of the law is arguably accelerated to reverse the advantage. When lex feranda is postulated in the interests of justice by developing States the formal and substantive qualities of international law is affirmed.151

This idea of the use of force is based on a powerful partner who has the power to interpret the precedence and the legal procedures to justify the use of force in their interest. To some extent, this is the most salient argument that any Western legal expert can use against the use of Islamic Law. Lex Lata has become a norm. Building upon this norm is Lex Petrolea, in which a door to the use of force is opened in the contract. If this thesis holds true, then it appears that the decisions in the AMINOIL and ARAMCO cases, as in many other cases, were in effect predetermined and they could only have ended in decisions that were largely favourable to Western business. While there is certainly a trend to study further along this line of thinking, it will not be totally accepted. The fact that the AMINOIL case produced some level of victory for the Kuwaiti state is instructive. On the whole, however, we must heed the warning given in the above quote, and adopt a more critical view of the jurisprudence of international courts and arbitration awards. Developing states must consider this reality very carefully in agreeing to venue and forum of arbitration although there hands will be tied in many cases by the sheer weight of international practice.

Sophisticated licensing agreements, production sharing agreements, and service contracts are now the common contractual formula by which states with oil reserves enter into business with oil companies. These agreements are often combined into hybrid agreements and appear to firmly place the risk and the expense of oil exploration and exploitation at the feet of the oil companies.

The resource-owning states in return enjoy royalties, taxation revenue, and bonuses. While there is the possibility of making vast profits on all sides, it appears that oil companies are now subject to far more risks, checks, and stages of negotiation than what was previously required. Before engaging in activities such as exploration, drilling, and transportation (both on land and sea), the resource-owning state must consider the costly sealing and closure of non-commercial well-heads. Consideration must be given to crude and refined oil sales and exchanges as separate processes. Doak Bishop reminds us that the environmental impact of drilling and exploitation must not be underestimated by right-granting states. At each step of production new agreements are reached and entered into. This necessarily introduces numerous points at which disputes may arise. All these areas must be anticipated and considered both in the relevant resource clauses and effort must be expended in deciding which areas are best suited for arbitration or best handled under other sophisticated and applicable methods of dispute resolution.

In other words, Lex Petrolea is something that must be decided upon and developed with the most acute appreciation of the event. Only the most qualified experts ought to be involved in the negotiations, and they must have received the best opportunities at the training stages. Unfortunately, this has not always been the case in many Middle Eastern resource-owning practices. As Walde puts it,

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153 Bishop op.cit., p. 65. Supra note 116.
154 This problem is increasingly pointed out in much of critical scholarship emanating from the developing world. As a writer put it "In the case of negotiators from developing countries, a further handicap arises because of their lack of knowledge of the precise implications for their economies and their trade of the proposals that are under discussion." Vinod Rege, "Developing countries and negotiations in the WTO," Third World Network, Available at: http://www.twnside.org.sg/title/vinod-cn.htm. Accessed on September 12, 2010.
Cross-border commercial and financial transactions are not for widows and orphans. They are trained, certified and well paid professionals on both sides... This is a game for men and women, and not for boys and girls - caveat emptor and literal respect for a contract is more appropriate than importing easy escape from contractual commitments (duty to negotiate; large scope for recognition of error/mistake; force majeure; hardship, renegotiation) or using law to impose duties where no duties have been negotiated though they could have been.\textsuperscript{155}

The truth being denoted here is that there is little appetite for sympathetic treatment for a party that has not adequately fortified itself in the hard world of Western investment law much of which has become globalized into international commercial and investment law. The best of minds must have been applied to the task to ensure that the investment activity that is to be embarked upon is one that ties in with the socio-legal development needs of the state that will host the investment. The scope for making retrospective laws has shrunk beyond usefulness, and this indeed is a good thing as retroactivity of law making is as a general rule understandably frowned upon by international law.\textsuperscript{156} Therefore, touchy issues such as the requirement of 'clean up' payments ought to be made clear to operators even before the contract is operative and included in the contract. Again, this will underline and necessitate the need for arbitration, and perhaps more importantly, clarity in arbitration agreements and reference to any applicable laws.

Clarity is especially important in resource exploitation contracts and agreements given the usual lack of right of appeal in International Arbitration. The majority of arbitral processes do not have, or do not allow for any type of appeal process.\textsuperscript{157} Clarity of drafting and adequate addressing of the minds of negotiators to all aspects of their work will indeed assist the ability for a tribunal to offer a final and binding

result. Wherever disagreement does ensue, initial attempts to achieve the best clarity possible are still of benefit to the parties that come to the arbitration.

Clearly one of the lessons that the *Aramco* and *Aminoil* cases offer is that states must be quite clear about the nature of their commitments at the earliest stages of the drafting of contracts. This includes a proper appreciation of not only the preferred dispute resolution route but also a clear understanding of the dispute resolution clause. It is clear also that the Saudi Arabian system is similar to those of other developing, resource rich states in the need to develop a dispute resolution clause drafting capabilities and capacities to the most elaborate possible levels. The assumption that dispute resolution clauses can continue to be midnight clauses must be jettisoned in its entirety.\(^{158}\) The arbitration or dispute resolution clause is one of the most important aspects of the task before parties to international resource or petroleum contracts.\(^{159}\)

A question that has been very common in much of the reaction of non-experts to decisions that do not favour states is whether there is, or there ought to be a right to appeal decisions and awards. In the two major cases discussed in this chapter, the oil companies enjoyed pleasant and cordial relationships with their respective states. All had profited greatly from their partnerships together, and the arbitration indeed underlined a relationship worth salvaging as well as preserved the scope for future business. As a general rule, it may be suggested that appeal mechanisms ought to be excluded from the investment dispute resolution mechanisms, as they would only serve to dig deeper divisions between the parties.

The cases discussed in this chapter demonstrate that the composition of the ad hoc tribunals and the selection of arbitrators and applicable law have been the remit of the parties. It is not inconceivable to appreciate that to have a method of appeal in these cases could have prompted allegations of bias against the arbitrators. To directly or

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\(^{158}\)The phrase "the Midnight Clause" came into being because the clause is often the last clause negotiated by the parties after all other clauses have been concluded. Yet, the most important clause in any contract is the dispute resolution clause for so many reasons, not the least of which is that the way contracting parties manage any dispute, disagreement or controversy that arises in the course of implementing the contractual agreement, would invariably determine their future commercial relationship. [http://www.nigerianlawguru.com/articles/arbitration/DRAFTING%20THE%20DISPUTE%20RESOLUTION%20CLAUSE.pdf](http://www.nigerianlawguru.com/articles/arbitration/DRAFTING%20THE%20DISPUTE%20RESOLUTION%20CLAUSE.pdf) accessed 03 February 2012.

indirectly be seen to criticize arbitrators, even in the most high profile investment disputes, goes against one of the clear benefits of choosing arbitration. The philosophy of investment arbitration is that the parties can choose their arbitrators and effectively compose their own arbitration tribunal. This has a multitude of benefits for the autonomy of the contracting parties, and avoids what may become major domestic issues. Yet, considerable internal upset is inevitably generated when states lose cases before international courts and arbitrations. This was experienced in Nigeria following the ICJ judgement in Nigeria v. Cameroon.\textsuperscript{160} Relations between Cameroon and Nigeria had long been strained due to problems along their common border, which is more than 1700 kilometers long and extends from Lake Chad to the sea.\textsuperscript{161} After the judgment, which handed over an oil rich Peninsula to Cameroon from its previous owner Nigeria, many in Nigeria argued that “post-colonial” judges were deciding the validity of the colonial treaties. Thomas Waelde, an advocate of arbitration, wrote that there would have been no room for such allegations had the parties opted for arbitration.\textsuperscript{162}

All states that opt for pacific resolution of disputes must understand that one party will be substantially victorious and the other may lose important points and issues. The loss of vital national interests does not usually come easy to statesmen and the populace. For instance after the International Court of Justice judgment in the \textit{Maritime Delimitation and Territorial Questions between Qatar and Bahrain case},\textsuperscript{163} that was favourable to Bahrain, the Bahraini Prime Minister issued an edict to declare a public holiday in Bahrain because: “…this day is one of the great days in the history of Bahrain.”\textsuperscript{164} Qatar, on the other hand, expressed ‘pain’ at the loss of what it considered national territory. In a television address to the state after the verdict, the Qatar Amir, Shaikh Hamad bin Isa Al Thani stated that the recognition of Bahrain’s

\textsuperscript{161}For a brief pre-independence era outline of the disputed area see Mendelson op.cit., 224-227.
\textsuperscript{163}Thomas W Waelde, Vol. 1 \textit{Oil, Gas & Energy Law Intelligence}, Issue 02 March 2003
\textsuperscript{164}Case concerning the Maritime Delimitation and territorial questions between Qatar and Bahrain (merits) (Qatar v. Bahrain) Judgment of 16 March 2001. ICJ Reports are available on the website of the IC available at www.icj.org.
\textsuperscript{164}Edict No. 7 of 2001. Thousands of Bahrainis took to the streets. Press reports recalled that “celebrations broke out across the island with thousands pouring out into the streets ... waving flags, blaring their car horns, cheering, congratulating and waving one another ”, “Hawar Stays with Bahrain HH Amir Hails ICJ verdict” \textit{Bahrain Tribune} Saturday, March 17, 2001 pp. 20.
soverignty over the disputed Hawar territory "was not easy upon us." The importance of such examples is to show that dispute resolution processes may yield painful results; but they are hardly a reason for states to recoil from international relations or indeed shy away from modern instruments such as international agreements or investment treaties.

Thomas Waelde's thesis is, however, tested by other instances of party intransigence after an arbitration award. For instance, ten years after the much-celebrated award in the arbitration between Ethiopia and Eritrea by the Eritrea-Ethiopia Boundary Commission (EEBC), the award has not yet been given effect, and there is much recognition of failure to implement the award between the parties. It, therefore, appears that both judicial resolution and arbitral award may end with dissatisfaction if their dispute is improperly delineated or if there is a lack of political will to achieve resolution.

What is important is for states to appreciate the demands of capacity building in legal training and staffing of their various ministries—finance, judicial, central banking, etc. Indeed as a result of this realization, it becomes imperative that Saudi Arabia, take more seriously arbitration training and arbitral practice. At the very least it is necessary for states to take the arbitrator nomination stage very seriously.

As has been demonstrated, the choice of arbitrator also affects the quality of the arbitration. In an ad hoc arbitration, such as those that have been profiled in this

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chapter, individuals can be chosen to serve on the basis of possessing particular expertise, or two-fold expertise (such as specialist knowledge of particular legal principles, such as Shari‘ah, as well as commercial dispute expertise). Arbitrators may also be drawn from a particular cultural or social background that reflects those of the parties and that bring with them an understanding of the issues that go beyond their expertise. This is true of state versus private arbitration, just as it is true of nominations or appointment to bodies such as the WTO or ICJ. Both these organizations offer an available, ‘pre-selected’ pool of experienced judges and arbitrators that are familiar with each other and can work quickly and professionally together. The main problem with these bodies is that they tend to not have enough scholars from the developing world on their bench. This is accentuated by the fact that there is a dearth of truly well trained scholars in Islamic law and jurisprudence within these bodies.

3.5. Conclusion

The early cases on investment arbitration treated above reveal a pressing need for legal reform in relation to arbitration regime and investment laws of the Saudi Arabian state. Continuous modification is imperative in both capacity developments in legal training and reform of arbitration law. Although certain changes have been made since the era of the cases highlighted above it is fair to say that scholars still detect continuing failures of the Saudi Arbitration Law and its Implementing Regulations. It is clear that those countries that look towards the Sharia as the supreme source of all rules must consider that international law regulating FDI

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167 In the case of the ICJ such judges are financed by the United Nations.
168 Oduntan op.cit., pp. 310-313.
169 Saudi Arbitration Law 1983 and the Implementation Regulations 1985 is available in the Saudi Chamber of Commerce East Province Legal Department published in Official Gazette (Umm al Qura) Issue no 2969 dated 22 of August 1404 H (June 1983). For instance, the provisions to indicate on which grounds the challenge to arbitral awards will be successful results in leaving the door wide open to the challenge of awards. Therefore, it is recommended that express provisions setting down the reasonable grounds for challenges of arbitral awards should be incorporated in the Implementing Regulations when the time comes for its revision. It should be made clear and unequivocal that if the arbitral award is sought to be implemented in an Islamic country where the principles of Shari‘ah are applied, such an award should not be contrary to the rules of Islamic law. Similarly, if the arbitral award is not contrary to the Qur‘an, Sunnah or Consensus, it should be automatically enforceable and not subjected to challenge. Faisal M. A. Al-Fadhel, Party Autonomy and the Role of the Courts in Saudi Arbitration Law, With Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law (PhD Thesis submitted at Queen Mary College University of London, 2010) pp. 238-248.
constitutes a necessary exception to their reliance upon the Shari'ah. Compliance with international laws may dictate outcomes that go against both the national interest and the Shari'ah. Autonomy of the contracting parties is the bane of FDI relations and international commercial arbitration accords sanctity to contracts, the emerging lex mercatoria and pacta sunt servanda.

Finding the right balance between the rights and responsibilities of foreign investors, on the one hand, and those of governments, on the other, is a key imperative of legal reform. It needs to be a balance that combines the stability, predictability transparency and mutuality of interest that ought to guide investment decisions with the national interest of the state and the contracting party. It is indeed true as concluded by another scholar of the topic that “Finding regulatory solutions to this challenge is not easy. It is important that the process of rebalancing, which is already underway, proceed in a manner that strengthens the overall international investment regime”.

The arbitrators in both the ARAMCO and AMINOIL cases recognized the validity of the property rights that oil companies possessed over the actions of the right-granting states, and the exercise of state sovereignty. Equally, the tribunals also addressed the issues of the authorities' sovereign right to expropriate those rights. In the case of AMINOIL, this was clearly shown by the awarding of compensation to AMINOIL following the expropriation of their assets and exclusive rights under the original concession agreement. On one hand, the oil companies lost highly lucrative streams of revenue and rights over massive deposits of natural wealth, but on the other hand, due to their expertise, commercial size and power, they were able to survive such intervention and continue in their businesses. These actions did not dissuade them from entering into future agreements with other states for their petroleum and crude oil contracts. One could also argue that the experience of the major oil companies in Saudi Arabia and other parts of the Middle East involving nationalization, forceful acquisition and egregious use of state power forced a sea-change within the petroleum investment industry that required oil companies to seek out and develop additional new sources of oil such as the North Sea, Africa, and the Caspian region.  

170 Al-Fadhel, ibid., p. 16.
however, is that in many cases their actions in all these new places, particularly in Africa and Latin America, have continued to be heavily criticized and controversial.

In relation to the idea that Islamic law is inadequate in dealing with modern commercial affairs, it appears that this view is erroneous. Every legal system just like every language is capable of being used to cover all human circumstances. The belief exists partly because of the ignorance of Western jurists and even some Muslim writers who do not sufficiently understand the true nature of the Shari'ah. With appropriate resort to the *ijma* and *Qiyas* when the Qur'an and the *Sunnah* is silent upon a matter or in new and analogous situation Islamic law will be able to cope with any transaction that can occur on earth. However, the fault is not only upon Western scholars but it also lies on Islamic scholars who have not being sufficiently elaborating Sharia principles in a confident and competent manner. Even worse are the clerics and scholars who adopt a fixed and very conservative view of Islamic principles. These scholars do the most damage and truly make it impossible for the Shari'ah to perform its task in modern international relations. This is also not to say that there is no deliberate bias against Islamic law and other competing legal world view as a result of power politics in world affairs. As a result it may indeed be better for the modern international law to be used when the matter is of international commercial nature.

Ultimately, oil companies such as AMINOIL and ARAMCO are overseas investors and commercial trading entities. This fact must always be borne in mind by the leaders and decision-makers in their host states. Dispute resolution by an arbitration tribunal may be a long established method by which disputes between commercial transactions of companies are resolved, but it is not free or completely devoid of politics and international power. The size and economic capacity and influence of many multinational companies’ means that they are able to facilitate, fund, and initiate the use of the GATT/WTO dispute panel procedures much more effectively than some states. It has been long observed that developing countries made limited use of the dispute settlement set out under the General Agreement on Tariffs and Trade (GATT).172 Most observers insist that the various GATT reforms that were

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intended to help developing countries failed to insulate them from the “power politics” of the system. The effects of this differential attitude become apparent in the result of studies that establish the tendency of WTO rulings to lean for the complainant in 64 percent of rulings, and in the GATT-era Panels, 77 percent of rulings. Indeed, many oil multinationals have successfully hidden “in the shadow and under the mantle of a WTO member state.” This means that not only ad hoc arbitrations like the ones focused on above harbour dangers for Saudi Arabia, but even institutional arrangements may also be difficult to resort to unless a lot more effort is expended in studying these institutions and adapting to their peculiar needs.

The increase in transnational transactions, both between member states and commercial companies means that there will be a concomitant increase in transnational disputes. In light of current trends, we are likely to see more of these disputes resolved by way of arbitration, primarily for the reasons discussed above but also because the transnational nature of the transactions mean that disputes are likely to be born out as a result of differences in culture, law, business norms, and procedures. Equally so, domestic means of resolution will never be satisfactory to an oil company, or any other inward investor, on the grounds that the acceptability of their decision will have elements of bias and enforcement.

It will appear that a similar situation as that which was faced by African states before the ICJ and the PCA is applicable on a South-wide basis under both the GATT and WTO, as well as in the ad hoc arbitration rule described above. Many of the judgments emanating from international courts have shaken the confidence of the resource-rich states in referring disputes to these bodies. This, however, does not mean that developing states like Saudi Arabia could not have approached their cases

Dispute Settlement (Queen’s School of Business and CIAR, 2011) available at http://userwww.service.emory.edu/~erein/research/Berkeley.pdf accessed 6 February 2012.


with more expertise and due care. In fact, the prevailing situation, as we have argued above, simply shows the crucial nature of the resource-rich state to acquire better expertise across board to cover contract negotiation and dispute resolution phases. There is also the need for international lawyers and scholars to argue in favour of changes that will make dispute resolution fairer and more responsive to the needs of developing states.

WTO procedures and those of ad hoc tribunals have been shown to lean in favour of richer and more economically powerful countries and companies. It is argued that this disadvantage is in addition to other systemic faults in international relations that prevent powerful authorities from enacting legitimate rules and principles. Commendable improvements include the recently instituted WTO Legal Advisory Centre, which offers financial assistance to poor countries by co-financing their litigation. The better the legal advice a party obtains, the better the chances of its success.

In conclusion, it is clear that both the cases of AMINOIL and ARAMCO have contributed to the manner in which oil arbitration is conducted, and to the overall pool of Lex Petrolea. These cases have been analyzed and reinterpreted in many other situations, and by scholars in other states in the Middle East and beyond. In the emerging global market, the development and expansion of the WTO means that it is highly likely that we will see many more disputes resolved by way of arbitration. With respect to oil companies, the economic and political future of these organizations is still uncertain, with environmental and nuclear issues coming to the fore at a pace that has not been previously witnessed. Nonetheless, this is good news for the arbitration industry as the better developed and equipped an oil company is to deal with the disputes arising from oil concessions, the better prepared it will inevitably be in its legal relations and technical operations.

It is also important to mention briefly two other cases, which made similar impact in the region. They are indeed part of the body of the so-called Lex Petrolea, namely: Petroleum Development Limited v Sheikh of Abu Dhabi (1951) and The Ruler of
Qatar v International. These cases, when viewed in the context of Lex Petrolea, can reshape the entire legal understanding to any judgments or academic literature accomplished in the past 60 years.

_Petroleum Development Limited v Sheikh of Abu Dhabi (1951)_\(^{176}\)

The Abu Dhabi dispute, which took place in 1951, was the first Arab oil arbitration case. Abu Dhabi has a coastline of about 275 miles on the Gulf. Sheikh Shajbut of Abu Dhabi nation engaged himself in a contract in Arabic with Petroleum Development Limited. In this contract, the Sheikh purported to transfer the exclusive right to drill for, and to win mineral hydrocarbon within a particular area in Abu Dhabi, for a period of 75 solar years from date of signature to the company.

The umpire in this arbitration, Lord Asquith, in coming to the determination whether a concession granted by the Sheikh of Abu Dhabi extended to mineral exploitation of the territorial waters and the subsoil of the continental shelf, made certain conclusions worthy of discussion. On the one hand, his words were seized upon by some as showing the inadequacy of Islamic Law to be applicable to modern business. The argument of the state was that the Sheikh was quite unfamiliar with the legal term “territorial waters” and therefore held the argument that the subsoil of the territorial waters was included in the concession. Since there was not a choice of law clause, Lord Asquith concluded; “if any municipal legal system was applicable, it would prima facie be that of Abu Dhabi.”\(^{177}\) But he also declared that, “No such law could reasonably be said to exist...it is fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments and that the Sheikh of Abu Dhabi administers a purely discretionary justice with the assistance of the Quran.”\(^{178}\) Writers such as Anthony


\(^{178}\) Ibid.
Anghie argues that international law has strong links and connections with imperialism, and in the colonial era had a “civilizing mission” have used this case.\textsuperscript{179}

A similar approach was evident in the case of \textit{Ruler of Qatar v. International Marine Oil Co. Ltd.}, where the arbitrator held that although Qatar law was the proper law to apply, it had to be dismissed because as he put it, “I am satisfied that Qatari law does not contain any principles which would be sufficient to interpret this particular contract.”\textsuperscript{180}

The question may then be asked, if the UAE has learned its lesson from the \textit{Abu Dhabi case}, and Qatar from the \textit{Qatar case}, then why did the Kingdom of Saudi Arabia not learn from the ARAMCO case? It is a prime contention of this thesis that a grand level of cultural legal philosophical chauvinism is apparent in these cases. Business was foisted on the Arab states in this period without any respect for their own legal and cultural civilization. Yet, it must also be argued that the Kingdom of Saudi Arabia must reform its constitution, and bring its state laws into conformity with international norms. This contention does not seek to make the Kingdom into a “Western Nation”, but to operate in a 21st century world of commerce and industry, the laws of which are in constant flux even traditional societies must adapt. As such, the Kingdom must consider the possibility of adopting constitutional reforms to allocate Islamic law for internal use, and embrace a parallel commercial private law program compatible with the international legal practice. This approach has been adopted in Dubai, and appears to be successful.

It remains, therefore, to see how our conclusions may allow us to begin to understand the necessary holistic changes in Saudi Arabia’s regulatory environment that must be put in place given the determination of the government to move away from a past of suspicion of international law and particularly International commercial arbitration. Given the unique natural gifts of oil resources that the country possesses the future must be planned for with more seriousness in order to maximise the benefits of trade.


and investment and modern international relations. It is suggested that the changes must first of all come from within in a socio legal sense.
Chapter 4: MAKING SAUDI ARABIA AN ATTRACTIVE DESTINATION FOR FOREIGN INVESTMENT - SOCIO-Legal DEVELOPMENT FOR BETTER PROTECTION OF INVESTORS' RIGHTS

4.1. Introduction

This chapter aims to explore the historical, ideological and socio-legal basis for the differences between Saudi Arabia’s legal regime and those of the majority of the western investor states. It is hoped that such an analytical approach will help understand the fundamental differences and also pinpoint precisely what strategies will best succeed in implementing reform. It has, for instance, been shown in chapter two that Islam itself is not opposed to economic and legal modernisation. It has also been shown there is recognition among all states as to the inevitability of international trade and the mutual interests for all.

The purpose of this chapter is to appraise the socio-legal background to the Kingdom and question whether what is discovered lies behind the difficulties the State is having in realising its full potentials. Specifically the argument will be tested that without socio-legal changes Saudi Arabia cannot be or remain an attractive destination for foreign investment. The thesis in this chapter also looks at the Saudi legal system through the prism of the international legal regime that bears on the international investment law including international human rights and international investment dispute resolution. It is from this basis that the reform needed to address the identified shortcomings will be presented in later chapters.
4.2: Saudi Arabia Imperatives of Socio Legal Development and Changes to Human Rights Regime

The law of Saudi Arabia, however, presents a special case, not just because it is based on religious perspectives but because it is based upon a particular set of interpretation of these rules which does not permit the necessary development of the law in order to conform to modern international realities. The elaboration of the law is left us to this day primarily to religious clerics. These very traditional actors are still involved in the development and determination of national law without any training or appreciation of the resulting international implications. Furthermore as a result of the heavy reliance of the world on petroleum energy the difference between slowly developing Saudi law and international (Western) standards continue to cause serious problems.

One frequently overlooked fact is that reform in Saudi Arabia is somewhat rendered more difficult because of its insular history having avoided the wave of colonialism that swept through many of the neighbouring states. Thus, although it avoided the trauma of legal transplant of foreign legal civilisations this very fact also appears to have increased its resistance to changes that may have been taken for granted elsewhere even in the region. In a sense, therefore, unbroken sovereignty and national pride that ought to be of great advantage arguably has come at its own massive cost. The unfortunate result has been undue rigidity to change and resistance to modernisation particularly as a result of the influence of a conservative class of

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religious clerics. This rigidity has over time begun to adversely affect Saudi market credibility and engendered a reputation of opaqueness rather than transparency.

Furthermore, the refusal to continuously fine tune and reengineer the Saudi legal system particularly as it relates to international developments in human rights, democratic principles and the rule of law in order to make it fit for the lucrative investment destination it has become in the last six decades has made the country like many other Arab states unable to fulfil its socio-political destiny by attracting even more diverse quality foreign investment.¹⁸³

It may be rightly said that throughout the ages all human societies have possessed notions of justice, fairness, dignity, and respect. Ancient manifestations may be found in the practice of the Greek city-states, traditional African concepts of peoples and ancestral rights, and even biblical accounts of cities of refuge. Indeed the understanding of human rights as we know it today is but one path to implement a particular conception of social justice. However, it is true to note that the idea of human rights, particularly the notion that all human beings, by the very fact of their humanity have certain inalienable rights that they may exercise against society and their rulers, was foreign to all major pre-modern Western and non-Western societies. Pre-modern societies generally see political authority as something that is to be used wisely and in pursuit of the common good.¹⁸⁴ In most cases, this mandate was explained by the theory of divine commandment, natural law, tradition, or even contingent political arrangements. Importantly, however, it did not rest on the rights (entitlement) of all human beings to be ruled under the rule of law. In other words, the

¹⁸³ As one writer notes: "scholars have begun to argue that the relationship between human rights and foreign direct investment is more complex. Various factors have been cited....among these are increased public awareness of human rights abuse, greater effectiveness of activists via the internet, an increasing need for well-trained labour, and a desire for access to new markets. Arguably, respect for human rights creates an environment conducive to the development of human capital, with such countries generally more open, accountable, and economically efficient". Shannon Lindsey Blanton, "What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment" p. 2 available at http://nathanjensen.wustl.edu/me/files/Blanton.pdf accessed 16 February 2012. See also Shannon Lindsey Blanton, Robert G. Blanton, "Human Rights and Foreign Direct Investment A Two-Stage Analysis", Vol. 45 Business Society no. 4 (December 2006) pp. 464-485.

people had no natural or human rights to be maintained against unjustly constituted political or ecclesiastical leadership.\textsuperscript{185}

It is a fortunate turn of events that has made the history of the $20^{th}$ to $21^{st}$ century one that commands increasing respect for human and people’s rights, personal freedoms, and economic development. However, the changes have come in stages and different societies approach this development at various speeds. It has become fashionable since writers like Karel Vasak and Bryan Garth introduced it in the 1970s for writers to claim that international human rights rules belong to three distinct generations.\textsuperscript{186} The first generation consists of civil and political rights central to the legal philosophy of the Western capitalist states, as evidenced in the postulations of John Locke, Jean Jacques Rousseau, and other writers of the “natural law” school. This particular generation of rights still eludes many traditional societies, such as Saudi Arabia, and constitutes a major aspiration of progressive elites. The second generation of rights are those economic, social, and cultural rights developed under socialist jurisprudence with the support of the developing states. The third generation of human rights is a product of the aspirations of the newer states to assist each other in attaining independence, and to create a more level field in the international system. This set of rights includes the right to self-determination and the right to development. To some extent the current Saudi legal framework for the freedom of movement is perhaps not to the global standards and it needs to be reformed to be in consonance with international practice.\textsuperscript{187}

Human rights as a concept represent demands or claims that individuals or groups can make on society, either at the level of the nation-state or internationally. Some of these rights are recognizable \textit{lex lata}, i.e. settled law, while others remain aspirations.


to be attained or elaborated upon in the future. These rights are generally aggregated under five sub-groupings: civil, political, social, economic, and cultural. Civil and political rights are seen as including such rights as: the right to self-determination, the right to life, freedom from torture and inhumane treatment, freedom from slavery and forced labour, freedom of association, the right to liberty and security, freedom of expression and opinion, freedom of movement and choice of residence, rights to fair trial, privacy, assembly, marriage and family life, participation in governance, equality before the law and nationality. Economic, social, and cultural rights, on the other hand, refer to that entire gamut of rights as enshrined in the International Covenant on Economic, Social and Cultural Rights (1966), such as the rights to work, just conditions of work, fair remuneration, adequate standard of living, collective bargaining, union activities, equal pay for equal work, social security, property, education cultural life and the benefits of scientific progress. These rights are of tremendous importance especially “as recognition of some link between human rights and development is relatively well supported”. Thus, there is a convincing basis for societal and necessary human rights reform. The argument for reform is, however, hampered by the influence of religious clerics who have repeatedly tried to control this reform through the insertion of religious guidelines within the government’s administrative machinery. In this way among others, necessary and progressive changes have been obstructed. Such practice has led to conflicts within the state and indeed has halted reform of social and legal side relevance.

There is indeed a general assumption that economic, social, and cultural rights are no more than political or moral aspirations, and that to speak in terms of them as rights is a misnomer. This is probably a reflection of the initial schisms that were present in the formative years of human rights doctrines, namely the Western doctrine, the socialist doctrine, and the doctrine of developing countries. The Western doctrine is based on the assumption that human rights should be as clear as possible and woolly terminology should be avoided so as not to place too many restrictions on the freedom

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of individual states with the resultant effect that many states would shy away from ratifying treaties. The socialist doctrine, on the other hand, was clearly in favour of economic, social, and cultural rights; the right to self-determination for all peoples particularly the colonies and the equality of all persons including the prohibition of discrimination, especially of racial discrimination. Developing countries who gained independence from the 1950s upwards seemed to possess the collective opinion that considering their current state of development, it was better to focus on the realization of economic, social, and cultural rights. It was against this background that a strict separation of the so-called first and second generation of rights was maintained in the form of two separate international covenants of 1966, although the Universal Declaration of Human Rights (1948) did not maintain this division.

The Western states' rationale for the insistence on the primacy of civil and political rights is based on their shared legal and social traditions emanating from the events of the American and French revolutions, and other documents such as the Magna Carta, which include the strong influence of natural law thinking. Indeed, human rights in the sense that we know it today entered the mainstream of political theory and practice in 17th century Europe. John Locke's *Second Treatise of Government* (published in the wake of Britain's Glorious Revolution of 1688 which witnessed the overthrow of King James II) presented the first recognizable developed theory of the natural rights of man. It is also correct to state that Western philosophers in the 17th and 18th centuries were particularly concerned when they referred to the 'rights of man' with the individual civil liberties for men of the propertied class.

However, it is probably fair to state that while statesmen debated extensively the primacy of certain political rights, the general population was making demands for food, work, and better pay are the antecedents of present day economic social and political rights. Substantive equality of human beings was a much later conception. In the first years of the operation of the UN Charter, it was naturally the Western political philosophy that prevailed. Civil rights and political freedoms were promoted

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as having primary relevance and importance. This found prominent expression in the Universal Declaration of Human Rights in 1948, and was then enshrined into positive law in the 1966 International Convention on Civil and Political Rights.

It is important to point out that the doubts as to the readiness of Saudi Arabia to take the whole gamut of human rights more seriously and at least to the level satisfactory to investing states may continue to affect the decision of investors even in the ‘cut throat’ world of oil and gas investment. Furthermore, the general doubts as to judicial competence in the field of human rights appear to extend to the confidence of investors in the courts of Saudi Arabia. Indeed the influence and intervention from the religious clerics who give the justification for cases in a less than systematic fashion further erodes investor confidence. In a sense, therefore, the now politically incorrect assumption of Lord Asquith in respect of the law of Abu Dhabi continues to apply to impressions of law and justice in Saudi Arabia.192 Indeed in some cases, the decisions are different based on a specific cleric or a judge's mood, understanding, and to an extent, level of education. Such arguments cannot be referenced or cited, however, due to the nature of the Saudi legal system, given that judgements are saved and archived as state confidential documents, and as such, are inaccessible to scholars.

The second generation of rights emerged from socialist thinking. Traces of these concepts can be found in Karl Marx’s critique of 19th century capitalism.193 However, the emergence of more socialist countries in the UN around 1955 signalled the beginning of aggressive attempts to espouse these rights. On the part of the socialist states there is a necessity to create a preference for economic, social, and cultural rights based on their doctrinal focus on the transfer of real power to, or at least for, the benefit of the majority; i.e. the working class proletariat. The Western countries originally perceived the rights that are contained here as non-justiciable. They include, inter alia, the right to work, just conditions of employment, reasonable standard of living, participation in trade unionism, and other forms of collective

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bargaining, the right to equal pay for equal work, social security, education, property and the enjoyment of cultural rights, and the proceeds of scientific progress.¹⁹⁴

Starting after the end of the Second World War, the quest and attainment of independence for the erstwhile colonial countries and territories became a reality. By the mid-1960s, the Afro-Asian bloc had become the largest group in the United Nations. These countries, which had suffered under colonial rule, had a special interest in human rights. They found a sympathetic hearing from the Soviet bloc and some countries in Europe and the Americas. The focus of this group, and the successes they achieved in shaping positive rules of human rights, constitutes what has been typified as the third generation rights or solidarity rights.

The United Nations once again seriously began to attend to the elaboration of human rights. Most significantly, the International Human Rights Covenants were completed in December 1966. In the 1970s the developing countries used their numerical strength and enthusiasm in conjunction with the socialist states to espouse in addition to the economic and social rights, specific rights relevant to the removal of all vestiges of the injustices they collectively suffered as a result of colonial oppression. These led to the emergence of treaties against racial discrimination (1965), discrimination against women (1979), rights of the Child (1989), and on migrant workers (1990), etc.¹⁹⁵ It is interesting to note that some writers are beginning to speak in terms of a fourth generation of rights which have arisen as a result of the desire of states to correct previous and prevailing ills. Among these newer rights are the specialist areas of developmental rights and environmental rights. A good example of this is the Kyoto Protocol.¹⁹⁶


It has, however, been asserted with much credit that the history of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages. In 1948, the Universal Declaration of Human Rights (UDHR)\(^{197}\) contained the whole range of human rights within one consolidated text. The subsequent separation of rights into two human rights covenants in 1966 was primarily as a result of Cold War politics and ideological differentiation.\(^{198}\) Moreover, the moral ground both the Western doctrine and the socialist approach claim to have is negated by objective examination. Indeed, it may be argued that the system of economic exploitation hiding behind the façade of liberal democracy is in total contradiction to human rights, and many aspects of the so-called ideals of socialist rights and duties are a pretext leading to forced labour, exploitation, and a gross abuse of rights. It is this realization that makes agitation for political changes in Shari‘ah countries very difficult to articulate, even though the case for progressive change becomes clearer in course of time. For meaningful progress to be made by a traditional society like Saudi Arabia, determined and sustained effort is imperative, whereas the contradictions and hypocrisy of the leading western states and blocs makes the argument for change difficult to articulate.\(^{199}\)

The question that seems to suggest itself is which direction of the possible directions (political right or economic and social) a state that aspires for economic growth like Saudi Arabia must embark on. The initial conclusions reached on this are that both are needed in equal measure. In any case since 1966 the UNGA and municipal courts have always taken the view that these sets of human rights are interrelated and indivisible. On June 25, 1993, representatives of 171 states adopted by consensus the Vienna Declaration and Programme of Action of the World Conference on Human Rights. The Conference examined the link between development, democracy, and economic, social, cultural, civil and political rights, and evaluated the effectiveness of the United Nations methods and mechanisms. The final document, which was


\(^{199}\) Note may be taken of the numerous interrogation scandals in the prosecution of the war against terror, the policy of illegal rendition, the controversial Guantanamo bay detention centre, repressive reaction to some of the “Occupy Wall Street” movements.
endorsed by the forty-eighth session of the General Assembly (resolution 48/121, of 1993), reaffirmed all the principles that have evolved since the end of the Second World War, and further strengthens the foundation for additional progress in the area of human rights. The significance of the Vienna Convention (1993) is that it more or less renders obsolete pre-existing divisions maintained between classes or generations of human rights. This is because it endorsed the recognition of the interdependence between democracy, economic development, and human rights. Thus, the continuing relevance of maintaining a strict distinction, particularly between the first and second generations, of rights is questionable. In order to receive the full benefits of economic development the Saudi people will have to exercise all the full range of rights applicable to them under international law, to the extent that these are not disruptive or incompatible with the public policy and provisions of the Shari’ah.

There is, however, no shortage of people who take the view that states like Saudi Arabia must move slowly toward adoption of the same route to development that other states have done. Sceptics of the development of human rights are quick to point out that international law is a little more than an attempt to legitimize the interests of powerful Western states. In as much as human rights play a role in this process, it is because it serves the hegemon’s interests, not because of concern for human security and dignity. The US, for instance, is said to have used its considerable political and economic power to promote a particular conception of human rights that sought to legitimise its own interests and those of capital. The assumption that human rights are inherently Western concepts imposed upon other cultures takes a static view of moral and legal principles, and is, therefore, flawed. Even if it can be argued that the concept of ‘right,’ and political rights as we know today began as a Western concept, it is more reasonable to believe that these concepts are now separable from their genesis so as to be applicable universally. Furthermore, the contemporary concept of human rights as we know it today has been greatly enriched by legal and political inputs from other cultures and civilizations. Islamic civilization was indeed one of the major sources of both human rights as well as trading customs such as the lex mercatoria.

As Braitwaite and Drahos correctly noted in their seminal work:

Much that we have shown to be constitutive of European regulatory states and their economic power originated in these other empires: coins and paper money, paper itself that enabled and transformed complex state regulatory bureaucracies and legal systems that could carry its commands across long distances (China), monetary policy, commercial credit (China-Arab), enabled double-entry bookkeeping, maritime trading regulations, the commenda that was the foundation of the limited liability corporation, bills of exchange (India-Arab-Islam), systems of efficiently regulating slave labour (Africa-Arab-US) and perhaps the regulatory institutions of guilds and trade standardisation such as weights and measures (India-Pakistan). 202

In that respect, it may be intellectually inaccurate to claim that all human rights or a sophisticated understanding of the demands of a trading civilization are the product of Western societies.

The view that holds human rights as a Western concept is the ethical and cultural relativist argument. The reasoning here is that human rights standards, being peculiarly Western and individualistic, are products of imperialist thinking. There are also many writers who maintain the contrary in that human rights, in fact, emanate from a set of thinkers with an inherent abhorrence of tyranny. Writers from both the developing and developed states are divided in their opinion on this for various reasons. Higgins' view on this is that in many cases it may be no more than a fear of the local elites of a loss of their political, personal, and cultural hegemony. She states very persuasively, "individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state...they are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment." 203 The conception and drafting of the UDHR itself is

202 Braithwaite and Drahos, op.cit., pp. 480.
indicative of the universal relevance of human rights. It was adopted by the General Assembly without any state voting against it. There were 48 states in favour, but there were 8 significant abstentions: Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, Union of South Africa, USSR, and Yugoslavia. The days of opposition or indeed coolness towards human rights standards have long departed Saudi Arabia as well as the other states that voted in this manner. We have already highlighted the statements and pronouncements from the highest authorities signifying a willingness to engage in speedy political reform in Saudi Arabia.

In conclusion, the view that there are generations of human rights from which a developing country may pick and mix is no longer convincing. Even if it were true that chronologically there were generations of rights, this does not mean that an aspiring state like Saudi Arabia is given the luxury of choosing which one to disregard completely. More importantly, the preferred view is that the international regime for human rights as progressively developed has taken into consideration and adopted aspects of the jurisprudence of the main legal systems and civilization. This formidable jurisprudence and legal practice must be tapped into by any state, resource-rich or not, that wants to retain all the benefits of its divine blessings.

Thus, from the very beginning it was widely assumed that there were bound to be differences in the nature of the legal obligations and the systems of monitoring to be imposed by the conventions. A basic differentiation between both sets of rights suggested is that in the case of civil and political rights, for instance the right not to torture persons, are negative rules which are capable of immediate implementation by states that are involved, whereas economic and social rights such as the right to adequate housing are positively framed, and necessarily require a progressive and differential method of compliance. It is a trite observation that probably the best means of ensuring compliance for any right is to back it up with legal guarantees to be administered by courts of law, whether municipal or international. The regime for compliance at the universal level created for the Covenant on Civil and Political rights (1966) with the First Protocol (Optional Protocol) was to be monitored by the Human rights committee while that of the Economic and Social Rights Convention (1966) was to be monitored by the Committee on Economic and Social Rights. A central difference in the monitoring and actualization of the two conventions is that while the
former is designed, and has been operating with an individual complaints system under the First Protocol\footnote{Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius Human Rights Committee, Twelfth session. Available at: http://www.unhcr.org/refworld/category,LEGAL,,,MUS,3f520c562,0.html . 999 U.N.T.S. 302.} to which at least 89 countries are party, no remedy lies for an individual victim of right abuse under the ICESCR. It was thought that the essentially programmatic and conditional nature of rights contained in the ICESCR, only a system of country reports was suitable. It is for these reasons that some have argued that economic and social rights are mere aspirations and are not justiciable.

Having said that, it must be stated that the material scope of the protection of human rights generally, and the degree to which they are in fact protected, varies from country to country, and depends on the prevailing political will of governments. Several reasons exist supporting the justiciability of economic and social rights. Many contemporary scholars on the subject have rightly insisted that they are not aspirational goals, matters of generosity, privilege, or objectives to be achieved. In 2002, the UN Commission on Human Rights pointed out that health, food, education, and housing were human rights, not market access opportunities. They should be viewed as inherent rights as articulated in the Universal Declaration (1948), and imply obligations on the part of governments to respect, promote, protect, and fulfil these rights.

The truth is that the separation of both sets of rights is largely artificial and may lead to unnecessary confusion where much clarity is needed. There are civil and political rights, which require positive action and expenditure of funds in the future. For example, a state that undertakes to ensure a fair trial will have to build court buildings and develop a legal aid scheme. In other words, even those political rights, which are assumed to entail immediate implementation often, require relatively programmatic changes in societal structures or attitudes. Similarly, there are some economic, social, and cultural rights that are based on negative rules. Examples of these include the right to form trade unions, which would require restraint on the state not to interfere with the right. There are also undertakings expressed in the ICESCR that are designed

to have immediate effect. Examples include Articles 2 (2) and (3) requiring states to 'guarantee' and 'ensure' non-discrimination and equal rights and treatment, the duty of states to respect and not interfere with parental choice of schools (Article 13 (3)) and scientific freedom (Article 15).

It may indeed be a controversial point to claim that economic and social rights are not justiciable when, in fact, individuals and communities are entitled to claim their rights through judicial or legislative means whenever they believe that those rights have been violated. The right to an effective remedy for the violation of rights is guaranteed in Article 8 of the Universal Declaration of Human Rights, which states "everyone has the right to an effective remedy, by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Accordingly, parties to the ICESCR undertake to "take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." In any case, the burden is on the state, which cannot meet up with specific provisions of the treaty to prove the inability and courts will not assume the inability. It is notable that in some jurisdictions such as South Africa economic, social, and cultural rights have thus been incorporated into constitutional provisions.

The Limburg Principles on the Implementation of Economic, Social, and Cultural Rights (formulated during an international symposium in Maastricht, Netherlands 1986), state that, "although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time." The Principles elaborate further, "States parties shall provide for effective remedies including, where appropriate, judicial remedies." As mentioned above, this is

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difficult for Saudi Arabia, as many companies do not come to engage in the country due to the state's Islamic law. The artificiality of the strict separation of rights view is clearly betrayed by the fact that justifiability of Economic, Social, and Cultural Rights usually goes hand in hand with the requirements of respect for civil and political rights, including an independent judiciary. The interconnectedness of rights generally has been recognized in many cases where issues of law have cut across various categories and have had to be dealt with together. The Broeks case\textsuperscript{210} for instance confirms that Article 26 of the ICCPR prohibits discrimination in any area of law. The consequence of this decision therefore is that rights within the ICESCR may be the issue of an individual petition under the Optional Clause, as long as the claim is one of a sexual or racial inequality in the guarantee of the right concerned.

The controversy as to whether economic, social, and cultural rights are inherently inferior to civil and political rights has been largely answered by the Vienna Declaration and Programme of Action (1993), adopted by consensus by 171 states. This instrument emphasizes the interconnectivity of rights and the need to treat them as a whole system. Furthermore, it supports the adoption of an Optional Protocol as a means of redressing the imbalance between rights, clarifying the scope and meaning of provisions in the Covenant and establishing a body of case law to ensure improved compliance with those provisions.

4.3:Socio Economic Challenges to Saudi Arabia

Although we have argued that all human rights must be pursued so far as they are not incompatible with the Shari‘ah law and that both popular classification groups ought to be embraced, it is, however, argued that economic, social, and cultural rights must accelerate even faster in the next few years. This is particularly crucial over the next decade if the Millennium Development Goals (MDGs) are to be within realistic achievement in Saudi Arabia\textsuperscript{211} This will mean better consideration for the people's interest in relation to business, as well as other areas of economic life. It is for this


\textsuperscript{211} Eight Millennium Development Goals (MDGs)— form a blueprint agreed to by all the world’s countries and all the world’s leading development institutions. They range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015 have galvanized. For more information on MDGs see United Nations, http://www.un.org/millenniumgoals/bkgd.shtml Accessed 15 February 2012.
reason that the effective abandonment of the economic cities by inaction is regrettable. Such development would have had a significant boosting effect on the provision of qualitative employment for vast sections of the population. The UNDP was particularly persuasive when it linked the attainment of Millennium Development Goals in Saudi Arabia to democratic governance and human rights.212 Although in the Fall of 2010, the Kingdom of Saudi Arabia was specifically praised by the United Nation at the 2010 Millennium Development Goals Awards for its dedication to meeting the goals the tasks are significant and much more will have to be done to make a significant impact on the lives of the populace.213 The relevant MDGs that are aspired to by Saudi Arabia along with the majority of the developing world are as follows:

Goal 1. Eradicate extreme poverty and hunger214
Goal 2. Achieve universal primary education215
Goal 3. Promote gender equality and empower women216
Goal 4. Reduce child mortality.217
Goal 5. Improve maternal health218

214 Target 1. Halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day; Purchasing power parities (PPP) conversion factor, local currency unit to international dollar.
215 Target 2. Halve, between 1990 and 2015, the proportion of people who suffer from Hunger.
216 Children under 5 moderately or severely underweight, percentage; Children under 5 severely underweight, percentage; Population undernourished, number of people Population undernourished, percentage
217 Target 3. Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling; Literacy rates of 15-24 years old, both sexes, percentage; Literacy rates of 15-24 years old, men, percentage; Literacy rates of 15-24 years old, women, percentage; Net enrolment ratio in primary education, both sexes; Net enrolment ratio in primary education, boys; Net enrolment ratio in primary education, girls; Percentage of pupils starting grade 1 reaching grade 5, both sexes; Percentage of pupils starting grade 1 reaching grade 5, boys; Percentage of pupils starting grade 1 reaching grade 5, girls
218 Target 4. Eliminate gender disparity in primary and secondary education, preferably by 2005, and to all levels of education no later than 2015; Gender Parity Index in primary level enrolment; Gender Parity Index in secondary level enrolment; Gender Parity Index in tertiary level enrolment; Seats held by men in national parliament; Seats held by women in national parliament; Seats held by women in national parliament, percentage.
219 Target 5. Reduce by two thirds, between 1990 and 2015, the under-five mortality rate
Children 1 year old immunized against measles, percentage; Children under five mortality rate per 1,000 live births; Infant mortality rate (0-1 year) per 1,000 live births.
Goal 6. Combat HIV/AIDS, malaria and other diseases

Goal 7. Ensure environmental sustainability

Goal 8. Develop a global partnership for development

The deliberate focus over the next few years on human developmental rights will lift a lot of people out of poverty and put a stop to some of the excesses of governmental action. The lifting of a substantial part of the Saudi population out of poverty will, for instance, increase the earning capacity of the populace to buy luxury goods. This will translate to even more investment successes as investment in non-oil areas such as manufacturing and recreational businesses will improve. For instance, the right of the government to remove squatters from land does not permit them to do this without legal notice. In South Africa, for instance, economic and social rights have formed the basis of the prohibition on the state to make forced removals from land. In the

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218 Target 6. Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio
Births attended by skilled health personnel, percentage Maternal mortality ratio per 100,000 live births;
219 Condom use to overall contraceptive use among currently married women 15-49 years old, percentage
Contraceptive use among currently married women 15-49 years old, any method, percentage;
Contraceptive use among currently married women 15-49 years old, condom, percentage;
Contraceptive use among currently married women 15-49 years old, modern methods, percentage;
Target 8. Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases;
Tuberculosis death rate per 100,000 population
Tuberculosis detection rate under DOTS, percentage; Tuberculosis prevalence rate per 100,000 population
Tuberculosis treatment success rate under DOTS, percentage; Target 7. Have halted by 2015 and begun to reverse the spread of HIV/AIDS.
220 Target 9. Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources; Carbon dioxide emissions (CO2), metric tons of CO2 per capita (CDIAC); Carbon dioxide emissions (CO2), thousand metric tons of CO2 (CDIAC); Consumption of all Ozone-Depleting Substances in ODP metric tons; Consumption of ozone-depleting CFCs in ODP metric tons
Energy use (Kg oil equivalent) per $1,000 (PPP) GDP; Land area covered by forest, percentage
Protected area to total surface area, percentage; Protected areas, sq. km.; Target 10. Halve by 2015 the proportion of people without sustainable access to safe drinking water; Proportion of the population using improved drinking water sources, rural; Proportion of the population using improved drinking water sources, total; Proportion of the population using improved drinking water sources, urban; Proportion of the population using improved sanitation facilities, urban; Target 11. By 2020 to have achieved a significant improvement in the lives of at least 100 million slum dwellers; Slum population as percentage of urban, percentage Slum population in urban areas.
221 Target 16. In cooperation with developing countries, develop and implement strategies for decent and productive work for youth; Share of youth unemployed to total unemployed, both sexes; Share of youth unemployed to total unemployed, men; Share of youth unemployed to total unemployed, women; Target 18. In cooperation with the private sector, make available the benefits of new technologies, especially information and communications; Internet users; Internet users per 100 population; Personal computers; Personal computers per 100 population; Telephone lines and cellular subscribers; Telephone lines and cellular subscribers per 100 population.
Kyalami Flood Victims Case (2001), the issue before the court was whether a citizen’s right places an obligation on a government to take action, places a self-executing obligation on the government, or does it require legislation to be passed before there is an obligation for the government to act and on which those citizens can rely? The court’s decision was an affirmation of the view that people’s basic needs will outweigh formal considerations. Similarly, Articles 32 and 226 of the Constitution of India deems it that all economic and social rights are justiciable. Thus, in the cases of Bharati (1973) and Nawab Khan (1996), the proactive approach has been adopted by the courts. It may, however, be noted that this position is not universal and other countries have a different approach and treat economic rights as aspirational.

Other developing states like Nigeria created Peoples Banks for the poor, mass transit systems, and other poverty alleviating schemes, some of which may be of use in Saudi Arabia. It is important to examine these devices, and not to limit innovations to boost socio-economic development only to the ideas introduced by the World Bank and other major international financial institutions. All of these may contribute to elements of the rights to housing, education, health, food, and so on. Saudi Arabia as the largest producer of oil with very significant earnings ought not to find it too difficult to finance poverty alleviation schemes and indeed the entire gamut of socio-economic rights. Doing so will pull the citizenry out of poverty and assure that the state will be seen as a stable society in which investments can flourish. The success of Dubai in this area is quite instructive. It is suggested that Saudi constitutional provisions particularly are not incompatible with the ideas we have grappled with above and it is important that articles 50-55 provide a space of freedom for action in the area of economic and social rights. It is also appropriate to conclude in this area by agreeing with the erstwhile prime Minister of a neighbouring State, Yemen as to the role of modern Arab government:

He wrote:

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223 Bharati v. The State of Kerala and Others (AIR 1973 SC 1461)
"the universal role of the state at the advent of the 21st century can be summarized as follows:

1. Fostering the rule of law and individual as well as collective security of its citizens.
2. Maintaining an independent judiciary.
3. Adopting a stable economic policy, freeing the economy from distortions and combating corruption.
4. Enhancing democracy or democratization and popular participation in free and fair elections.
5. Judicious use of national wealth with special attention to disadvantaged groups in society.
6. Directing state resources to investment in social services (health, education and welfare) and infrastructure projects.
7. Protection of the environment.
8. Protection of human rights^{225}

There is little doubt that if reforms in all the areas suggested above are implemented in a genuine manner the present level of success in the area of foreign direct investment into Saudi Arabia will increase tremendously. It is, however, necessary to elaborate further on a crucial issue of democratic reforms to further buttress this point.

^{225} Abd al-Karim al-Iryani op.cit.
4.4. Globalization, Liberal Democracy and Right to Democratic Development of the Saudi People

It is argued here that existing national rules may, in the short-term, be reconciled with the imperatives of the international legal rules to attain immediate steps toward democratic and economic development. There are favourable indications toward greater democratic change in Saudi Arabia. Held in 2005, the first elections in Saudi Arabia were heralded as a milestone by the world community. However, the government has been exhibiting mixed signals to the worry of its domestic and foreign observers. Political dissent remains subject to the harsh religiously inspired repression, effectively freezing development processes in many areas of national life. The fate of the radical elements that sought to take advantage of the Arab spring in Saudi Arabia is instructive. The impression projected, therefore, is that the Saudi state is, at best, questioning the values of globalization and its imperative of liberal economic principles along with right to democratic development.

4.4.1: The Right to Democratic Governance in Saudi Arabia

In view of the forgoing, it is necessary to examine the trend toward recognition of the right to democratic governance, and to place Saudi practice within this discourse. The existence of an entitlement to democratic rule as a legal right is subject to jurisprudential debate. However, it is impossible not to recognize that significant changes have taken place in international affairs, in the last few decades, which make it credible to argue for the emergence of a right to democratic governance along with other ‘new’ norms collectively, referred to as the third generation rights (discussed above). It is recognizable that a greater percentage of the states in the world today are democratic than at any time in human history. Just over 30 years ago, there were

227 Harold J. Berman, Law and Revolution II (Harvard University Press) 2003 pp. 4-20
fewer than 30 established democracies in the world. As of December 2000, some 120 of the more than 190 countries in the world had become legally committed to the preservation of freedom and democratic self-governance. This is a phenomenal change on a global scale, and offers compelling proof that the idea of democracy has genuinely universal appeal. Most of the new entrants into democratic society of states turned toward democracy in the last 10 years, with two of the world’s most populous states - Indonesia and Nigeria - going democratic only within the last two decades.

The most well established precursor of the emerging principle of democratic governance is the right to self-determination. Self-determination encapsulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion. Therefore, it constitutes the core of what is now regarded as an entitlement to democracy. The development of this normative principle may be traced to the Universal Declaration of Human Rights and the two international Covenants on Civil and Political Rights, and Economic and Social Rights of 1966. Specific reference to the principle of internal self-determination is found in the ‘codification’ of existing practice, laid down in the 1970 UN Declaration on Friendly Relations. At that stage, however, claims to democracy and good governance were limited to the grant of rights to equal access to government given to racial groups, which had been denied such access. With time and the increasing ratification by states of these UN Covenants, which confer the right to internal self-determination on the ‘people’ of each contracting state there was a clear realization that democracy was probably the best model for the actualization of the provisions of both instruments. In other words, the UDHR itself and its covenants created the

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229 Jane Mansbridge, James Bohman, Simone Chambers, David Estlund, Andreas Fællesdal, Archon Fung, Cristina Lafont, Bernard Manin, José Luis Martí. The Place of Self-Interest and the Role of Power in Deliberative Democracy. *Journal of Political Philosophy, Volume 18, Issue 1, pages 64-100, March 2010*


231 This right to internal democracy is as much a product of the sympathy of world opinion to formerly oppressed people as it was a reflection of the trend towards democracy in general. D. Archibugi, “A Critical Analysis of the Self-determination of Peoples”, Vol. 10 *Constellations* No. 4 (2003) pp. 493, Available at:
right atmosphere and statutory precedents upon which democratic rights naturally developed. The phenomenon of self-determination is not one with any reasonable application in contemporary Saudi Arabia. This is a fortunate reality, and arguably makes the journey toward democratic reform less fraught with political danger.

Another central component of the gradual movement towards the recognition of this right was the creation of a normative requirement of participatory electoral process. Early manifestations of this date back to 1948 when the Universal Declaration of Human Rights clearly enunciated the right of persons to take part in government, as well as in "periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures" in Article 21. Two decades later, in Article 25, the ICCPR extended the right (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors to every citizen.

The UN has played a critical role in promoting the spread of democracy in the world. By providing electoral advice, assistance, and monitoring of electoral consultations, it has assisted (or, as in the case of Cambodia, enabled) people in a large number of countries (including Namibia, El Salvador, Eritrea, Mozambique, Nicaragua, and South Africa) to participate in free and fair elections. In many of these places, people cast votes for the first time in their individual and national lives only in the last 15 years. The Human Rights Committee, which is authorized to monitor compliance with the Covenants, has been active in ensuring compliance with the implementation of Article 25.232

Thus modest success has been demonstrated particularly in connection with the review of national reports on implementation and a small number of petitions lodged under the Optional Protocol. In reviewing two complaints filed by two Uruguayans against the military regime of Uruguay the Committee concluded that the complainants had been arbitrarily deprived of protected rights by decrees banning their political party and by being barred from running for office Case 34/1979, 1981
With a certain conclusion to the end of the Cold war era and the ideological struggles, the General Assembly at its forty-fifth session, in 1991 adopted a resolution entitled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.” Though non-binding, this important document reaffirms and further specifies the electoral entitlement. In it, the conviction of the international community that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and, interests of the governed was expressed. It was also stated that, as a matter of practical experience the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social, and cultural rights.  

Further proof in favour of the argument that a right to democracy is more or less in place can be seen in the apparent williness of states to enter into various multilateral agreements, which legislate the enthronement of the democratic principle as the basis of governmental legitimacy. The signing by 53 states (including Europe, the USA and Canada) of the 1975 Helsinki Declaration was significant because it explicitly grants the right of self-determination to all peoples and its follow-up Declarations, which were adopted by the Conference on Security and Co-operation in Europe (CSCE), as it then was) explicitly laid down a right to democracy and to democratic institutions. Other notable instruments include the adoption by 116 states and territories of the Final Warsaw Declaration: Toward a Community of Democracies (Warsaw, Poland, June 27, 2000); the United Nations General Assembly Resolution on Promoting and Consolidating Democracy passed in 2000 (A/Res/55/107), and two successive resolutions of the United Nations Human Rights Commission explicitly recognizing democracy as a human right. With these new regulations for human rights, Saudi

235Furthermore there are a variety of quasi-legislative developments and resolutions created by regional and international organizations on this theme such as the Charter of the Organisation of American States, which in Article 5 establishes the duty of members to promote “the effective exercise of representative democracy.” These instruments confirm that democracy is not the construct of any particular country or region, but rather, the universal right of all peoples everywhere See The right to
authorities are presenting a new precedence of international law shifting from pure Islamic literature toward international understanding in which the state must protect the basic rights of a human being.

It is also possible to argue that respect for obligations under the general regime for the protection of human rights will necessarily lead to the right to participatory democracy in all societies. For instance, the rights to opinion (Article 18), expression (Article 19), and association (Article 22), and in fact most other rights in the political sphere as contained in the ICCPR are a refinement of the right to self-determination and constitute essential preconditions of an open electoral system which is the newest component of the democratic entitlement principle. In short, the logical conclusion of the respect for human rights in the municipal system is the enthronement of democracy. The holistic approach establishing a link between human rights and democracy was given legislative recognition in the preamble and substantive provisions of the Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on June 25, 1993 (Articles 8, 9, 17, 27, 34, 66, and 68). Further, the Conference recommended that priority be given to national and international action to promote democracy, development, and human rights. This linkage has also received judicial backing in international proceedings (Perdoma v. Delanza v. Uruguay).236

A clear sign of the significant strides made in this field is that conformity to democratic ideals has become a legitimising factor for states and governments. US Secretary of State James A. Baker noted the shift toward the democratic entitlement of peoples when he stated that, “legitimacy in 1991 flows not from the barrel of the gun but from the will of the people.”237 New states seek legitimacy and recognition in the international community by displaying conformity as much as possible with democratic ideals. Presently, acceptance into regional and political groupings is predicated upon demonstrable adherence to democratic principles. One of the central conditions under the "Copenhagen Criteria" (developed during an EU summit in

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Copenhagen in 1993), which the present 13 aspirants to membership of the European Union had to satisfy in order to join the EU, is that they must have stable institutions that can guarantee democracy, the rule of law, human rights, and protection of minorities. Even the international financial institutions are beginning to recognize the need to link democratic reforms to lending practices.

Similarly, new governments including military dictatorships, seek legitimacy by promising to uphold democracy. In the case of military regimes, the promise of a quick return to democratic rule is usually held out to the populace and international community in order to buy valuable legitimacy. In this manner it is notable that national governments confer legitimacy on international law just as much as international law confers legitimacy on national governments. The monitoring of national elections by international observers has also become a standard feature of international relations. Recent examples include the participation of hundreds of observers in covering elections in Bosnia and Indonesia in 1999, and in Zimbabwe and Cambodia in 2002. The effect of this development is that not only are states expected to adopt democratic governance in name, but they must also be seen to facilitate it in a genuine and verifiable manner.

On the occasions when states brazenly fail to meet the emerging democratic standards, dire sanctions and checks are immediately brought to bear on the offending regime. For instance, the Organization of American States (OAS) imposed sanctions on the military regime that seized power in Haiti in 1991. The regime was eventually removed through the use of force and the legitimate government was restored in 1993. This was achieved through the instrumentality of Security Council resolution 875 and

238 The Union at the Copenhagen European Council in 1993, took a decisive step towards the fifth enlargement. It was agreed that “the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.” Concerning the timing, the European Council stated that: “Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.” At the same time, it defined the membership criteria, which are often referred to as the ‘Copenhagen criteria’. European Commission "Enlargement" available at http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm accessed 12 February 2012.

239 The Managing Director of the IMF Horst Köhler stated recently at an International Conference on Poverty Reduction Strategies in Washington DC, January 14, 2002 that “Poverty reduction efforts will be successful if they are based on "self-help"—particularly the efforts of poor countries to establish peace, democracy, and good governance at home.” Available at: http://www.imf.org/external/np/speeches/2002/011402.htm
by virtue of actions taken under Chapter VII of the UN Charter. The suspension of Zimbabwe from the Commonwealth in March 2002 for serious and persistent violation of the democratic principles contained in the Harare Commonwealth Declaration of 1991 is another case in point. Thus, it appears that a new principle of international law is gradually developing to the effect that the continuous denial of democratic governance in the face of popular clamour or the deliberate and illegal truncation of a democratic regime is to be equated with 'threat to peace.' The consequence of such an interpretation is that it dictates the right and duty of the members of the international community acting through the United Nations to intervene and take measures to correct the anomaly in the concerned state.

However, it must not be assumed that the march to a universal democratic world is unstoppable. Significant threats to the emerging principle of democratic governance persist. For one, it appears that while some developing countries are quite aggressively recruited towards democratic change, some states like Saudi Arabia have received weak pressure to move towards democratic change. Thus, there is a paradox. Without progressive democratisation Saudi Arabia will not reach its full potentials as an investment destination even in the field of oil and gas. Yet, because of its vast oil and gas resources little pressure is assured on the state to democratise further. The reasons for this include the economic importance that Saudi’s natural resources represents toward the very states that are most active in promoting democratic change elsewhere. It is well documented, by reputable NGOs, media outfits, and many Western governments’ agencies, including the State Department and the US Commission on International Religious Freedom that rampant violations of minorities and expatriates’ rights occur in countries considered allies of the US and other Western democracies such as Saudi Arabia. One such account goes:

“American expatriates must accept and adjust to the Saudi way of life. Unfortunately, for some Americans living in Saudi Arabia, part of this adjustment include experiencing the Saudi system of criminal punishment...rooted in traditional Islamic Law, a harsh system of punishment

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by Western standards. Drinkers of wine are flogged, thieves' hands cut off...”

Even in those states where democracy has supposedly being enthroned, the political systems operating in reality are bizarre aberrations of democratic principles. In some African states, for instance, democratically elected leaders have proceeded to dismantle the multi-party systems and have either constructively elected themselves as Presidents for life, or ensured that no serious competitor emerged to challenge their rule. In some countries, victory in elections is not entirely determined due to oppressive tactics and rigging of electoral results. In many others, the determining factor for electoral success is often the amount of financial, as well as other resources that is available to the party or individual largely obtained through stolen wealth.

In summary, it must be admitted that a full right to democratic governance to be exercised by peoples remains a radical vision the broad outlines of which we can see presently. What must be realized is that democratic governance has become a normative rule of international law, and there is no lack of textual provision and state practice in support of this proposition. The emerging right to democratic governance operates to confer a legitimizing function for states and governments, and at the same time, fulfils a shared sense of community expectation of the populace. It is fair, then, to say democracy is becoming a global entitlement to be promoted and protected in Saudi Arabia by processes that do not compromise the overall safety and integrity of the state. The UNDP was particularly persuasive when it noted:

Democratic governance provides an 'enabling environment' for the realization of the Millennium Development Goals (MDGs) and, in particular, the elimination of poverty. Effective governance systems are likely to be characterized by participation, transparency, equity, accountability, coherence, responsiveness, integration, and ethicality. Promoting democracy and strengthening the rule of law were strongly highlighted and endorsed at the Millennium Summit of 2000.

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241 For a lively discussion of these see JM Young, “‘Torture and Inhumane Punishment of United States Citizens in Saudi Arabia and the United States Government’s Failure to Act” - Hastings Int'l & Comp. L. Rev., 1992 p. 663 et al.

242 Osita Eze, Human Rights in Africa (Lagos: The Nigerian Institute of International Affairs, 1984) pp. 56-57. The latest in time is the attempt by the current President of Senegal who has recently announced his candidature for a third term despite the existence of constitutional provisions to the contrary.

Furthermore, Amartya Sen’s argument that development of a state is also predicated by a willingness and determination of the particular society to embrace change is instructive.\textsuperscript{244} Thus, it can be argued that in order to secure a smooth reformation of the legal system in Saudi Arabia, the reforms must be established under an ideology of progressive change and flexible theoretical perspectives. Further, it is important to engage with globalization and the democratic imperative. It is also important to consider the economic case for reform. There needs to be a balance between the two streams within the Saudi society: the first is the traditionalist, while the second demands of strategic development. To begin the process of such reform, a balance must be established which must come from the current legal system in order to pave the way for further development.

The political and legal system in Saudi Arabia needs an effective mechanism in order to keep the society balanced.\textsuperscript{245} Moreover, from the technical side, the nature of the current governing system would help to speed the progress since it is within the absolute power of the King to issue the relevant decrees and laws. If such an agenda is adopted, the state will secure its long-term development plans, which must be processed under a global legal framework. These goals, particularly those regarding FDI, cannot be established under the current official laws in Saudi Arabia.

\textsuperscript{244}A. Sen 2001 pp.50-53

\textsuperscript{245}Saudi constitution Article 57(b) the deputies of the prime minister and ministers of the Council of Ministers are responsible, by expressing solidarity before the King, for implementing the Islamic Shari’ah and the state’s general policy. This is an indication that the system has effectively been designed to implement such legal applications and to be directed to serve states general policy. Yet, it is a matter of reforming and developing these texts to be much more effective to the new international and global development era. Available at: http://www.saudi.gov.sa/wps/portal/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3iTMGenYE8TlwMLt0BzA89glyMfVw8TI39HE_3gxCL9gmxHRQAfnyR/ accessed 15 February 2012.
4.4.2: Traditions versus Development: The Imperative for Legal and Political Reforms.

Developments in human rights and democratic development appear to be very slow in reaching the Saudi Arabian state. The Saudi legal system has the unique feature among many of its neighbours in that it was never been built or drafted under pressure of civil wars like other countries.\textsuperscript{246} The main legal conflict to resolve is relating to the interactions between the local system (Shari’ah laws) and the international legal principles of the latter half of the last century and its contemporary manifestations. The overwhelming importance of the Shari’ah and its legal traditions is bound to have an effect on every aspect of Saudi national life. Saudi Arabia is the birthplace of Islam and home to Islam’s two holiest shrines in Mecca and Medina. The king’s official title is the Custodian of the Two Holy Mosques. Although the state’s law is based on Shari’ah law, several secular codes have been introduced for special committees that now largely handle commercial disputes.

The reluctance of the Saudi Arabian state to embrace international jurisdiction is perhaps revealed in its non-acceptance of the compulsory ICJ jurisdiction.\textsuperscript{247} Yet, the modern Saudi Arabia must do business with the world and interact with the world and especially the richer foreign partners in line with international rules that are not necessarily based on Islamic principles. It is suggested that the conflict between the two is accountable for the underdeveloped state of overseas FDI into Saudi Arabia. However, Saudi legal institutions are, however, not incapable of developing new authorities or reconsidering the reformation of the old policies and legal texts.

Socio-legal changes of a commendable nature have not gone unnoticed by Western institutions.

King Abdallah has continued the cautious reform program begun when he was crown prince. To promote increased political participation, the government held elections nationwide from February through April 2005 for half the members of 179 municipal councils. In December

\textsuperscript{247} These facts are not lost to the governments and corporations of foreign states where most of the investment into Saudi Arabia is meant to come from. The non-acceptance of the ICJ compulsory jurisdiction is for instance one of the peculiar features about the state highlighted by the US government in its official digest about the Kingdom. See The CIA World FactBook, Available at: https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html, Accessed on October 10, 2010.
2005, King ABDALLAH completed the process by appointing the remaining members of the advisory municipal councils. The king instituted an Inter-Faith Dialogue initiative in 2008 to encourage religious tolerance on a global level; in February 2009, he reshuffled the cabinet, which led to more moderates holding ministerial and judicial positions, and appointed the first female to the cabinet.\textsuperscript{248}

It is commendable that the Saudi King has indeed committed himself to drastic changes and reforms, which reflect much liberalization to the market and more freedoms in response to the challenges of globalization. It is also commendable that the religious leadership are especially being wooed towards this direction because without their consent meaningful progress towards rights and democratic reforms would be nearly impossible. Nothing perhaps demonstrates the dramatic developments and closer cooperation towards development between the government and religious authorities than the epoch making appointment by Saudi Arabia of first female minister. King Abdullah appointed Noor Al-Fayez to the Saudi Council of Ministers in 2009. She has served as deputy minister for women's education.\textsuperscript{249}

It can be argued that much of the changes that have occurred are driven by the aim for economic success. There is nothing, in fact, wrong in this. It is one thing to note that changes are needed to Saudi Arabian domestic laws to bring it in line with international standards in rights and democratic values. It is another to show precisely what particular route change must follow. What kind of legal parameters Saudi government will use? Is it the western values and culture of its principal investors? Would a western approach be rejected by the majority of the Saudi conservative society? Will there be red lines that the monarchy and ruling system will impose to free speech and individual freedom for its citizens on one hand and for business men and a growing number of foreign business women.\textsuperscript{250}

What is clear is that moderate changes towards democratisation and recognition of more human rights and freedoms would not violate Islamic law (shari'ah) especially where such changes end up in providing economic and financial security to the

\textsuperscript{248}http://www.pbs.org/newshour/updates/middle_east/jan-june09/saudi_03-02.html
\textsuperscript{249}Available at: http://www.guardian.co.uk/world/2009/feb/16/saudi-cabinet-woman-minister accessed 19 January 2012.
country. In other words, there appears to be nothing in the Shari'ah laws inherited by this generation of Saudi Arabians that is incompatible with the pursuit of financial gain that will improve the standard of living of the vast majority of citizens.

Other aspects of the new trends toward integration with the global investment community include application to join the WTO as a way of speeding up economic development. This signified the process of acceptance of international standards in many fields such as education, trade, social, political, legal, and cultural. Tensions, however, remain in that some of these changes may contradict the original religious character of the State. Saudi Arabia indeed concluded bilateral market access negotiations with all interested WTO Members. The WTO General Council formally concluded negotiations with Saudi Arabia on the terms of the country's membership to the WTO on November 11, 2005, and Saudi Arabia became a full WTO Member on December 11, 2005.\textsuperscript{251} This represents a significant shift away from old traditional approaches to trade and investment.\textsuperscript{252} Accession into the WTO means that further, continuous changes and reformation must take place in order to pave way for socio-economic development of the state and its expectant population that are eager to experience the benefits of growth and a rising economic profile.\textsuperscript{253} Much more still needs to be achieved, and not only the WTO, but interested individual countries and regions will insist on securing further reformation from the Kingdom.

Another important factor is the aftermath of the terrorist attacks of September 11, 2001. Although it does not always capture the attention of the world's press, but there has been an upsurge in terrorist activity in Saudi Arabia during the decade after the New York attacks. Since then the Saudi authorities have realized the dangers of extremist ideologies and their destabilising effects of conflicts that threaten its very political system and the safety of the monarch. This results in the ill-influence and


\textsuperscript{252} HRH Prince Saud Al-Faisal's Speech at Oxford University 24-2-2005, Available at: www.mofa.gov.sa. accessed 13 March 2012

\textsuperscript{253} The WTO Agreements recognise expressly the link between trade and development. About two thirds of the WTO's around 150 members are developing countries. They play an increasingly important and active role in the WTO because of their numbers, because they are becoming more important in the global economy, and because they increasingly look to trade as a vital tool in their development efforts. Developing countries are a highly diverse group often with very different views and concerns. WTO, "Understanding the WTO: Developing Countries Overview."
misinterpretations of Islamic legal applications and practises. The attempt to cope with extremism has led to significant changes both in the social values and official policy within the Saudi society. This has created two directions in the society: those who accept the need for more acceleration towards greater respect for human rights and freedoms as well as those who sympathise with conservatism in order to continue to achieve stability. Most importantly Saudi Arabia has since the early 1970s begun to look toward being a successful partner in the international arena with the knowledge that it cannot stand against the whole international society alone without any acceptable legal principles. At any rate, note must be taken of the unmistakeable fact that modernization has been happening throughout the Islamic world.254

It must be admitted that democratic freedoms in Saudi Arabia may never translate into European style societies; yet, progression towards greater freedoms must be urged. Moreover even the conservative forces in the Saudi state have recognised the need towards more individual freedoms as a tool towards a new development agenda.255 Hence, there are recently introduced legislation for counsel elections and wider policies towards development of libraries, qualitative education, better employment and development policies, promise of even more political freedom within local communities especially in the areas of freedom of speech, elections, and trade. Furthermore justification of the position that there is potential scope for greater respect for rights and freedoms may be found in the basic constitutional law, particularly articles 50-55 which provide much space for freedoms particularly relevant to FDI laws.256

While this thesis urges greater commitment to change it is also a necessary part of the thesis to explain that there may be downsides to wholesome jettisoning of everything traditional about Saudi Arabia and to highlight dangers and areas of hypocrisy in relation to the liberal agenda. The expectation is that changes to the institutions that


matter in Saudi Arabia such as the religious clerics, the monarchy and the bureaucratic class will assure an inflow of revenue stemming from globalization. The argument also is that if we apply Adam Smith's socioeconomic methods development will be accelerated as a result of a combination of political liberties and social development under the rule of law. Moreover, the assumption is that the educated class and local authorities do favour on-going liberalization process. Yet it is important to note that there are those who believe that the predominant strand of globalisation discourse and the move towards liberal trade policies may also actually harm human rights. The main problem, however, appears to lie with the religious clerics who do not have a deep understanding of the need for changes. The policies, institutions, legal and regulatory barriers faced by private sector businesses in developing and transitional economies do not affect the powerful religious class and the current system is arguably in their favour. This is the real threat to the Saudi government.

Saudi Arabia's lack of freedom is not coming from the refusal of development, but from the lack of enthusiasm to explore what is available to be used in the creation of a new legal system, not only within the domestic system, but internationally by virtue of international jurisprudence and treaties. It can be argued that while change is slow, changes highlighted above within the Saudi legal system gives some hope for the future. The authorities must however, maintain their current agenda of reforming the legal system. It is necessary to also link progress in the context of FDI with holistic developmental progress across the entire areas of legal discourse, particularly that of human rights.

258 Amr Daoud Marar, "The Duality of the Saudi Legal System and its Implications on Securitisations." Arab Law Quarterly 20,4 2006 pp. 389-399
However, such applications do not mean that the Saudi authorities have to abolish the Islamic Shari’ah law, but instead the authorities should introduce new laws that will give clearer guidelines to new applications. This will require the distinguishing between constitutional affairs for local and international issues, as well as identifying how the Saudi constitution differentiates between firstly, the international, economic, and development legal aspects and secondly, how it must be governed starting from the planning to the enforcement of any judgments under international standards and acceptance. 261

The second part of the constitution will present the legal framework that will govern local activities and individuals (the nation), 262 in addition to areas that will be governed by Islamic law. These constitutional classifications will, again, build up the trust in the Saudi legal system internationally. This can help FDI as investors would be more eager to invest in Saudi Arabia as long as investors are confident that contractual promises made to them will be complied with. Nonetheless, such developments in the legal system will give space for mechanisms for state-investor dispute settlement such as arbitration tribunals to be available within Saudi Arabia.

It is possible to explain what went wrong in the (Shari’ah law) dilemma if a deeper look is taken into the reason why the Saudis are so reluctant to any economic development or legal system reformation. It can be argued to some extent that religious clerics looked at the state and its authorities as individuals, and that these individuals must practice all of applications of the Islamic religion. Yet, how can a state or non-human being worship God, or carry our religious terms and conditions like a normal human being. Further, how can the Saudi authorities ask for the world’s entire legal system to be changed, or give space to its legal system to be held as superior to all other legal norms. Shari’ah laws are applicable only to human beings,

261 Saudi constitution Article 54: The law establishes the relationship between the investigative body and the Prosecutor-general, and their organization and prerogatives. What we mean by the Law here is the new reformed Saudi constitution which needs to classify the different between the individual rights and legal procedures and the state relations with the other states and organisations. See, Harold J. Berman. Law and Revolution II, 2003 pp. 29-70
262 Saudi constitution Chapter 5 Rights and Duties, Article 23 [Islam] The state protects Islam; it implements its Shari’ah; it orders (people) to do right and shun evil; it fulfils the duty regarding God’s call.
and the state will not be a wrongdoer if it applies a legal system that will help its economic factors and empower it to provide welfare to the entire state. 263

A reflection of a new threat and danger to the Monarch due to political reform and the legal reform has become a necessity. Work on this thesis began in 2005 – the current “Arab Spring” is an example of how this reform can play out. 264 Meaningful reform, it is submitted, requires the separation of the state from the religious sphere. But this is not to argue that the state should not be respectful to the national religion or that religious traditions should not inform domestic laws. Though this argument was first presented in this work in 2005, in the final stage of 2012, current events show clear evidence to support our ideas.

4.5. The Islamic International Law of Development and Saudi Reform Agenda

One of the original legal theories in Islamic international law is: “Rules and obligations must come into existence through authentic consent and not by ideological or military force”. 265

If the Saudi authorities apply its new reformed legal system under such original consent, it would lead the Islamic world to a new era of an international global paradigm that seeks peace and development away from conflicts. It is argued that such reforms would be compatible with the very foundations of the Islamic international society. Furthermore, it will by all means receive the authentic consent of the people. However, if the Saudi authorities pass these laws, they will be enforcing one of the principles of Islamic international law outlined below:

Islamic international law is, that part of law and custom of the land and treaty obligations which a Muslim de facto or de jure state observes in its dealings with other de facto or de jure state. 266

In this case, the supreme authorities in Saudi Arabia are the sole legitimate powers that can enforce such actions and laws. As long as the authorities are under the Imam's (the King's) influence, they will be able to establish new applications within the existing legal system, paving the way to a safer world looking for developing projects between all states. In principle, the system of Islamic international law rests on two fundamental concepts:

1. All international relations should be based on a principle of legality.268 Article 70.
   International treaties, agreements, regulations and concessions are approved and amended by Royal decree.

2. The practical and philosophical reasons for such international conducts should be clearly set forth.269

It is argued that such development within the international arena will not involve the Shari'ah laws that are related to the individual. Therefore, these two principles are the main keys to a new legal system concerning peace and development within the new era of globalization.270 It is the inability to make these crucial distinctions that has unfortunately fuelled speculation of links between Islam and terrorism in the world. Further elaboration on distinctions between the principles of Islam, the classifications of the role of the individuals and the state, and the sphere of state's activities can make the perspectives clearer to the Western society, so that Islam is no longer accused of wrongdoing when some misinterpret Islamic principles according to their own means and goals.271 In other words, there is a big difference between the relationship between the Muslim human being and God. Such a relationship is

267Saudi constitution Article 50; The King, or whoever deputizes for him, is responsible for the implementation of judicial rulings
271Saudi Constitution Article 55; the King carries out the policy of the nation, a legitimate policy in accordance with the provisions of Islam; the King oversees the implementation of the Islamic Shari'ah, the system of authorities, the state's general policies; and the protection and defence of the country.
governed by the religious applications that relate to a living mankind who believe in Islam as religion only. This application does not concern non-Muslims, or non-living mankind, such as a state. In this case, the state is not considered or required to apply or govern or follow the mankind religious applications. State to state relationships should be governed by neutral agreements based on the economy of the contracting parties, and governed by the principles of the international law or the UN charter if applicable.

The King of Saudi Arabia can practice this power under Islamic law, and can additionally pass certain powers to some new authorities that can help the state’s economy and development plans to maintain their progress governed under the Shura Council, which is the equivalent to a Western parliament. It is important to explore the Saudi constitution in order to establish a sole ground to our empirical proposal.

To conclude this part, it can be argued that Islamic international law means:

The equal, mutual and reciprocal respect of obligations expressed by rules, norms, regulations, provisions, customs, including moral obligations, which prevail for one reason or another between states, and organizations, states and groups and states and individuals and minor groups is unsettled.

The rapid development in international law may make Islamic laws look unsuitable when considering potential new universal applications due to the lack of development in the legal systems of Islamic states. It can be argued that it is the juridical authorities in Saudi Arabia that apply modern legal applications within its reformed ‘legal system,’ without the influence of the Islamic law (Shari’ah) in order to establish new

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272 Saudi constitution Article 62; If the safety of the Kingdom is threatened or its territorial integrity, security of its people and its interests, or that which impedes the functioning of the state institutions, the King may take urgent measures in order to deal with this danger. If the King considers that these measures should continue, he may then implement the necessary regulations to this end. See above 2.1: Background of the Study: The Kingdom of Saudi Arabia and below 8.2: The Saudi Constitution.

273 Saudi constitution Article 61; the King declares a state of emergency, general mobilization and war, and the law defines the rules for this. In our case Saudi Arabia is under attack from some terrorists groups and this renders the state under "war" by way of statutes. This affords the King more powers and authority to apply new laws under this section even if it is for development purposes.

274 F. Maleian, *The Concept of Islamic International Criminal Law a Comparative Study* (Graham & Trotman Ltd) 1994 pp. 5-6.
norms for the Islamic constitution reformed applications. However, the current Saudi constitution starts with:

Article 1; The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital.

Since Islamic law does not have a similar legal categorization to the principle of *jus cogens* defined in the international law system, it can be argued that the mechanism we are applying seeks to avoid such complexity. This applies when the idea of freedom and the utilitarian perspectives are used for the purpose of dividing an Islamic state’s constitution into two sections to avoid the clash of interests; and not between the laws which Islam prohibits, but to actually avoid religious clerics misleadingly interpret some issues related to development, economy and peace. The idea is to limit the use of force in order to create public order in the international community. Unfortunately, Islamic literature lacked a development toward peace philosophy since 1500 – *jus cogens* should be seen as a fundamental principle when building up this new legal practice. However, this argument will be refused by the religious clerics because it will limit their authority and power within the local society. Therefore, Islamic states must develop their constitution to achieve the goals of their development plans and for peace and harmony to be maintained in the international society.

Additionally, if Saudi Arabia applies such norms to its constitution, there will be no contradictions between its legal applications and international law norms which could make the state’s actions and treaties invalid when they conflict with new international

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276 Available at: http://www.servat.unibe.ch/icel/sa00000_.html visited 15 February 2012.

277 The notion of *jus cogens* in international law encompasses the notion of peremptory norms in international law. Under this view certain overriding principles of international law exist which form "a body of *jus cogens.*" These principles are those from which it is accepted that no State may derogate by way of treaty. I. Brownlie, *Principles of Public International Law* (Fifth Edition, 1998) p. 515; T. Meron, "On a Hierarchy of International Human Rights", Vol. 80 *American Journal of International Law* (1986) pp.1, 14.


279 See the international law commission of the United Nations' draft proposal on the Law of Treaties. It concluded that the rules of international *jus cogens* are the consequences of international positive law. The Vienna convention in 1969 refers to *jus cogens* as "peremptory norms of general international law"; Articles 4, 53 & 64.
legal norms. If an Islamic state, via its constitution, remains consistent in applying some Shari'ah laws that may govern the individual locally, this could eventually become evidence of state practice and if enough states apply the laws they may become acceptable as international norms that the international society must accept.

Saudi Arabia will not succeed with the understanding that it can enforce Islamic laws to the international society, and this is the key to peaceful international relations. Such understanding has been in process in Islamic states since 1535, and if the Saudi authorities implement new legal reforms, they can reduce international conflicts. Moreover, Islam does not regulate the duties and obligations of mankind, and Islamic countries and Imams are not the creators of the universe. Islam can regulate the relations between the individuals, groups within the Islamic state, and give guidelines to the right relationship between God and worshippers.

Further, if the Saudi reform system is based on the authorities' obligations to the international society via valid treaties, any legal application that the state will adopt will not be looked at as a breach of any Islamic laws (Shari'ah). Instead, it will be within the true teaching of Islam. Prophet Mohammed (PBUH) strongly recommends Muslims to respect their agreements or treaties and not violate their obligations. This gives Islamic law flexibility and gives the state much more space and freedom to act within the international society as a peacemaker or development seeker.

At the same time, any action the Saudi authorities take in order to maintain their wealth or development and to empower their relationship within the international society would not be forbidden in Islamic laws and the state shall not therefore be in breach of its obligations. Treaty obligations and responsibilities must not be violated and the state shall issue the right local regulations to honour these agreements.

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It has to be emphasized that Islamic countries and cultures are not immune to the fact that the world has moved on and progressed in different ways from the 15\textsuperscript{th} century. There is not yet, and most likely will not be, a universal Islamic state, but there is indeed a world that is increasingly regarded as a small village. Therefore, Islamic states must accept the separation between religious guidelines applicable to individuals and its external relations with other states.\textsuperscript{283} The Saudi authorities to some extent are moving forward in implementing some reforms, which will give the international society comfort in knowing that the entire Saudi legal system is becoming liberal. This is very obvious if note is taken of the new judicial updates and reforms taking place in the entire legal system. Again, due to the lack of legal awareness and the application of valid theories such as \textit{jus cogens} across the nation, the Saudi society's culture has not sufficiently engaged with the legal reforms.

There are indeed lessons to be learnt from the historic events leading to the separation between the state and religion in Europe during the period 1555-1648.\textsuperscript{284} Islamic law and guidelines will continue to govern the relationships between the individual and the states and the individual and God. Yet, to create a constitutional application that will be applicable in governing the state's relations with the international society is not feasible in the current state of international affairs. The aim is to differentiate the Saudi state's affairs from the individual's obligations to God. The religious guidelines and perspectives do not obligate the state. Such practice could save the state from becoming a religious one and avoid repeating history. Now, Saudi authorities and scholars must draw a new line in history of legal, constitutional development and peace if they want to apply new reforming policies to the legal system for a brighter future for the next generation.

However, earlier in this chapter we discussed the principles of freedom and legal reform in addition to some new Saudi attempts to reform and development such as the King Abdullah's economic city and the act of joining the WTO. Nevertheless, it does not matter what the state will do or try to achieve, as it will stop at one point when

\textsuperscript{283} M.Khadduri, \textit{The Islamic Law of Nations}, (Baltimore) 1966 pp.60-70.

such efforts and attempts clash with ultra conservative Islamic clerics and their limited vision of Saudi Arabia's role in a global world. For example, the investment of foreign private capital in other countries is regulated by a comprehensive set of legal instruments. Yet, unfortunately in Saudi Arabia it is governed by a fragmented entities and political structures and there is no unified legal system with the benefit of the separation of powers that grants judicial independence. Legal disputes in private investment, therefore, depends to a great extent on the autonomy of the contracting parties in designing their international foreign investments agreements and the applicable arbitrations clause.

Yet, any foreign investor has to think carefully about the legal mechanisms in the host state where political risks can off-set his rights. Indeed, the investor should embark on a special legal technique in order to secure those rights against state hegemony. Given this concern, we will highlight the legal effects of state commitments "promises," which can affect the legal constitution by treaty terms and conditions (Stabilization Clauses). This type of action from states will build a notion of legal protection available to investors under the host state's law (National Law), or under customary international law.

The reason for focusing on affirmative steps that can be taken by investors is in order to reduce the threat of political risks (non-commercial) when they are included in contracts operating within unsecured jurisdictions. These securities come only through enforceable constitutional guidelines governed by a transparent process that limits the state's hegemony via articulating the validity of security clauses. Moreover, the use of stabilization clauses can bring up new issues and conflict zones between international law and sovereignty, and the validity of the clauses within the international law arena. Saudi Arabia will be analyzed as a case study due to its special progress toward the latest trends in foreign investment invitations and laws. It will be considered within the framework of the new development plans.\textsuperscript{285}

\textsuperscript{285} From a practical viewpoint, the Saudi Arabian juridical system has no transparent guidelines that show the foreign investor how to tackle problems via the legal channels. Legal advisors and lawyers, to some extent, are unsure of whether their clients are submitting to the right court or not. See \textit{Emarr vs Jadawel} entailing a commercial legal dispute in Riyadh 2007 in the high administrative court 'Diwan Almazalem'. Available at: \url{http://www.mep.gov.sa} accessed 12 February 2012.
4.6: Conclusion

Saudi Arabia faces significant challenges in socio-economic terms. Its developmental problems and immense and the demand for human and capacity development are quite daunting. In a sense however this creates both problems and opportunities for investment in the country. On the one hand investments are needed to provide even basic amenities and consumer needs. Related to this is the fact that the State is simultaneously aspiring to high technological relevance and heavy industrial infrastructure and transfer of technology. On the other hand the level of education despite some improvement is still too low creating much scope for conservative and poverty driven hostility towards foreign and perhaps western involvement in the country. This reflects in an arguably negative attitude to changes proposed. It is therefore, necessary to advocate socio-legal development as a first step towards ensuring that the entire populace, state institutions and civil society are all ready for the effort of making Saudi Arabia an attractive destination for foreign investment.

A first step to take in improving the socio-economic and socio-legal situation in line with the above is to recognise that there are important changes and reforms to be made to the national to human rights regime. The assumption that human rights are inherently Western concepts imposed upon other cultures takes a static view of moral and legal principles, and is, therefore, flawed. The contemporary concept of human rights has been greatly enriched by legal and political inputs from other cultures and civilizations. Islamic civilization was indeed one of the major sources of both human rights as well as trading customs such as the lex mercatoria. For this reason better appreciation of human rights regime as allowed under the Sharia is imperative. Better adherence to human rights will also make the Kingdom a more attractive place for investors. This is particularly true in terms of medium and small scale investment from foreign companies whose work force may currently be discouraged by a perception that human rights does not come high on the agenda of governance in Saudi Arabia.

This is particularly because the more democratic freedom a state can guarantee the more it appears that it attracts economic progress. It is not surprising therefore that the
richest societies in the world are the ones with wide democratic participation and impressive respect for human rights and equality before the law. It is particularly necessary for greater participation of Saudi Arabians in the consultative assemblies. This will be a good place to start the necessary reforms and to stave off protests and subversive activity. The King of Saudi Arabia can additionally pass certain powers to new democratically elected authorities. Strategies like this can help create the right conditions that will sustain the progress already achieved through the creation of economic and industrial cities.
5.1. Introduction

Most states are willing to give guarantees to foreign investors, and these guarantees can take different forms. These include clauses and instruments offering protection against compulsory acquisition; Investment Acts with legal safeguards against adverse amendments to the law (such as expropriation); status of most favoured nation and the national treatment. This protection has to be put in a legal order through international agreements, treaties, and conventions. Yet the question arises: how can these statements or promises bind the host state within its jurisdiction and against its local laws and norms especially in a country like Saudi Arabia?

The state can be bound by its promises under international law only when it fulfils the terms which obliges it to keep its promises, or when it builds on legal aspects. The host state is forbidden to nationalize or expropriate FDI according to the International Investment Code, Article II. From this perspective one can underline some of the state’s promises or statements that could bind it, such as:

(a) The state’s policy or public statement, e.g. Liberia and Nigeria

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287 Detter De Lupis, The Concept of International Law, (Stockholm: 1987). What is meant by the FDI Climate is the legal, economic, social and political estuations, which creates the right increment of the successful long term investment. Also see the Investment Climate Report in the Arab countries 1996.


289 The Principal Laws on Foreign Investments in Nigeria are (a) the Nigerian Investment Promotion Commission Act No.16 of 1995; and (b) the Foreign Exchange (Monitoring and Miscellaneous
(b) National state legislation and constitutional guarantees e.g. Article 31 of the Indian constitution

(c) Official declarations

(d) Bilateral and multilateral treaties

There are therefore, two possible arguments: The first is that the relationship between the host-state and multinational companies or private foreign investors cannot be governed by international law. The answer to this argument comes within the new UN/ILC law draft which confirms that an action or omission by a state or person with international personality that leads to harm against the legitimate interests of another state or person with international legal personality will be a wrongful act. Such an action or omission will create responsibility in international law and may provide basis for compensation and other remedies such as reparation. The second view is that the clash of interests as a result of nationalization or expropriation, are so unique and of far reaching effects that the situation must be covered by international law. Akehurst describes this inherent tension:

Provisions) Act No.17 of 1995. The Investment Protection Assurance of the government reads: - No enterprise shall be nationalised or expropriated by any Government of the Federation, and - No person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other persons. - There will be no acquisition of an enterprise by the Federal Government unless the acquisition is in the national interest or for a public purpose under a law which makes provision for: (a) payment of fair and adequate compensation, and (b) a right of access to the courts for the determination of the investor's interest of right and the amount of compensation to which he is entitled. - Compensation shall be paid without undue delay, and authorisation given for its repatriation in convertible currency where applicable. See Nigerian High Commission, "Foreign Investment Requirements and Protections" available at www.nigeriahc.org.uk accessed 21 February 2012. Article 31 provided that "no person shall be deprived of his property save by authority of law." It also provided that compensation would be paid to a person whose property has been taken for public purposes.

Each of these promises need technical elements in order to validate or to render them binding. For example, the declaration from state officials needs to cover three terms: 1) the official should represent the state in high capacity 2) the declaration should be clear and address the particular point concisely E.g. we are looking for concepts that deal with integrated projects, which, as far as gas is concerned, will give us an end-product such as desalinated water power, or petrochemicals' Oil &Gas Journal, Feb.15.1999. Mr. Ali AL-Naimi, Saudi Arabian minister of Petroleum and Mineral Resources. Not only can the foreign investment declarations or invitations affect the FDI but also political declarations, e.g. the end of Iraqi-Iranian war in 1988. This encouraged the foreign investor to invest in the area due to the political stability and the freedom of selling. See Investment climate report in the Arab countries (1998) pp. 12-18.

The emergence of transnational companies reflects the globalisation of economic activities and new forms of specialisation and the international division of labour requiring direct investment in foreign markets. Some states, however, for obvious economic reasons, are more favourable to the operations of multinational companies based in their own territory than other states where these companies are operating. Developing countries especially have expressed concern about the dominance of TNCs in national economies, in contract negotiations and in other respects concerning company interests, including interference in the domestic politics of the host state. Industrialised countries, on the other hand, tend to be more worried about the protection of the investments of their multinationals in foreign countries and about legal certainty for their transactions.\(^{293}\)

It is difficult not to appreciate that for the foreign investor engaging with a developing state, it is possible to experience serious disappointments resulting in heavy financial losses. It is arguable that it is the attempt to resist such losses that have led to the *Aminoil* and *Aramco* cases we have discussed earlier.

Investors are interested in receiving compensation when the state expropriates or nationalise investment in an arbitrary way.\(^{294}\) Multinationals and their home countries have in fact become more careful in requesting guarantees that ensure they avoid endangering investment. However, it could also be argued that the host state must also act in a manner that aligns with its national interests developmental needs and with deference to emergency situations. Therefore, the real tasks before a state like Saudi Arabia are three fold. First, there must be internal self-conviction to provide a safe investment milieu. The political will must be in fact very genuine and shared by the most important political actors in the state. Second, there must be social cohesion among the citizenry and civil and professional groups. Indeed Saudi Arabia cannot afford to be divided on the push toward economic success and the attraction of foreign capital in any way. Third, the State must communicate convincingly that it is irredeemably committed to economic development through promotion of FDI. Divisions and disunity on the issue will be spotted by foreigners and foreign businesses. We have shown above that the highest political authorities in the


\(^{294}\) *BP Exploration Co v Hunt*, [1979] 1 WLR 783.
Kingdom have expressed serious commitments to the international community to attract and retain capital within an environment of reform.

The objective of the economic reform discussed here is to modernize the state and get it to comparable Western or international standards. Saudi Arabia would benefit from reform of the entire legal system in order to make its laws more transparent and applicable to third party states and multinationals. These concepts can also be useful for the other Middle East states. The era of expropriation and nationalization of multinationals is perhaps long gone.\(^{295}\) The history of oil nationalisation in the Middle East and other parts of the developing world is a long one and includes the Iranian nationalisation of the Anglo-Persian Oil Company and Libyan Nationalisation of American Oil Companies.\(^{296}\) In truth, the developments and assurances emanating from Saudi Arabia are indeed common currency among developing states. What makes developments in Saudi Arabia unique is its obvious attraction to Western oil multinationals as the largest producer of both oil and gas resources and its influential position \textit{vis a vis} other Arab and middle eastern States. It may be suggested that while the prevention of expropriation and nationalization is the best-case scenario for investors and the development of international law on the topic has indeed made compensation and reparation unavoidable in the event of state expropriation, nevertheless, what amounts to prompt compensation in case law is less clear.\(^{297}\) Prompt compensation may have to come after long dispute settlement means hence


\(^{297}\) On Monday, April 10th, 2000, Saudi Arabia's Council of Ministers approved a new Foreign Investment Law, following the recommendation of the Supreme Economic Council. In a dramatic change from the previous investment law, the new Foreign Investment Law allows foreigners 100-percent ownership of the projects.
the problems faced by Aramco discussed earlier. This is one of the areas of possible improvements for the Kingdom. It should of course make it clear in its policies and laws that it will not expropriate in all but the most compelling circumstances but more importantly that if it does there will be prompt and adequate compensation.

The early cases such as the *Chozow Factory case* and the *Norwegian Shipowners Claims case* did not turn on the ‘prompt, adequate, and effective’ formula. The Resolution on Permanent Sovereignty Over Natural Resources and Wealth 1962 also merely referred to appropriate compensation, a phrase that received the arbitrator’s approval in the *Texaco case*. In *Amoco and International Finance Corporation*, a distinction was made between lawful and unlawful expropriations for the purposes of determining adequacy and effectiveness of compensation. In the case of unlawful taking, full restitution (which has been interpreted to entail calculated future earnings) in kind or monetary terms is required so as to put the affected concern back to its overall position *status ante*. While in the case of lawful taking, as was found in respect of Iran, the standard was the payment of the full value of the undertaken at the moment of dispossession. However the 1962 Resolution tried to reconcile the interests of the capital-exporting and importing countries by providing in Paragraph 4 that nationalization, expropriation, or requisitioning shall be based on grounds or reasons of public utility, security, or national interest, which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state enforcing such measures in the exercise of its sovereignty and in accordance with international law. In any case where there is dispute as to compensation, the principle of exhaustion of the local remedies of the state making the expropriation shall apply. Thus the resolution seeks to guarantee the enjoyment of

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300 (1922) 1 RIAA, pp. 307, 339-41.


302 83 ILR, p. 603.
legitimate fruits of investment for the capital-exporting states while preserving the sovereignty of the capital-importing states to restructure their economy.

More recent developments like the World Bank Guidelines on the Treatment of Foreign Direct Investment\textsuperscript{303} are notable in their compatibility with the Western position. Section IV (1) of the Guidelines provides that a state may not expropriate foreign private investment except where this is executed in accordance with applicable legal procedures, in pursuance in good faith of a public purpose without discrimination on the basis of nationality and against the payment of appropriate compensation. Section IV (2) notes that compensation will be deemed appropriate only where it is adequate, prompt, and effective.

In contrast, resolutions adopted by the UN have tended to be generally more favourable to developing states, but frowned upon by the developed ones. The true intentions of these resolutions remains debatable, but scholars from the developing states insist they are directed toward the rectification of age-old wrongs.\textsuperscript{304} Thus, the UN Declaration on the Establishment of a New International Economic Order 1974 grants to each state the right to determine the amount of ‘possible compensation’ as well as the mode of payment. It reaffirms that states have an inalienable right to nationalize property and is silent on the duty to compensation. The Charter of Economic Rights and Duties of States 1974 expressly grants a right: "to nationalise, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid...taking into account its relevant laws and regulations and all the circumstances that the state considers pertinent.\textsuperscript{305}"

Regarding the fairness of the existing rules, it may be observed that although the objectives of the developed and developing states in respect of the laws of expropriation are opposable, they do not need to be irreconcilable in all cases. It is important that the property rights of foreigners should be protected and that the practice of international investment is continued. However, it is understandable that

\textsuperscript{303} 31 ILM, 1992, p. 1382.
nationalization arose in many cases because of the need to correct past ills. Many nationalized properties or concessions had been acquired in colonial days by the use of force, threats, or deceit. It is also necessary to understand that the international economic system has so far not been conducive for the economic growth of the developing states. One could also argue that in the immediate post-colonial era, new nations had weaker bargaining power vis a viz MNCs.

In the post-colonial era, most investments, particularly in key industries that form the backbone of the economy of states, have taken the form of joint ventures and partnerships between the foreign investors and national governments, thus the impetus to embark on nationalization policies will naturally be on the decline. There are other mechanisms, which go a long way in reducing the harshness of the practice of expropriation. An example of this is the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1966, which sets up a centre for settling investment disputes by conciliation and arbitration. The utility of Treaties of Friendships and Commerce as a means of avoiding the commencement of dispute situations cannot be over-estimated. 306 Multilateral instruments such as the Conventions establishing the Multilateral Investment Guarantee Agency 1985 have also made provisions for insurance cover ‘against non-commercial risks’ such as measures of expropriation.

In the light of the above discussions it is pertinent that Saudi Arabia continues to project an image of being a safe investment destination for oil and gas industry and indeed protect investors not only through promises but also in practices. In this guise promises to multinational corporations and other states are crucial. Mutual assurances like the Agreement between the Government of the Republic of India and Government of the Kingdom of Saudi Arabia Concerning the Encouragement and Reciprocal Protection of Investments are also welcome developments. 307

306 See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1984 ICJ REP. 392 June 27, 1986. The ICJ pointed out that the existence of such a treaty between the US and Nicaragua ought to prevent the US from its actions against Nicaraguan interests in the way they occurred.
5.2. Improvement upon the regime of Bilateral Investment Treaties (BITs) and Multilateral Treaties (MITs)

Bilateral investment treaties have developed as a tool of international economic relations in exponential terms. Their popularity, which grew in the 1980s developed even more rapidly in the 1990s, and by the start of the new century had led to thousands of such arrangements and instruments. A bilateral investment treaty is an agreement concluded between two states in which each state agrees to offer certain protections to investors and foreign direct investment from the other state. It has been held that BITs have a two-fold purpose: to offer legal protection to investors with respect to investment in host states and to encourage the flow of investment. It is perhaps relevant to note that BITs have a European origin. The first such treaty was between Federal Republic of Germany and Pakistan on November 25, 1959. In time, other European states adopted this approach to treaty relations with other developing states. It is perhaps for this reason that some argue that BITs have become the tool of choice employed by developed states as a bulwark against expropriation by developing states which became a problem since the 1950s.

Despite this concern, Saudi Arabia has embraced this device with enthusiasm and there are currently at least eight BITs between the Kingdom and other states. The operative BITs are between Saudi Arabia and the following states:

- Belgium
- Malaysia
- Austria
- France
- Germany
- Italy

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309 Qureshi and Ziegler op.cit., pp. 412-413.
310 Dolzer and Stevens, op.cit., p. 1; Qureshi and Ziegler ibid. p. 413.
BITs form only part of the international network of investment rules, which also include other bilateral, regional, and multilateral trade agreements with investment provisions. Yet it is significant to examine briefly the Saudi Arabian bilateral treaties.

It is notable that apart from the BITs between the Republic of Korea and Saudi Arabia and Saudi Arabia and Malaysia, the majority of the BITs are with Western European states. The BITs all share a common objective of creation of a special economic relationship (a) between the states and (b) between the states and the investors. A central feature is the creation of a More Favourable Treatment clause, which can be seen in the case of the Agreement between the Governments of the Kingdom Of Saudi Arabia And The Government Of Malaysia Concerning The Promotion And Reciprocal Protection Of Investments, which stated:

If the treatment accorded by either Contracting Party, according to its laws and regulations, to investments or activities in connection with investments made by investors of the other Contracting Party is more favourable than that provided for in this Agreement, the more favourable treatment shall be accorded.\(^{312}\)

The levelling of the field approach is sometimes so phrased as to nearly be incompatible with the liberal free trade ideology that obtains globally. Hence the operative parts of the Agreement Between the Government of the Republic of Korea and the Government of the Kingdom of Saudi Arabia Concerning the Reciprocal Encouragement and Protection of Investments included the provision that states:

ARTICLE 2
(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations. It shall in any case accord such investments fair and equitable treatment. (2) Investments by investors of either Contracting Party shall enjoy full

protection and security in the territory of the other Contracting Party. Each Contracting Party shall not in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.

ARTICLE 3

(1) Each Contracting Party shall grant investments once admitted and investment returns of the investors of the other Contracting Party a treatment not less favourable than that accorded to investments and investment returns of investors of any third state. (2) In accordance with its laws and regulations, each Contracting Party shall grant investments once admitted and investment returns of the investors of the other Contracting Party a treatment not less favourable than that accorded to investments and investment returns of its investors.313

While it is certainly not mentioned in any of the BITs that open discrimination will exist with respect to states that are not party to the bilateral arrangement, issues may indeed be raised as to whether some of the BITs are opposed to the general WTO arrangement, which is binding on Saudi Arabia.

Furthermore there is usually the exchange of assurances that funds and profits will be freely repatriated. A case in point is that Article 6 of the Agreement Between The Republic Of Austria And The Kingdom Of Saudi-Arabia Concerning The Encouragement And Reciprocal Protection Of Investments The Republic Of Austria And The Kingdom Of Saudi-Arabia. This provision stated:

Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments in connection with investments and investment returns they hold in the territory of the other Contracting Party, in particular:
(a) The principal and additional amounts to maintain or increase the investment;
(b) The returns;
(c) In repayment of loans;
(d) The proceeds from the liquidation or the sale of the whole or any part of the investment;
(e) The compensation provided for in Article 4;
(f) Payments arising out of the settlement of a dispute;

(g) Earnings and other remuneration of personnel engaged in connection with an investment.

A central feature of the existing BITs that involve Saudi Arabia is the Settlement of Dispute clause. Inevitably, arbitration plays a central part. The dispute settlement clauses in all the instances involve dispute settlement arrangements between the states, and between the states and the investors. In the case of the latter, it is always a requirement that disputes concerning investments between the contracting parties and investors "should as far as possible be settled amicably." If, however, the dispute cannot be settled in that way the usual prescription is for a request within six months filed to the competent court of law of the contracting party in whose territory the investments was made or filed for arbitration under the Convention.

The matter may also usually be filed for arbitration under the requisite treaty or under the Convention of March 18, 1965, on the Settlement of Investment Disputes between States and Nationals of other States. If the investor chooses to file for arbitration, the contracting party agrees to the settlement by arbitration and not to request the exhaustion of local settlement procedures. In the Saudi Arabia and the Belgo-Luxembourg Economic Union (B.L.E.U.) arrangement it was agreed that,

11 (4).
At any stage of the arbitration proceedings or of the execution of an arbitral award, none of the Contracting Parties involved in a dispute shall be entitled to raise as an objection the fact that the investor who is the opposing party in the dispute has received compensation totally or partly covering his losses pursuant to the guarantee provided for in Article (6) of this Agreement.

Similarly in the Agreement Between The Government of the Republic of Korea and the Government of the Kingdom of Saudi Arabia Concerning the Reciprocal Encouragement and Protection of Investments, it was stated that in Article 11 (2) that

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314 ARTICLE 11 Agreement Between the Kingdom of Saudi Arabia and The Belgo-Luxembourg Economic Union (B.L.E.U.) Concerning the Reciprocal Promotion and Protection of Investments.
315 See Article 11 (2). 3. If the dispute is submitted in accordance with paragraph (2) to the competent Court of Law of the Contracting Party, the investor cannot at the same time seek international arbitration. If the dispute is filed for arbitration the award shall be binding and shall not be subject to any appeal or remedy other than those provided for the said Convention. The award shall be enforced in accordance with domestic law.
if the dispute cannot be settled amicably within six (6) months from the date when the request for the settlement was submitted, it shall at the request of the investor be filed with the competent court of law of the Contracting Party in whose territory the investment was made, or filed for arbitration under the Convention of March 18, 1965, on the Settlement of Investment Disputes between States and Nationals of Other States. But importantly the provision (3) also stated that if the dispute is submitted in accordance with paragraph (2) to the competent court of the Contracting Party, the investor cannot at the same time seek international arbitration. If the dispute is filed for arbitration, the award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the said Convention. The award shall be enforced in accordance with domestic law.\[317]

The BITs have gone far in developing the confidence of the business communities between the states. It remains to see whether much more can be achieved globally, either through a wide network of BITs, or through a proper engagement with the opportunity offered by the Saudi engagement with the WTO. It is this author’s suggestion that while BITs should be further developed with certain states with high value investors, the larger picture must be kept in mind by the Saudi state. The larger picture is that more and more states are becoming economically powerful, and they must all be convinced of the suitability of Saudi Arabia as a destination for investment. In other words, multilateral investment platforms are key to the Kingdom’s economic development. It is in this light that the Agreement between India and Saudi Arabia discussed above is laudable.\[318] Perhaps more importantly Saudi Arabia must aim to capitalise on its relative strengths as the largest economy in the Middle East, comprising 25 per cent of the Arab world’s gross domestic product. Also its position as the world’s leading oil exporter is relatively safe even as the Arab Spring plays out.\[319] It is on the back of such success that Saudi authorities make assertions such as follows:


\[318\] Chester Brown, Kate Miles, opcit.

“Saudi Arabia has become key to the stability of the world economy and this is reflected in the number of investors who are lining up to invest in the Kingdom...Thanks to the economic reforms, our rankings on various crucial indices have gone up phenomenally in the last few years”.320

Whereas much of this is true, it is also true as we have shown in our discussions above that much more still have to be done. Much of the success is actually due to vast oil wealth and not a deliberate fine-tuning of national laws to meet international standards. Without deep-rooted changes Saudi growth even in the context of a favourable investment era (such as in the last decade) will continue to depend on continuing good fortune and the vagaries of geopolitics.321 It cannot be debated that much more success is achievable if necessary changes are made not only in the sphere of rights and democratic standards but also in investment legislation.

The relative advantages and positional strengths immediately outlined above must not be allowed to detract from focus on areas of improvement dictated by commitment to international commercial law rules such as the dictates of the ICSID Convention and the commitment to the regime of conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states. The objective in making such facilities available is to promote an atmosphere of mutual confidence between states and foreign investors conducive to increasing the flow of private international investment.

While nearly all BITs provide for the reciprocal treatment of investment by each state, most BITs are concluded mostly between developed and developing states and according to the contract profiles they can decide who needs protection from whom. BITs usually address the following topics: (a) The rights of investors from one state to enter and establish investment in the other state; (b) The obligation of the host state to


treat investors according to the so-called "minimum international standards"; and (c) The right of the host state to expropriate assets of the investor located in the host state, with a corresponding duty to provide compensation (usually full compensation).

From the above, it can be concluded that the development of international BITs shapes a new understanding among contracting parties. This kind of co-operation creates trust between developed and developing countries. This trust would not be as effective if it were not grounded in international law. These shifts open the door to other types of international contracts and treaties. But, in this case, it is multilateral treaties that allow new parties to become a party to the contract rather than the state.

International rules on the protection of foreign direct investment contribute to the creation of favourable investment climates that benefit both international investors and host countries. Further reflection is needed on the rules of investment protection rules. Rules of this kind are enshrined in many bilateral or regional investment treaties but in some cases they have been subject to unexpected and controversial interpretations. Thus, international rules on FDI are not new, and have actually been implemented since the Second World War. 322

The first code of foreign investment is the Charter of the International Trade Organization (ITO), signed in Havana, Cuba, in 1948. Chapter III of the Charter – Articles 8-15. These provisions highlight the foreign investment protection (specifically, Article 12 (1)(A)(B)). 323 For example, some treaties of the United States have special concerns about the employment and high skills of foreign parties – i.e., Article VIII (1) of the treaty with Netherlands. The potential of FDI to contribute significantly to economic growth in both home and host countries is being increasingly recognized. However, the framework of multilateral rules for FDI should ensure the right conditions for international investment to be beneficial to sustainable development. Quite naturally, this aspect is of even greater importance for WTO

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322 Fraser Cameron, The European Union as a Model for Regional Integration. (September 2010) Available at: http://www.cfr.org/eu/european-union-model-regional-integration/p22935 accessed 21 February 2012. The European Community is the most advanced example of regional integration of the economies of its member countries, establishing a single internal market governed by common institutions and rules, and granting individual rights as to their respect to individuals and enterprises.

members that are still developing. In this respect, traditional provisions on special and differential treatment for developing countries may no longer suffice.

This argument reflects the non-discrimination principle between the contributing parties. This is one of the legal guarantees regulated under the International Trade Organization (ITO) Charter 1948 (Chapter III Article II (1)(b)) and it covers the aim of concluding bilateral or multilateral agreements (Article 12 (2)(b)). One of the keys to attracting long term FDI is to ensure that the treatment of established investors is predictable, and must be flexible with changes in applicable domestic laws, and regulations should be brought about as transparent as possible. International investors have identified difficulties in establishing knowledge of the laws and regulations of the host country as an important issue hindering their interest in investments abroad, and this can give a clear example of the global trend to the use arbitration in contract disputes.

5.3. Utility and Strategic Value of Stabilization Clauses

Indeed, having regarded the high capital risk and input that is often involved in foreign investment, especially in the natural resources sector, the economic, political, and regulatory stability of the host state is extremely important for attracting new investors. Therefore, over the last few years, there was a rapidly growing notion of BITs and Multilateral Investment Treaties (MITs) aiming to facilitate foreign investment in developing and transitional economies by inserting stabilization techniques. Likewise, international investment agreements e.g., regarding the exploration or exploitation of natural resources have included since the 1960s the so-called stabilization or freezing clauses. Although it is significant to mention that it has been noted that, "the presence or otherwise of such a clause affects the least of investors' decisions in countries such as Saudi Arabia and Brazil." More recently, some national investment codes equally provide for stability provisions. All these

325 Kronfol (1972) op.cit.
legal instruments have in common that they aim at immunizing against the impact of possible changes in the host state’s law. This development gives stabilization clauses great relevance despite the continuing importance of state sovereignty. Therefore, we will firstly outline the nature of stabilization clauses in order to analyse them from the legal perspective:

5.3.1: The legal Nature of Stabilization Clauses

In this case, it can be argued that the nature of the stabilization clauses comes from the type of investment, which can give the investor important rights within the host state and assure security of investment. Stabilization clauses can be separated into a number of categories.\(^{328}\)

Effective stabilization clauses aim to protect the contract from the application of legislation, or administrative measures, subsequent to the contract’s conclusion. There are at least three identifiable forms of stabilization clauses:

1. Provisions stating that the investor’s right will remain unaffected by subsequent enactments;
2. The anti-consistency rule according to which the agreement will prevail over future legislation or regulation if there is inconsistency between the two; and
3. The incorporation and freezing of the specific date that the host country’s municipal law was inserted into the contract. In this point arguably the nature of the stabilization clause is to remind the state that in this area it is under specific conditions and obligations, which cannot be breached.

Moreover stabilization clauses can be seen as especial procedures that can secure economic and development agreements under international law. On one hand, there are those who believe that the validity of stabilization clauses ‘branch’ from the principle of contract sanctity, whereas, on the other hand, there are others who argue

\(^{328}\) Kronfol (1972) op.cit., pp. 58
against their validity on the basis of the principle of sovereignty over natural resources, which would not allow authorities to sign away their independence.

5.3.2: The Validity of Stabilization Clauses

In an "internationalized" contract where the parties have specified a non-national governing law, the validity of the stabilization clauses can be upheld to derive from the parties' choice of international law or general principles as the governing law of the agreement. In other words, the validity is the enforcement of the agreement. Arbitrator Dupuy took that approach in the TOPCO case.\(^{329}\) Even when a stabilization clause can be upheld under international law, this of would not detract from the fact that the host state's authorities have the power to act in breach of it by changing the investment conditions. Yet, nothing can prevent a state from carrying out such an act. However, this does not imply that stabilization clauses are useless. It has been observed that "the most important aspect of a modern arbitration statute is the irrevocability of the arbitration clause."\(^{330}\)

Stabilization clauses have a functional value, in that they support the private contractor's bargaining position. When an authority knows that it will be widely shamed by an arbitral ruling upholding the stabilization clause and giving it its full effect, it will be willing to compromise. When an authority is found to have acted in breach of a stabilization clause, the investor will have a right to due compensation.

To achieve the purpose of stabilization clauses in the long term, contracts including such clauses should be away from the changing national law. Even if this happens, the contract has to be protected from the host state's law reform. Even still, when the state changes its law, the law governing FDI will only exist for that particular contract and the new law will not apply to it. Unless the contracting parties agree to change it, the clause should be viewed as an independent obligation governed by international law.


regardless of state sovereignty. The contract's governing law as a whole will remain valid in the eyes of the law.

5.3.3: Stabilization Clauses and State Sovereignty: Legitimacy of the Saudi Investment Policies and Laws

It is clear that states must retain the right to act within their national sovereignty and must be able to make tough decisions in regard to many areas of national and international life. In OPEC meetings for instance since the Gulf War, Saudi Arabia has been clearly in the dominant position. It refused to relinquish its hold on pricing output decision-making. Yet where the confidence of investors is shaken because of the action of government, much needed investment may not come in and the exploitative industry of the state will suffer. To this extent even a resource rich state like Saudi Arabia must curtail its drive for ostentatious actions within its sovereignty because the attraction of investors to any given territory is not inelastic. The situation where it is recognised that the royal family has effectively constructed international and regional alliances aimed largely at preserving its power and “...in the absence of any institutionalized mechanisms for accountability, the royal family has always allocated state resources in the manner of absolute monarchs” may no longer continue without serious negative effects and such as reluctance of foreign partners to engage with the kingdom. The atmosphere of the international investment and the oil revenue in 1996-97 was an initial warning to the Saudi authorities when its oil production was reduced from 10,000,000 a day to 2,200,000. This forced the Saudi authorities to adopt new legal policies in favour of maintaining economic development. International co-operation and consultation have, however, become more commonplace, particularly under the auspices of the United Nations.
The law and practice of International Arbitration is one of the strong factors that have come to temper the full complements of sovereignty. Arbitration continues to be one of the best representations and reflection of the laws developed within the international economic order. In the case of Saudi Arabia it is contained in the Commercial Court Regulations, issued by Royal Decree 5-1-1350H (particularly Article (1)).

If the state is a party to such different types of treaties the question is if a dispute arises, how can the contracting parties, or any third party who has an interest, reach their goals or protect their rights if there is not clear legal applications or guidelines to follow. To some extent, Saudi Arabia is slow in modifying or reforming its legal system. Saudi Arabia does have a dispute settlement mechanism in its legal system, but the current Saudi authorities are trying to modify its regulatory instruments in order to provide speedy procedures and preventive measures to deal with any dispute between the commercial parties. The Saudi market is characterized by the dominance of joint ventures, whereby the national partner is trying to secure some control over the enterprise. At the same time, the authorities are engaging in proactive approaches in order to respond to any improvements in the disputes settlement mechanisms. New tools to bring impartial and independent regional and international bodies are updated deciding conflicts is becoming more common. This new trend in the FDI it is not new issue to the Arab countries it developed since 1995 UNCTAD Report illustrated that 226 billion dollars is the total FDI, 1994, and 235 billion dollars in 1995 and United State is the dominate country who attract this investments. See Investment Climate Report in the Arab Countries 1995 pp. 22-25 See, OPEC Member Countries' Crude Oil Production Allocations (1000 b/d).


Establishment and conduct of commercial courts is regulated by Royal Decree No. 32 issued on 15 Moharram 1350 H. (1930). Under this law, a “Committee for Commercial Disputes” comprising two “Shari'ah” Judges and one Legal Adviser settle all commercial disputes, except for those related to insurance business. The disputes related to insurance business are referred to the Ministry of Commerce for decision. Arbitration Law, promulgated by Royal Decree No. M/46 dated 12/7/1403 H. (April 25, 1983) cancelled and superseded the previous arbitration provisions contained in the above-mentioned Royal Decree No. 32. Since December 31, 1987, Commercial Disputes have been within the competence of the Grievances Court (Diwan Al-Mazalem), Commercial Circuit, instead of the Committee for Commercial Disputes. The disputes pertaining to negotiable instruments are governed by Negotiable Instruments Regulations approved by the Council of Ministers Resolutions No. 692 dated 26 Ramadan 1383 H. (1963) and issued under Royal Decree No. 37 dated 11 Shawwal 1383 H. (1963). These regulations supersede Chapters VI, VII, VIII and IX of Commercial Court Regulations issued under Royal Decree No. 32 of 1350 H. also see, Saudi Arabia issued its first Arbitration Regulations in 1983 (Royal Decree No. M/46 dated 1983), and its implementing rules by Council of Ministers Resolution No.7/2021/M dated 8/9/1405 H, corresponding to May 27, 1983.

regularly. These measures were based on the Islamic practice adopted in Saudi Arabia to secure foreign investment in a climate of a dynamic market and one of the fastest growing economies of the Middle East. Yet it is not easy to enforce an arbitration judgment in Saudi Arabia. The difficulty of enforcing foreign arbitration awards in Saudi Arabia has led some non-Saudi parties to conclude that arbitrating any disputes in Saudi Arabia itself is inimical to investors’ interests. A recent case suggests that arbitration approach indeed provides few guarantees to investors. 337

It is for these reasons that the concept of stabilisation clauses is of interest to our discussion at this stage. Stabilization and adaptation clauses are the two ways to achieve the parties’ common objective to allocate between them the risk inherent in a long-term transaction. 338 Stabilization clauses in the oil and investment contracts are used to ‘freeze’ the parties’ rights and obligations in the name of the sanctity of contracts (pacta sunt servanda) and adaptation clauses are useful for providing for the renegotiation of contractual conditions in the presence of a change of circumstances, in the name of the rebus sic stantibus rule. 339 Such legal arrangements are an important part of the overall package that a country can offer to potential foreign investors. Under commonly used stabilization clauses, the host government commits itself “not to change the regulatory framework in a way that affects the economic equilibrium of the project, and to compensate the investor if it does so”. 340

The tension between the practice of stabilisation clauses and sovereignty is clear and relates to the Saudi experience as well. As a Cotula put it:

“While these legal arrangements can help shelter investment from undue host state interference, they may also distort the pursuit of sustainable development

339 Ibid.
Developing countries, thus, have the view that these stabilization clauses affect their sovereignty especially with regards to the right to the absolute control over natural resources. Several United Nations Resolutions recognize this right as pertaining to all the states: 1961 UN Draft Natural Recourses 1803 (XVII), UN Resolution 1314 (XIII) 1958 which gives the state the right to self-determination, UN Resolution 1515 (XV) 1960 in which the recognition of state sovereignty over its natural recourses is specified, and finally Article 25 in the Convention of the Social and Cultural Rights 1966. Sovereign breach or repudiation of a contract is a political risk when an authority or a state entity is a party. When there is no effective remedy against the breach, this amounts to the confiscation of the rights of the private party. The Multilateral Investment Guarantee Agency (MIGA) Convention of 1988 has recognized the specific nature of this risk, including the non-commercial risks that the Agency can cover in favour of a MIGA guarantee holder, besides currency transfer (including non-convertibility) and expropriation and similar measures. These issues are defined in Article 11 of the Convention. Stabilization clauses, involved with a specific element of the state, such as economic development, affect the state's sovereign powers. Therefore, international law protects state sovereignty; from this perspective the state cannot be limited by contractual obligations it has not willingly entered into. One such example of this is Hong Kong's insistence of this practice with their agreements with Great Britain, though no formal stabilization clause existed in the treaty at that time. 342

There are two arguments with respect to this issue: the first supports state sovereignty. Jimenez De Arechaga argued that the stabilization clause could only be effective in matters of compensation and cannot be used to limit state sovereignty. The second

341 Ibid., p. 2. The writer notes further at p. 3: "These tensions between investment protection and sustainable development goals call for the development of innovative approaches that can reconcile the investors' legitimate need to ensure stability of the investment climate with efforts to maximise the contribution of foreign investment to the pursuit of sustainable development goals".

argument views state control as an analogy to state sovereignty as was argued by Professor Garcia-Amador. It could be said that Professor Garcia and Judge Fitzmaurice’s views are more rational. This can be argued because when the host state enters itself into this type of contractual relationship and/or international treaties, the state argues to ‘shrink’ or ‘sacrifice’ part of its sovereignty in favour of economic development or national interest and it is linked to a compensation option, and this can come through the BIT and MIT’s terms and conditions. Moreover these treaties are governed by international law, thus state sovereignty has not been abused, but rather the state has chosen to cease some of its obligations to protect investors.  

Saudi practice in these areas has been of significance. In 2000, Saudi Arabia implemented the Foreign Investment Act by the Royal Decree Number (M/1), which liberalized the foreign investment laws in the Kingdom. The Saudi Arabian General Investment Authority (SAGIA) was created under the Act, which has the responsibility for licensing all new foreign investment in Saudi Arabia. Under the new Act, foreign persons and entities are permitted to invest in all industries and services except for those which are specifically excluded from foreign investment. Saudi Arabia presents a wide variety of business opportunities for United States companies.


345 Royal Decree in Foreign Investment Code Royal Decree no: M/1 10 April 2000. Also see, Royal Decree dated 2/2/1399 H, this also extends to nullifying all matters that contradict with the rules. Foreign Capital Investment Act promulgated under Royal Decree No. M/4 dated 2 Safar 1399 H. (January 1, 1979). Under Article 2 of this Act, regarding taxation and tariffs the Saudi authorities gives preferential treatment to the FDI and has implemented new laws showing it to be so; 3/3170 IN 2.12.1413H. This law illustrates the alleviation of tax given to foreign investors involved with new projects and expansions to existing projects by the state. See Investment Climate Report in the Arab Countries 1993 pp. 219-222.
In 2000, Chevron Phillips Chemical Co. LLC and its affiliates (CPChem) and private Saudi investors opened Saudi Chevron Phillips Co. The venture’s petrochemical plant in Al Jubail is the kingdom’s first privately financed basic petrochemical enterprise. A second company, Jubail Chevron Phillips, formed in 2003, operates another petrochemical facility adjacent to and integrated with the first plant. In 2005, the Chevron AlBakri Lubricants Company, a joint venture headquartered in Jeddah, was established.346

To be effective and successful, a company executive must have a basic knowledge of the business community in Saudi Arabia and the Saudi legal system. Such efforts would make a huge shift in its economy and attract more interests. However, the Saudi authorities have to take this as a lesson and it has to work to avoid any blunder in the future.347

Stabilisation clauses are, thus, a veritable tool against expropriation. In this sense it is important that the Saudi legal system portray itself as to be very unlikely to engage in expropriation. The uses of stabilisation and adaptation clauses in doing so are vital. The term ‘expropriation’ or what some prefer to call ‘nationalization’ is used to denote the taking-over of foreign private property by a sovereign state in the exercise of the right of eminent domain. Generally, expropriation by law of enterprises is done with a view to public management in the national interest. It is particularly in this context that the term nationalization was developed. Expropriation therefore involves taking property, but actions, which are short of the direct dispossession of the assets in question, may still constitute the action of expropriation. Thus, in 1965, after a series of Indonesian decrees were passed, the UK government stated that: “in view of the complete inability of British enterprises and plantations to exercise and enjoy any rights of ownership in relation to their properties in Indonesia, Her Majesty’s Government has concluded that the Indonesian Government has expropriated this 346See Chevron Corporation, “Saudi Arabia Record of Achievement”, available http://www.chevron.com/countries/saudiarabia/recordofachievement/ accessed 21 February 2012. See further the fact sheets for Chevron. http://www.chevron.com/documents/pdf/saudiarabiafactsheet.pdf accessed 21 February 2012.
347 In 1995 the Saudi Authorities signed the treaty, which protected the FDI, became a member of MIGA. See World Bank, Investment Climate Report in the Arab Countries 1996, p. 137.
Indeed, measures taken by a state can interfere with property to such an extent that these rights are rendered so useless that they may be deemed to have been expropriated even though legal title remain with the original owner (such an example can be seen as correctly explained by Malcom Shaw in the decision of Starret Housing Corporation v. Government of the Islamic Republic of Iran.)

Nationalization must, however, be distinguished from confiscation, which is a punitive measure and occurs without compensation. It is however, arguable that some nationalisations are indeed of a confiscatory nature. In this sense we may note the existence of indirect expropriation. One such example of this is the measures taken after the Russian Revolution of October 1917 that brought in its wake the takeover of foreign-owned private property, most of it without any compensation. Normally the property rights of foreigners deserve protection under international minimum standards, yet such respect for property may sometimes perpetuate a state of unfair or exploitative relations. Even Western countries indulged in the policy of nationalization after the Second World War, as in Britain between 1949-1950, but those industries were privatized in the 1980s. However, the practice took root more than anywhere else in the policies of nationalization taken by the Soviet Union after its successes in the communist revolution and later on in the practice of the new states that emerged during the period of decolonization after the Second World War.

In reality, there has been little agreement on the rules that guide expropriation. The main divisions occur between the views of the Western capitalist economies on one hand, and the communist/socialist states, and the developing states on the other. Whereas it is common position that expropriation may occur, the developed states with much heavy investment abroad, have consistently argued that it must take place in accordance with an "international minimum standard" set by international law. The developing states have equally consistently denied that this is true, or even desirable.

Their position is akin to that expressed by the Soviet delegate to the International Law Association Conference of 1962, who stated that,

in promulgating nationalism laws, the State fixes the procedure of nationalisation, including the question of whether or not compensation is to be paid to the former owners of nationalised property, when it is to be paid, and in what proportion...The State may decide to nationalise the property without compensation, or with partial or full compensation...Such considerations of a social nature, like many others, may be decisive in fixing the size and procedure of compensation.\textsuperscript{351}

Historically, the Board of Settlement of Commercial Disputes often settled disputes between parties to trade disputes both national and international. Disputes resolution was slow and foreign companies had little confidence in the efficiency of the system. It is therefore not surprising that nearly all BIT’s at present tend to include a brief arbitration clause. Saudi Arabia like many other developing states has found it necessary to establish a strong legal structure by signing up to the widely respected International Centre for Settlement of Investment Disputes (ICSID). It would appear that the Saudi government is indeed satisfied with the jurisdiction of ICSID unlike some other developing states. Moreover, the authorities no longer require exclusive applicability of Saudi law in the resolution of private commercial disputes. In practice, however, Saudi courts tend to apply Saudi law in commercial disputes litigated in the Kingdom, even when the relevant contract contains a foreign choice of law provision and provides for a foreign forum to have jurisdiction. Business-to-business (B2B) arbitration assistance, although expensive, is available from local chambers of commerce for some types of disputes.\textsuperscript{352} Such practice gives the contracting parties the freedom of choice of the way they like to conclude their case.\textsuperscript{353}

\textsuperscript{352} Although Saudi Arabia is considered seventh among the developing countries who attract FDI and it is the largest in terms of FDI in the Middle East and North Africa: Investment Climate report in the Arab countries. See, FDI report 2008 pp. 2 Available at: http://www.arab-hdr.org/publications/other/escwa/foreign-investment-08e.pdf. Also see, The International Arab investment Guarantee Corporation 1996 pp. 129. Also see, https://www.cia.gov/library/publications/the-world-factbook/geos/lsa.html accessed 15 February 2012.
\textsuperscript{353} Saudi Foreign Investment law, Article 13: Without violation of the agreements to which the Kingdom of Saudi Arabia is party, settlement of disputes between the authorities and the foreign investor as regard to the latter’s licensed investments, in line with the system, is to be carried out in an
With this careful positioning of its international legal obligations it is no serious surprise as mentioned earlier that Saudi Arabia has come within the top 20 hosting countries in the global FDI inflows.\textsuperscript{354} This has taken place due to some impressive and radical innovations to its legal regime. For example, the company law of France was adopted as a model for revising Saudi Company law regime.\textsuperscript{355} Yet it is argued here that more needs to be done and the changes ought to be more holistic. It is however, necessary to note that many of the radical changes have taken place under the clever use of ministerial authority. It is therefore, arguable that there remains a danger that the ministerial directives may be reversed by the religious clerics if they choose to be concerned about the religious legal process especially when the legal issue comes before a Saudi court sympathetic to the views of the religious class.

The possibility of such interferences and arbitrary changes is moreover incompatible with foreign investment law. It also does not conform to the changing status of international trade law. It is also fair to note that there is fierce regional competition to attract financial investments. This reality has created a positive environment that is beneficial to Western investors. Saudi Arabia cannot in these circumstances afford to rest on its oars and must continue to reform its laws to make them responsive to global trends. The government must continue to satisfy foreign investors by for example avoiding any conflict in the future with regards to long-term investment projects. On the other hand the state must also watch out and avoid unfair bargains that lock it into relationships of exploitation. A useful strategy in this direction is to offer adequate and well-constructed renegotiation clauses. Such clauses are common in international investment law practice and they stipulate that the agreement will be open to periodic negotiations in order to adapt it to the new policies or plans if any arise.\textsuperscript{356} Such mechanisms are indeed useful and can be mutually beneficial. This area is also one of the key areas in which Saudi lawyers and negotiators must increase their


\textsuperscript{356} Bernardini, op.cit., pp. 98-112.
knowledge and technical capacity. Renegotiation clauses and the stabilisation devices are in fact realistic methods by which developing states in OPEC and the GCC may continue to advance their interests in integrating further into a future of FDI security and stability through their involvement in MITs and BITs.

The Saudi legal system and international conformity: Do Saudi Arabian BITs and MITs comply with the Saudi constitution?

Saudi Arabia is governed by an absolute monarchy that sits at the head of feudal and hierarchical authorities. When we talk of the Saudi authorities, we talk of the ruling Al-Saud family who, as absolute monarchs, influence and determine every aspect of Saudi governance. While the citizens of the United Kingdom are subjects of the Queen, that monarchy is not an absolute monarchy, as the system of authorities is accorded with a number of checks. Governance and external relations of the United Kingdom involves the constitution, statutes, and international treaty. Of these three, only the British constitution exists in an un-codified form, embracing tradition, statute, precedent as well as treaties and agreements. 357

Saudi Arabia is similar to the United Kingdom in as much as it does not have a written, codified, constitution. The Saudi authorities argue that they already have an adequate constitution in the form of the Holy Quran,358 the Muslim holy book, and the Sunnah359 of the prophet Mohammed. Saudi Arabia is the birthplace of the religion of Islam and it is only until relatively recently that it was suggested that a more stringent, defined, set of rules should be put in place and form the basis for the country’s constitution. Previously it had been argued that on the basis of Saudi Arabia’s special relationship to the conception and practice of the religion of Islam it had no need for written, formal, rules or laws, it was sufficient merely to live by the word of the

358 The recitation of the Gods own words as recounted by the angel Gabriel to Mohammed, the last of the prophets. Available at: http://www.religioustolerance.org/isl_intr.htm accessed 18 January 2012.
359 The record made of the Prophet’s deeds, utterances and of his unspoken approval and disapproval of situations.
Quran and to interpret life in accordance with it. From such interpretations and applications the right path would emerge and, furthermore, that path would be as decreed by the prophet Mohammed.

Muslim Shari’ah is the law of the Holy Quran as interpreted by clerics. To outside observers, this method of dispute resolution and governance may seem cumbersome and difficult to understand. To international observers this system may appear to be disproportionately Arab centred, whilst this may reflect the literal interpretation of the Shari’ah — “the clear path to be followed” is the law of Islam. Saudi Arabia and Yemen are the only countries left in the world to base their legal systems purely on Shari’ah. It should be noted that there is a second part to the law, regulations called the Nizam. There are four sources of Shari’ah law: the Quran, the Sunnah, the Ijma, and the Qiyas.

The need to codify, or to introduce a clear, written constitution, was resisted until 1992. On March 1, 1992, King Fahd recognized the importance to the commercial and international interests of the Kingdom of introducing a written constitution. While the Saudi approach may have been sufficient for the ruling royal family and its subjects, King Fahad introduced three major laws that were to form the backbone of the Saudi rule of law and its constitution. These three laws were the Basic Law of Authorities, the Consultative Council Law and the Law of Provinces. The Consultative Council Law and the Law of Provinces are procedural laws and are concerned with the replacement of authorities’ council (the Consultative Council Law) whilst the other concerns the regulation of the relationship between central authorities’ agencies and regional governors.

\[\text{Dr. Mohammad Omar Farooq.} \text{The Doctrine of Ijma: Is there a consensus? Upper Iowa University. Available at: http://www.scribd.com/doc/45747285/The-Doctrine-of-Ijma-Is-there-a-consensus accessed 21 February 2012. See also above Chapter 3.5.2. Sufficiency of Islamic Law in Relation to Complex Investment Contracts in Light of Aramco, Aminoil and Qatar cases.}\]

\[\text{In Arabic Qiyas means ‘comparing’ or ‘measuring’. In the Saudi legal context it should be interpreted as reasoning by analogy which allows the principles established in the Quran, Sunnah and Ijma to be extended to problems that are not covered by these other sources.}\]

\[\text{The Consultative Council Law, the full text relative laws at:} \text{www.saudil.gov.sa/wps/portal?ut/p/c4/04_SB8k8xLm9MSSzPy8xBz9CP0os3iTMEgenYE8TIwMLt0BzA89glyMfVw8TI39HE_3g1Lz40GD9gmxHRQ8KzgM/. Also at:}\]
When Saudi Arabia is said to have a constitution, it would serve as the basic law to which we refer, although this would arguably be misleading given that the basic law clearly states that the Kingdom’s only constitution is the Holy Quran and Sunnah. The subject is further confused by the lack of provision to interpret the manner in which the Quran or the Sunnah is to be applied in matters concerning the rule of law or constitutional affairs. The basic law preserves the absolute monarchy and does nothing to remove, or limit, the powers of clerics in determining, or interpreting, matter of constitutional, and legal importance.

5.3.4. Saudi Law and Practice in BITs and MITs?

As Saudi Arabia’s international role grows so then does the need to acknowledge that many of the activities in modern life did not exist at the time of the Prophet Mohammed. The problems that arise as part of our life today are not within the contemplation of Shari’ah and cannot be interpreted within the four sources of it. Such modern issues can be dealt with by reference to the ‘Regulations,’ or the Nizam. The Nizam are statutory codes implemented by the King under authority granted by the Shari’ah for him to do as he sees fit in the interests of the country and the people. Such sets of principles are necessary for Shari’ah to function outside of the parameters of the Kingdom. Through the use of the Nizam company regulations, employment regulations, trade regulations and the like can be determined. In this way Shari’ah provides authoritative guidance sufficient to develop a commercial, industrial, and technological society.

http://www.saudiembassy.net/about/country-information/government/Majlis_al_shura.aspx accessed 21 February 2012.

363 All three of the 1992 laws were issued by the King without formal consultation with any authority’s body. They were instead drafted by an ad hoc committee headed by the Minister of the Interior, Prince Nayef, one of the Kings brothers. See May I, Human Rights Watch Report, “Empty Reforms: Saudi Arabia’s New Basic Laws”, Available at: www.hrw.org/reports/1992/saudi/INTROTHR.htm. Accessed 19 February 2012.

The test of any legal system, or set of laws, is how it is administered in the courtroom, which is the Shari'ah courtroom in Saudi Arabia. Shari'ah courts have jurisdiction over criminal and civil matters, and over non-Muslims. Appeals from Shari'ah courts are made to the Courts of Appeal. More complex civil proceedings, including claims against the state or its authorities, and the enforcement of foreign judgements, are heard before tribunals that have been specially convened.

When we talk of bilateral treaties (BITs) and multilateral treaties (MITs) we should be sure of what it is to which we refer. BITs are usually treaties that have been entered into between two states to form an agreement to do, or not to do, certain actions. A BIT could also be an agreement, or treaty, between two groups of states, where one group will form a party to the agreement and another group will form another party to it. The Vienna Convention\textsuperscript{365} sets out the procedure for making, operating, and terminating a treaty, however the convention does not particularly distinguish between MITs and BITs.\textsuperscript{366} MITs are agreements that are entered into with multiple states or groups of states acting as individual parties. Such agreements will usually have as their subject some area of mutual benefit or be contractual in nature. While most treaties are bilateral in nature, it is fair to say that most MITs are contractual in nature.

Before entering into a contractual agreement in the Kingdom, it is important to appreciate how any dispute may be resolved. With the lack of formal constitution and the application of Shari'ah, the manner in which a possible dispute is resolved is a very real issue and, in the absence of a suitable system to resolve disputes, could be a serious deterrent to trade with the Kingdom. When contemplating entering into an agreement with a Saudi organization or entity there are three matters that should be considered: whether to use Saudi courts or the courts of another country, the type of Saudi tribunal that will resolve any disputes, and the suitability for arbitration.

In addition to a preference the parties may have, there are additional factors that may determine the type of dispute resolution that is applied. If an action is bought against a

\textsuperscript{365}The Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations 1986.

\textsuperscript{366}Article 60(1) is the only provision that is limited to BIT's and Articles 40, 41, 58, and 60 refer expressly to multilateral treaties.
Saudi company in another state’s court, then the body bringing that claim must be sure that they will be able to enforce their judgement in Saudi Arabia, or at the very least, that there are assets against which a judgement can be enforced. The most important question is if the nation within which the judgement has been obtained has a reciprocal enforcement treaty with Saudi Arabia. In the event that no such treaty exists, the Saudi Board of Grievances will review the judgment to ensure that it does not violate Saudi state policy.

5.4. Issues in Saudi Judicial and Arbitration Practice

In addition to the court system, the Saudi judicial system is also comprised of a system of tribunals. The type of tribunal that has jurisdiction depends on the nature of the dispute and may consist of a combination of judges and non-judges. The Board of Grievances has jurisdiction over disputes arising from Saudi authorities contracts and some commercial disputes. In complex disputes outside experts may be utilized, and, contrary to the Shari’ah courts, a system of precedent is used. The tribunal system is almost exclusively reserved for the resolution of disputes of an industrial or commercial nature.367

The arbitration process is also an alternative to using the Saudi judicial system. Prior to entering into an arbitration agreement, enquires by contracting parties should be made into whether a particular arbitration decision can be enforced in the Kingdom, and they should also be aware of the rules governing arbitration. Arbitration in Saudi Arabia is governed by strict rules concerning the selection and suitability of arbitrators, the duration of the arbitration and the extent the decision can be reviewed. The arbitrator must be an expert on Shari’ah, or Saudi commercial law, and once the final decision is reached it must be approved by court. Once an award has been made and approved, it is enforced through the Civil Rights Directorate if the arbitration has taken place within the Kingdom. An alternative would be for a foreign company to include an international arbitration clause, however their decision would still need to

www.saudilembassy.net/about/country,information/laws/GrievancesBoardProcedure.aspx accessed 15 February 2012.
be examined to ensure that due process was followed, that the arbitrators were suitable, that due process was followed and that the final decision does not conflict with the Shari'ah. It may then be found necessary to resubmit the award for reconsideration on the merits.

In an international context, Saudi Arabia is a party to the New York Convention on Foreign Arbitral Awards.368 There are two conditions under which a court may refuse to enforce an award: firstly, under royal decree,369 recognition of an award under the Convention is limited to awards that were made in the territory of another contracting state and secondly, the Convention will not be applied retroactively to disputes initiated prior to ratification.

In addition to the New York Convention, Saudi Arabia has also ratified the Convention on the Settlement of Investment Disputes between states and nationals of other states. The Kingdom is also a member of the International Centre for Settlement of Investment Disputes.370

We can see that in addition to the court system, there are other mechanisms by which dispute resolution can operate within the Kingdom. However, if the intention is to enter into a contract with the authorities or a state agency, it is highly unlikely that the foreign party will have any ability to negotiate the jurisdiction or the forum by which dispute can be resolved.

When considering whether a treaty complies with the Saudi constitution, the distinction between multilateral and bilateral treaties must be understood, as well as the intricacies of treaties themselves. When talking about treaties, Memorandums of Understanding (MOUs) and exchanges of notes should also be considered. We can consider each of these to have the effect of a treaty in as much as they are taken to be binding agreements between states; but the issue is if they differ and should we consider those differences when judging their efficacy when applied alongside the

368 June 10, 1958, 6997, 330 U.N.T.S. 38 ["New York Convention"],
370 Information and Materials about ICSID are available at the official website of the body available athttp://icsid.worldbank.org/ICSID/Index.jsp Accessed 19 February 2012.
Saudi constitution. However, to some extent and due to the local legal applications we can argue that the nine BITs reported by UNCTAD\textsuperscript{371} to which Saudi Arabia is a party are not compatible with the Saudi constitution or some if the local legal applications from the practical perspective’s.

Anthony Aust,\textsuperscript{372} states that one must be especially careful when talking about Memorandum of Understanding (MOUs). An MOU would predominantly be a record of mutual understanding between two states or the contracting parties, and would not necessarily be intended by either party to have the effect of a binding agreement. This could be no more than an indicator of how the parties were to behave, rather than a document requiring the parties to be forced, under international law, to act in a particular manner to each other. Therefore, the MOU can be the right tool to avoid the BIT application under the contracting parties’ autonomy if the dispute arises.

Such an MOU need not be drafted in particular terms nor take a particular form. The document of mutual understanding could be an email, a fax, a letter, or another written document. The law of treaties does not require a treaty document to be in any particular form or to use defined terms or wording. In the case of \textit{Aegean Sea Continental Shelf},\textsuperscript{373} it was for the International Court of Justice (ICJ) to consider the intention and terms of a joint communique issued by the Greek and Turkish Prime Ministers and the circumstances within which the communique was drafted so as to be able determine its nature.

The ICJ found that the parties had not intended to enter into an agreement that would be enforceable by the court. It was not their intention that the agreement should come within the jurisdiction of the court in the event that a dispute arose. We can therefore deduce that an intention to submit to international law is derived from the terms of the document itself, and the circumstances at the time the document was drafted as opposed with the intentions of the parties at the time of a dispute. This vagueness of intention has a lasting effect on jurisdiction in the event of a dispute, and this is one


reason why the informal nature of the MOU may not be best suited to agreements of such importance that generally merit documenting in more formal terms.

Although MOUs are often found in the form detailed above, it could also be that a treaty is called an MOU, as there is no uniform title by which a treaty is known. One should take care when presented with a document that appears to call itself an MOU. It is therefore necessary to examine the content of the document and its terms to ascertain whether the intention is that it should have the effect of a treaty. By the same token, it has also been the case that as a result of several treaties having the term MOU in their title, the attitude that MOUs must be treaties and enforceable as such has evolved. Aust suggests that this reference to an MOU in the title of a treaty may be an indication of the desire for the treaty to appear less formal and less like a binding agreement between two states. The trend behind this could have many reasons, and may be as much to satisfy internal domestic expectations, as it is to portray a particular state of affairs to other states. 374

The International Law Commission’s Commentary states that the use of the phrase ‘governed by international law’ is sufficient to infer an intention to create obligations under international law. If there was no such intention, the document could not be called a treaty.

The question then is, how does the apparent reluctance of Saudi Arabia to embrace a written constitution fit with its becoming party to an MIT or a BIT. We can see from other sources of law and international trade how such agreements are subject to constitutionality. The nature of dispute resolution in Saudi Arabia and the recourse to the Shari’ah courts may be sufficient to put-off foreign investors or businesses from investing in, or doing business with, Saudi Arabian entities. Unless a company or individual has specialist knowledge of the Saudi legal system, they could be considered to be at a distinct disadvantage should a dispute arise. One option would be to incorporate a jurisdiction clause into any contract or agreement that favours an alternative legal system or jurisdiction over Saudi Arabia in an effort to present a more level playing field. Such a clause would be fine between individual, but would

fall foul of Saudi legislation, which prevents the authorities' departments and institutions entering into agreements that include jurisdiction clauses that state that jurisdiction of any dispute lies outside the courts of Saudi Arabia. This rather insular perception of trade with the rest of the world does not mirror the efforts that Saudi Arabia is making to embrace world trade and to reduce its reliance on the petrochemical industry. For this reason there maybe additional benefits in entering into MITs and BITs that have not yet been considered.

Depending on the purpose or nature of the treaty we may be able to infer a level of duality in its content. That is, it may serve a purpose beyond that which may at first be apparent. As well as the subject matter of the agreement between the parties that forms the treaty itself, there may be additional benefits from entering into the treaty. There may be the opportunity to share knowledge and technology, to develop new areas and new ideas with the benefit of knowledge gained from a new (possibly strategic) partner, or group of partners. There is also the very public act of entering into such an agreement, which in itself may say more to those about how you wish to be perceived as conducting yourself as the actual substance of the agreement itself. For a country such as Saudi Arabia, the overtly public act of entering into a treaty, or agreement, with another state or states, is a message to other countries and authorities that those concessions can be made.

These concessions are not only in terms of commercial considerations, indicating a willingness to adapt and accommodate methods and practices that may not at first seem to be in complete alignment with Saudi customs or practices, and also demonstrate a greater compromise. Examples of Saudi Arabian trade policy in the past have demonstrated that there is an apparent reluctance of the Saudi authorities to give up their sovereignty in the face of international arbitration or dispute resolution. Being subject to the rulings and findings of international arbitration bodies has been seen as too great of a compromise for Saudi Arabia. International law has long been perceived of as part of the trend towards giving up an element of Saudi sovereignty.375

Far from being a feeling of lack of control by government officials alone the impression also affects those watching the actions of the state from within. The threat of the government using international law to bypass state and local institutions or in the case of Saudi Arabia religious authorities is seen as very real.\textsuperscript{376} Perhaps the most pernicious effect of recent trends in international law is the proliferation of international The \textit{Aramco} case award only came to confirm the impression in the minds of some jurists. While we may say that this is entirely normal in that when entering into agreements with other states, the state loses some of its independence to act contrary to the details of the agreement. The impact of such an impression is perhaps greater on a country such as Saudi Arabia that has a monarchical and religious approach to commerce and economics. Saudi Arabia's special position in the Islamic faith means that compliance with the laws of Shari'ah must be seen to have equal, or greater, importance than economic or trade factors to leaders and decision-makers.

Arbitration requires the parties to submit to arbitrators, who are usually chosen or agreed upon by the parties who will also agree to accept the decision of the arbitrators and their determination. Most treaties will stipulate how the arbitration panel is to be composed,\textsuperscript{377} whether the arbitrators shall be from a particular country\textsuperscript{378} or shall be possessed of some expert knowledge that shall assist them in their determination. Most BITs and MITs will include an arbitration clause that will stipulate that any dispute be settled by way of arbitration, and will also define how the arbitration panel is to be composed. The effect of an arbitration award will be that the decision of the panel is legally binding on both parties.

In the event that an arbitration clause is not included in the agreement a dispute will be settled by way of judicial settlement. The International Court of Justice has certain advantages over an arbitration tribunal, in that it is already established and has judges

\textsuperscript{376}Ibid., 321, 330.
\textsuperscript{377}Gary Brian Born. \textit{International Commercial Arbitration: Volume 2}. (Kluwer Law International, 2009) pp. 180-212, 346-353. It is usual to have more than one judge, or arbitrator, however in simple matters of dispute it may be agreed that a single judge will determine the dispute. (Most treaties and their contracting parties autonomy will stipulate not resist processes).
available to hear disputes. It is also cheaper than convening an arbitration tribunal as it is of no cost.

Once a dispute has been determined, what is its effect on Saudi domestic law or policy? In certain instances, it will be for a Saudi court to rule as to whether it shall abide by the finding of the tribunal or court. In the event that it agrees to be bound by the decision it may find itself submitting to a ruling or judgement that proves to be contrary to the principles or rules of Shari'ah. If a ruling is found to be contrary to the principles of Islamic faith or Saudi constitution and the Saudi state declined to be bound by its terms what methods of enforcement could it expect to be employed, how much of an incentive would there be to force adherence to future judgements. The answer is that a persistent failure to submit to the findings, or judgment, of an arbitration panel or court would seriously undermine the credibility of the state in the eyes of the international community. Even worse, it could find that it is subject to far reaching penalties such as the withdrawal, or suspension, or diplomatic relations or worse, such as trade sanctions, in an effort to force compliance. The long-term effects of such a policy could be crippling to a country that has such a significant reliance on its export market.

It is with this realisation reason that Saudi Arabia became a party to the New York Convention on 18 July 1994. However, under Royal Decree No. M 11/1994 of January 21, 1994, Saudi Arabia has however, attached the following reservation.

"Awards will be recognized and enforced only if made in the territory of another Contracting state". Generally arbitration awards rendered outside Saudi Arabia are enforced in Saudi Arabia by the Board of Grievances. The law authorizes the Saudi Board of Grievances to enforce Judgments issued by foreign courts. Article 6 of the


380International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of the States refusal to give effect to the award or judgment. United Nations International Law Commission, (1991) opcit., p. 108.


382 Article 8(1)(g) of Royal Decree No. M/51 dated 17/7/1402 H / 11. May 1982
Rules of Pleadings and Procedures of the Grievances Board, issued by Council of Ministers requires satisfaction of two conditions.\(^{383}\)

First, there appears to be a strict requirement of reciprocity in that it is not enough for the Board of Grievances to receive a letter from the Legal Office of the State Department of the concerned State to the Legal Counsel of the Saudi Embassy. Experts note that the Board would in reality require a specific example of such recognition. Second, the Foreign Judgment must not violate Islamic law as enforced in Saudi Arabia.\(^{384}\) This perhaps indicates a test of conformity with Wahabi doctrines. Furthermore as M.H. Siddiqui correctly describes it is notable that judgment may in practice be refused on the grounds that:

a. The judgment is contrary to Islamic law or public policy. For instance, if it involves awarding payment of interest, consequential and/or punitive damages.

b. Lack of Notice. Default judgment and awards.


d. Dispute is pending before a Saudi Court.

e. The judgment is against the Kingdom or an agency and instrumentality of the Kingdom or an official acting in his official capacity.\(^{385}\)

f. Lack of reciprocity. It is not enough that the court or laws of the state, where the judgment was issued or award was rendered, declare that it would honour the judgment of a Saudi court. This must be demonstrated in actual experience and practice.

For this reason it has been suggested that "the enforcement in Saudi Arabia of a non-Saudi judgment or non-Saudi arbitral award remains the exception rather than the rule".\(^{386}\) Most Islamic states especially in the Middle East are parties to the New York Convention and it can be said that this makes it perhaps necessary for Saudi Arabia to


\(^{385}\) Ibid

\(^{386}\) Ibid.
distinguish itself as compliant with the provisions of the Convention. The prevailing image as a country where enforcement remains an exception rather than the rule is certainly not good enough.

5.5. Conclusion

There is little doubt that the Saudi state's promises to the international investment community in the form of BIT's MIT’s treaties, agreements on foreign investments protection must be given effect to. There is nothing in Saudi law broadly construed that prevents it from granting full recognition to its modern trade agreements made in good faith. The Shari’a agrees with a general theory of contract. Verse 1 of Chapter V indeed instructs believers to 'keep faith with contracts'. It has been shown above that the majority of laws discussed and agreements entered into foresee one way or another, that a contract should be negotiated in good-faith and with honesty.

By way of conclusion we can see that Saudi Arabia may be perceived of as facing more serious difficulties in relation to its investment law and practice. While it must engender confidence of investors using modern day instruments of legal protection of investment and international trade law, it must also keep a close eye on its national interests as well as the dictates of Islamic law. The Saudi state is required to submit to a multi-tier legal regime. For non-Islamic, or non-Shari’ah countries, it is easier to reconcile their judicial process with findings couched in international law. This is considerably harder for Saudi Arabia as it is in a unique position.

The State must embrace the use of sophisticated modern day devices and legal regimes such as stabilisation clauses, renegotiation clauses and adaptation clauses. It must fashion these to assure investors of the prospects of meaningful participation in

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in business within its territory as well returns on their investment. It must also reform its domestic, or day-to-day, laws of corporate governance. It must, however, be seen to be conducting itself in accordance with the principles of Shari’ah. It is hard to see how the current system could reconcile this conflict without significant modification or constitutional reforms.

There are therefore, a few things that can be recommended. The country’s international commercial arbitration practice ought to be elaborated upon and improved. Unless further development of arbitration can be achieved Saudi Arabia would appear to be at a continuing disadvantage. The improvements needed span the development of new and improved arbitral institutions; the development of capacity among its arbitrators and very importantly a strong respect for the enforcement of international awards.

Yet there are limits that the Saudi State must not exceed in its quest for FDI. For the Saudi state to accept a ruling that is in apparent conflict with Shari’ah would not only be seen as unacceptable in terms of the country’s position as the presumed leader of the Islamic faith, but it would also be seen as encroaching on the sovereignty of the authorities in as much as they should be free to govern its country in any way they see fit. Islamic principles are there to protect the state against harm. Thus, stabilisation clauses, which have a very high likelihood of creating grave environmental damage may be un-Islamic and also against the true national interests. It is notable that throughout the Qur’an and hadith there are many general references to the environment (i.e. animals, plants, mountains, seas etc.). The environment is considered to be blessings from Allah. Islamic law generally requires that the environment be protected. Flora, fauna and animals must be treated with kindness, and land must be utilized sensibly. For specific wanton damage to the environment there are prescribed punishments.389

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For this reason, it may be of greater benefit to the Saudi authorities to consider the benefits of the less formal MOUs. MOUs are relatively informal in character and they can be adapted, or added to.
Chapter 6: FDI IMPLICATIONS OF SAUDI ARABIA'S, REGIONAL, COMPETITIVE AND LINKAGE DIPLOMACY

6.1. Introduction

This chapter will evaluate Saudi Arabia's commitments to three major international organisations of multilateral diplomacy and the value of the state's commitments to these groupings and its stated aim to achieve development through management of its valuable natural resources. The organisations to be discussed herein are the Organisation of Petroleum Exporting Countries (OPEC) the Gulf Cooperation Council (GCC)\(^\text{390}\) and the World Trade Organisation (WTO). Although observations regarding the areas of similarities with other developing states of the OPEC, GCC and WTO among other intergovernmental organisations will undoubtedly be of interest to us, this chapter will however, focus on how Saudi Arabia can put its membership and diplomatic activities in these organisation to approach its developmental needs within the context of FDI.

There is little doubt that the formation of OPEC and Saudi Arabia's membership of it has benefited all the participating states.\(^\text{391}\) Similarly participation in the GCC and the

\(^{390}\) The Cooperation Council for the Arab States of the Gulf was brought into existence on 25th May 1981. Their Majesties and Highnesses, the leaders of the United Arab Emirates, State of Bahrain, Kingdom of Saudi Arabia, Sultanate of Oman, State of Qatar and State of Kuwait met in Abu Dhabi, United Arab Emirates, where they reached a cooperative framework joining the six states to effect coordination, integration and inter-connection among the Member States in all fields in order to achieve unity, according to article 4 of the GCC Charter. Article 4 also emphasized the deepening and strengthening of relations, links and areas of cooperation among their citizens. The areas of coordination of the GCC include: Political Affairs, Military Cooperation, Security Cooperation, Media Cooperation, Cooperation in the field of Human and Environment Affairs, Legal and Judicial Cooperation, Consultative Commission of the Supreme Council, Cooperation in the Field of Auditing, Cooperation with the Republic of Yemen, Economic Relations with the Other Countries and Economic Groupings. Information and material about the GCC is available at: http://www.gcc-sg.org/eng/index.html accessed 23 February 2012.

\(^{391}\) J.E Peterson, The Politics of Middle Eastern Oil (Washington DC: Middle East Institute, 1983) pp.147 available at https://www.cia.gov/cia/publications/factbook/rankorder/2003rank.html accessed 12 March 2012. Also available at www.imf.org/external/pubs/ft/weo/2004/01/pdf/appendix.pdf accessed 21 February 2012. An important OPEC declaration also calls for boosting cultural co-operation among the member states. It calls for the organization of a summit conference for the heads of states and authorities from OPEC member states to be held at regular times after consultation with the member states so as to enhance the capability of the oil cartel to continue along the path of its achievements, which were based on oil price and production.
WTO, are positive aspects of Saudi Arabia's foreign policy. It is indeed difficult to imagine that the state could have abstained from these organisations without much damage to its economic prospects. Developing countries generally share a lot of similarities and many of them engage in peer emulating policies. Many of the OPEC countries like Saudi Arabia do not have a diversified economy and depend on their oil revenues for survival. Although there may be cultural differences especially along the lines of religion and ethnicity the basic aspiration towards development is perceptible. Benefits of the linkage politics they have engaged in since the 1970s range from sharing production methods to coordinating price mechanisms.

Furthermore, OPEC members have over time learnt from each other's mistakes and identified best practices, thus, introducing measures to improve their general business environment (some of these are identified below). They have also realised the importance of co-operation among the national petroleum companies among the OPEC member states, as well as between these companies and the international petroleum industry. Quintessential progress was made in 1975 following the First OPEC (Organization of the Petroleum Exporting Countries) Heads of State Summit in

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394 See, Klaus Schwab and Peter Cornelius, eds., The Arab World Competitiveness Report: 2002-2003 (World Economic Forum, 2002) pp. 168. It all began with a modest Ministerial Seminar for Oil-Producing and-Consuming Countries on July 1-2, 1991, co-hosted by OPEC Member Venezuela. This evolved into the world's premier channel for high-level producer-consumer dialogue, the aforementioned International Energy Forum (IEF). This declaration calls for a dialogue aimed at finding effective channels of co-operation between oil producers and oil consumers to stabilize the oil market. It also calls for contributions to international economic growth and environment protection from OPEC members. The declaration reiterates that OPEC would go ahead in its efforts to accelerate economic development in developing countries through its aid programs; the International OPEC Development Fund and the International Fund for Agricultural Development. It urges industrial countries to contribute positively to these efforts and to work toward the reduction of debts of the developing countries. See New Charter consolidates OPEC's drive for Dialogue. OPEC Bulletin Commentary March 2011. Available at: http://www.opec.org/opec_web/en/press_room/2016.htm accessed 19 February 2012.
Algiers, Algeria in 1975. The finance ministers of member countries in a declaration proposed the creation of a new multilateral financial facility to channel OPEC aid to developing countries.

Furthermore there has been a realisation that FDI must progress in tandem with innovation, knowledge transfer and scientific progress. In Saudi Arabia, the King Abdul-Aziz City for Science and Technology (KACST) was introduced to put the country on the track for scientific renaissance.

This development is based upon the correct view that scientific research and technological advancement are pivotal elements of the progress and prosperity of nations in various developmental areas. The realisation is that:

"developed countries, striving towards progress, have long understood...have spared no expense on research and development (R&D), dedicating a considerable portion of their GDP (Gross Domestic Product) to this purpose, which has led to the phenomenal scientific and information revolution."


397 The development in this area has been Incremental over the last decade. For instance, in the first quarter of 2001, Algeria issued a series of tenders for contracts, including investment in fixed-line and mobile phones, infrastructure projects and a consultancy on the privatization of state-owned monopolies in the energy and financial sectors. In the first quarter of 2001, Algeria issued a series of tenders for contracts, including investment in fixed-line and mobile phones, infrastructure projects and a consultancy on the privatization of state-owned monopolies in the energy and financial sectors. In Venezuela, flood-related reconstruction and rural development programs are providing a major boost to infrastructure investment. Incentives offered to foreign investors in the non-oil sector and clear policies to privatise telecommunications, power projects, and regional electric utilities and transport, will contribute greatly to enhancing the business environment. In Indonesia, the cumulative effects of liberalization and trade deregulation, associated with financial adjustments, have recently increased the private sector's access to credit and spurred export-led growth; manufacturing now constitutes a larger proportion of GDP than either agriculture or petroleum. See M.M. Qurashi, Abdul Qayyum Kazi, Tajammul Hussain "Science and Technology Policies for Third World Countries" (Morocco: Publications of the Islamic Educational, Scientific and Cultural Organization ISESCO, 2010).

398 The King Abdulaziz City for Science and Technology (KACST) is an independent scientific organization administratively reporting to the Prime Minister. KACST is both the Saudi Arabian national science agency and its national laboratories. The science agency function involves science and technology policy making, data collection, funding of external research, and services such as the patent office. Information and materials about the KACST is available at http://www.kacst.edu.sa/en/about/Pages/default.aspx accessed 23 February 2012.

This is also an example of how countries copy from each other - throughout the region Qatar and UAE at least have also adopted similar strategies with emphasis on the science/education linkage.\textsuperscript{400}

OPEC member states have indeed committed themselves to enhancing efforts and their programs that aim at the diversification of their economies. The industrial countries and the relevant international organizations are requested to co-operate in the realisation of this goal. The declaration further recommends enhancing ties among research centres in OPEC member states so as to boost research, and it also recommended considering the possibility of establishing a research institute or a university. The declaration called on finance ministers in OPEC member states to explore the means for cementing financial co-operation among the member states.

At Riyadh in 2007 The OPEC member states made important observations in the form of a Solemn Declaration about the true nature of their collective national interests to retain control over their natural resources whilst still being successful at attracting much needed investments.

It was noted \textit{inter alia}:

\begin{quote}
The Sovereigns and Heads of State stress that the exploitation of the depletable oil resources in their countries must be based, first and foremost, upon the best interests of their peoples and that oil, which is the major source of their income, constitutes a vital element in their development.\textsuperscript{401}
\end{quote}

\textsuperscript{400} Rory Jones, "Science and Education Key to UAE Innovation" \textit{The National} Jul 3, 2011 p. 2.

\textsuperscript{401} Solemn Declarations of the OPEC 1975 (Algiers) 2000 (Caracas), 2007 (Riyadh) are available online at http://www.opec.org/opec_web/static_files_project/media/downloads/publications/Solemn_Declaration_I-III.pdf accessed 23 February 2012.
In a sense the OPEC developing states could be said to be in mutual competition with each other to attract the few states that have corporate entities capable of making meaningful investments in their territories. This may be true but the importance of the coordination that must exist between the producers must not be underestimated. This interestingly has produced a certain level of suspicion in international relations. This is reflected in the following statement of the 2007 Solemn Declaration;

3. Moreover, the Sovereigns and Heads of State condemn the threats, propaganda campaigns and other measures which have gone so far as to attribute to OPEC Member Countries the intention of undermining the economies of the developed countries; such campaigns and measures that may lead to confrontation have obstructed a clear understanding of the problems involved and have tended to create an atmosphere of tension that is not conducive to international consultation and co-operation. They also denounce any grouping of consumer nations with the aim of confrontation, and condemn any plan or strategy designed for aggression, economic or military, by such grouping or otherwise against any OPEC Member Country.402

Similarly with respect to the GCC it is clear that the member states are in natural competition to attract FDI towards individually, yet in a sense they are better coordinating in the way they have been doing. Firstly they are collectively in competition with other parts of the developing world and must make themselves competitive as a region. Secondly their developmental needs are again quite similar. One of the paradoxes in the development of the Gulf Co-operation Council (GCC) and Saudi Arabia is the strong economic dependency on foreign labour. It is still the case however that a local labour force is still not in place to supply the huge job market in oil and gas exploitive activities of Saudi Arabia. It is suggested that this is because the educational system, has not been specifically targeted to reflect and respond to development plans. The economic development in Saudi Arabia is based on the oil industry, so there is real need to work on human development to replace the huge amount of foreign skilled labour. Indeed it is also true that there may be a need to develop a skilled labour force for the non-oil based industries which Saudi Arabia and other Gulf countries are now investing in, to create the diversification necessary for the post oil dependent state. The following points will clarify this statement:

402 Ibid.
1. GCC countries are facing profound changes and transformations in different areas, such as politics, economics, social status, and culture.

2. GCC productivity systems are observing massive restructuring; these operations are based on four elements:

   (a) Generating a specific capitalist productivity system, transferring the existing system of employing high technology equipment and reinvesting the funds.

   (b) The continuation of the 1980s economic reformation, which is based on the re-acquaintance and rethinking of the role of oil as the core of equilibrium in both the economic and social sides and as a generator of development. The financial restoration will not be focused on the industrial sector only; it will cover the whole authority's system. However, the new idea of development will give the private sector the chance to participate in the national economy; besides, the state will no longer be the fundamental actor in the national economy focusing its attention on the economic restoration in GCC because of:

      (i) The subordination of GCC in the oil sector, which represents the 95 percent of total exports;

      (ii) The high dependency on foreign labour and foreign consumer goods, which represents 45 percent of the total income; and

      (iii) The profound liability on the oil market being deeply affected by price changes.

   (c) The inconsistency of the educational system and the re-adaptation of the national labour force for the goal of participating in the international market and to cope with the requirements of new technologies; therefore the underlined restoration will be in the centre of the following:

      (i) The restructure of economic development plans by adopting efficient policies and procedures;

      (ii) Joining the GCC economic market as a whole; and
(iii) Revising the economic and political style of the GCC, which will lead to a better usage of oil policies to achieve economic development. 403

The points above are designed to encourage the GCC authorities to enter into more advanced stages of development which are not solely based on - or affected by - oil prices. The newly stated objectives of development include transformation of the largely mono export economy typified by Saudi Arabia and trying to adjust the economic system towards liberal capitalism by the reinvestment and continuance of capital. Furthermore and very importantly in the case of Saudi Arabia it is desirable that other areas of investment must be cultivated. Therefore, attention will be focused on a new stage of developmental strategies in Saudi Arabia. The two main problematic issues with development are the educational system, its position in the development strategies and the lack of a national labour force. 404

Saudi Arabia's political power is based on its possession of oil reserves. The Saudis are haunted by the prospect that one day there will be no more oil below the sand. When that day comes, the oil companies will leave, the migrant workers will probably follow and Saudi companies staffed by Saudi workers will have to take their place. This is a prospect that has instilled an acute sense of pragmatism in the Saudis and their developmental policies. Bearing this in mind as the primary driving force for change, many other factors contribute to the changes in the overall position of Saudi Arabia with respect to its power and ability to influence events around it. The changes themselves can be categorized under three main processes:

1. The development of Saudi's population into a workforce of adequate quality to satisfy the needs of the ambitious development plans that the Kingdom began to set for itself, after the decision was taken to divert most of the rising oil revenues into the development of a non-oil economy.

2. The industrial development of the country and the attempts that began in the 1970s to create a modern sector from scratch, and to transform the country from a less-developed state where most of the production was employed in traditional industries into one with a growing modern industrial sector. There were also attempts to diversify the economic base away from the total dependence on fossil fuels in a country where oil is the only source of external political influence.

3. The development of the political relations of Saudi Arabia with other states, especially those of the Gulf and the Middle East.

Each of the above processes contributed to the transformation of Saudi Arabia into a well-developed and effective power on the world stage. Since 1973, Saudi Arabia has successfully created a development revolution in order to diminish its dependence on oil as the primary source of national income. It has achieved this by encouraging investment in alternative industries that will create employment opportunities, increase GDP figures, maximize revenue derived from oil wealth and diminish Saudi’s dependence on oil.

It is in this direction that the phenomenon of Saudi Industrial cities is created. Saudi Arabia’s now has fourteen “industrial cities”, comprising 92.8 million square meters. The cities are managed by the Saudi Industrial Property Authority (MODON). Each industrial city has an on-site Administration to handle the day-to-day needs of investors and oversee the site development process.

The primary task of MODON is planning industrial cities in the Kingdom and it is also tasked to encourage establishment, development and management, maintenance and supervision of these cities including, but not limited to, the following areas:

Implement the strategy to develop the industrial cities; Develop rules and procedures relating to the establishment of industrial cities and their development, management, maintenance and operation; Propose appropriate locations of land belonging to the state to establish industrial cities and recommend necessary suggestions to the Supreme Economic Council for approval and adoption by the Council of Ministers for specific industrial city. Also, acquire land owned by the private sector and licensing for its development by the private sector for specific industrial cities according to its

405 http://www.modon.gov.sa/English/Pages/default.aspx accessed 27 February 2012
regulations and executive statute. Cooperate with the relevant authorities to provide services and necessary facilities to set limits of industrial cities.\textsuperscript{406}

In this way the government allows for the direct investment in strategic industries such as power generation, water desalination, and petrochemicals. For development processes to work effectively, they must have strong strategies in dealing with all eventualities from war to effective diplomacy. Older authorities like Kanovsky observe: “Of the many strategic interests that the USA and its allies have in the Middle East, surely one of the most crucial is securing energy supplies from that region”.\textsuperscript{407}

He also develops this point of view by adding:

...Since 1970s much attention has focused on OPEC: indeed, much of the influence that Arab, and practically all Gulf states (GCC) have wielded in world affairs derives from their asserted cohesiveness and presumed ability to bring the industrialised world to its knees with a turn of the spigot. This widely held belief rests upon two assumptions: that oil is and will continue to present a sellers’ market in the foreseeable future and that the countries comprising OPEC will pursue common policies toward common objectives.\textsuperscript{408}

Kanovsky later argues that both of these hypotheses are false and claims that for a variety of reasons the price of oil is likely to drop in the near future.\textsuperscript{409} In reality the old fear of the price of oil dropping has been replaced in more recent times by the fear of oil drying up.\textsuperscript{410} The contradictions between Kanovsky’s arguments and reality can

\textsuperscript{406} The Industrial City names and their total area (M\textsuperscript{2}) statistics are as follows: Riyadh 1st. 451,000, Riyadh 2nd. 18,786,000, Jeddah 1st. 12,807,000, Dammam 2nd. 25,487,000, Makkah 730,117 02-520 4927, Qaseem 1,542,934, Assir 1,543,000, Madinah 9,949,000, Assir 2,663,000, Al-Jouf 3,000,000, Tabuk 4,000,000, Hail 2,560,000, Najran 6,550,000, Total Area 92,773,051. SAGIA, "Industrial Cities" available at http://www.sagia.gov.sa/en/Why-Saudi-Arabia/A-Commitment-To-The-Best/Industrial-Cities/ accessed 25 February 2012. See also below our brief discussion on Economic Cities.


\textsuperscript{409} Kanovsky 1992

\textsuperscript{410} See John Vidal, “How much oil does Saudi Arabia actually have?" The Guardian ,Tuesday 15 February 2011 available at http://www.guardian.co.uk/environment/blog/2011/feb/15/oil-saudi-arabia-reserves accessed 24 February 2012. The writer wrote: “Is it 260bn or 550bn barrels? Should we believe the Americans or the Saudis? The answer may lie in the provenance of the information… senior US embassy staff were warning Washington that reserves could be 40% less than stated and that
be analysed from an ideological perspective, which can be seen as an outcome of a hegemonic imperialistic thinking. His argument rejects OPEC merely because it does not represent the decolonization of Arab countries, whereas imperialistic ideology profoundly views the whole scenario as an inferior complex compared to the post imperialist powers of England, France, and Germany, etc. In other words Kanovsky's analysis is dated. It raised important questions, some of which this thesis has pointed out such as the unfairness of international laws and the problems faced by developing countries, but the analysis in a sense lives in the past as there are more pressing enquires to make such as -are the OPEC members correctly reinvesting their profits? Are the member states deepening their socio-legal environments (in education, health, welfare provision, security etc.)? Is oil money being pressed to the use of genuine and holistic progress? Indeed have the individual member states reached their peak in ability to attract investment even in the field of oil and gas?

Nonetheless OPEC, as an international organization has proved to have a very strong economic character. It has shown this by targeting the development of its member states as a goal to achieving the highest GDP growth possible. In 1996-1997, when the total world economic growth rate was 3.8 percent, (slightly increased from 1996 when it reached just 3.7 percent), non-OPEC developing countries reached a growth rate of 4.3 percent in 1997 when in previous years the highest rate reached 5.4 percent; whereas OPEC reached a GDP growth rate of 4.9 percent in 1997 against a 4.6 percent rise in 1996. However, the new world economic growth changed dramatically since 1997, which was at 3.6 percent in 2011 and has been revised down to 3.7 percent in 2012. It is in these difficult circumstances that oil investment and investment in other industries must be planned for through regulation by the authorities in the Kingdom. In other words particularly in recessionary times

412 At least for now, the deceleration of global output seems to have stabilized, although many risks remain, particularly in the Euro-zone. The US is forecast to grow at 1.6 percent in 2011 and at 1.8 percent in 2012. The Euro-zone is now expected to expand by 1.6 percent in 2011, but by only 0.8 percent in 2012. Japan’s economy is expected to recover by 2.4 per cent in 2012, after a contraction of 0.8 per cent in 2011 http://www.opec.org/opec_web/static_files_project/media/downloads/publications/MOMR_October_2011.pdf accessed 27 February 2012.
strategies to attract investment have to be sharpened and more carefully delineated if development is not to become stalled.

When these old figures are associated with new ones since 2003, The Economic Analysis Division within the Economic and Social Commission for Western Asia (ESCWA) expects that, in general, the positive GDP growth of the past three years will continue in 2006, despite on-going political instability in parts of the region, negative expectations and increasing risks from asset prices bubbling in financial and real estate markets in several GCC and MDE countries. Oil prices are expected to remain at elevated levels throughout 2007-2020, supported by demand growth in Asia, and the disruption to supplies from destabilised oil producing Arab states with production and refining constraints and supply uncertainty. GDP growth in the GCC sub-region is forecasted to decelerate by approximately a percentage point, at 5.8 percent. Yet Saudi Arabia is ranked as “below potential: countries with high FDI potential but low FDI performance,” by UNCTAD. The above rates show that major economic expansion occurred in developing countries where the average economic growth was 4.6 percent. This was also reflected by a high demand for oil, particularly from Asia.

One of the crucial developments is the growing economic, political, military, and diplomatic relationship between China and the Middle East. This has led to dramatic improvements in the development of OPEC member states. In 2006, Chinese oil companies planned to build or upgrade more than a dozen refineries before the end of this decade, adding over 2.6 million barrels to the country’s daily crude distillation capacity. The planned new capacities would account for almost 40 percent of the 6.6 M-bpd markets.

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416 'Saudi to return as China's top oil supplier – Aramco' see, Amy Jaffe and Jafeer Elass: Saudi Aramco national flagship with international responsibilities. James Baker Institute for public policy.
There are a number of facts that explain how the market grows rapidly. For example, world oil consumption rose by about 1.2 M-bpd in 2005, after an increase of 2.6 M-bpd in 2004. The non-OECD countries account for 1.1 M-bpd of the 2005 increase, and the OECD as a whole account for 0.1 M-bpd. In 2004 when China's oil use increased by 0.9 M-bpd, its demand rose by only 0.4 M-bpd in 2005, despite continued strong economic growth. In the United States, a 0.4 percent decline in oil demand in 2005, which resulted from a combination of high prices, hurricane-related disruptions, and a mild winter. It was the first decline in US demand since 2001. According to all the statistics, Saudi Arabia owns the biggest oil reserve in the world with 264.3 billion barrels. 417

The Saudi Arabian economy is unique in that it adheres to what has become known as the Islamic Growth Model as advanced by writers like Robert Looney. 418 Indeed Saudi Arabia is an example of a country where religion governs all aspects of everyday life and the running of the state, its institutions, and its people. It is, therefore, important to emphasize that the foremost consideration given by the Kingdom in its attempts to industrialize and modernize itself has been to whether such a process of development would be in conformity with its religious ideals. In a traditional and deeply religious state such as Saudi Arabia, any industrial development or modernity plans that do not give credence to religious concerns, or that could be perceived as a threat to the Kingdom's traditions, are not only politically dislocating, but will be doomed to fail. 419

The historical base for modernization in Saudi Arabia was founded in the ten-point reform program announced in November 1962. This program endorsed the decision to divert much of the state's oil revenues into the economic and industrial development


of the Kingdom. It is however always important to put the process of development in 
Saudi Arabia within its Islamic context.

6.2. Saudi Arabia and National Labour

The development transformation covers a wider scope than factories and plants, as 
industrialization remains an input of the development process rather than a goal in 
itself. The industrialization process involves increasing the possession of capital 
equipment and working towards increasing the productivity of the workers. Saudi Arabia’s economic and developmental strategies are designed specifically for the 
particular country in question and should enable the industrial sector to be 
entrepreneurial and innovative. It aims not to just increase output or national income, 
but also to introduce modern technology and to work toward changing the state’s 
attitudes towards development. However, Saudi Arabia’s development plans have 
been, and will continue to be, affected by:

1. The availability of capital;
2. The availability of cheap energy;
3. Diversification as a means of offsetting a wasting asset;
4. Industrial ramifications of the participation agreements; and
5. The Saudis desire to achieve the maximum economic and social benefits for 
   Saudi nation from the industrial development, i.e. a willingness to succeed.

As stated earlier, Saudi Arabia is a young state, and as pointed out in the first 
development plan of the 1970-75, “about 46 percent of the population is below 15

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420 See, The Labor and Workmen Law of the Kingdom has been approved by the Council of Ministers 
on his Decision No 745 dated 24 Sha’ban 1389 H. (4 November 1969) and issued under Royal Decree 
No. M/21 of 6 Ramadan 1389 H. (6 November 1969). Labour disputes are governed by this law 
http://www.saudia-online.com/labor_workmen_law.htm

February 2012.
years of age and, therefore, not included in the group from which the (current) labor force is recruited.\footnote{422}

Saudi Arabia's efforts to create its own educated and flexible labour force were hampered by the oil boom, which attracted a considerable number of foreign workers into the country. This influx of quality workers caused the proportion of Saudis in the working population to decline from 72 percent in 1975 to 57 percent in 1980.\footnote{423}

The plan to replace the non-Saudi labour force by a national labour force had to be pushed from two directions: encouragement and enforcement. This was because it had been recognized that the goal would not be achieved if left to develop under the forces of the natural market. The co-operation of both the state and the private sector is needed to achieve the same goal. Towards this end the following procedures were implemented:

(a) Aid and subsidized loans were no longer approved unless the recipient had reached certain levels of 'Saudi-sation'\footnote{424} and has adopted replacement policies. 
(b) The rules of contracting with the non-Saudi labour forces were respected. 
(c) Adoption of hierarchy policies to stop importing foreign labour because of their experience but to 'home-grow' the experience in question. 
(d) To encourage women to work especially in the fields of education, health, and administration. 
(e) To replace the foreign labour force with a national labour force in many of the employment sectors for example in the public sector. 

In a strong economy such as that of Saudi Arabia the long-term effect of the lack of a national labour force can affect economic growth. Because the oil industry is the


\footnote{423}See, the Saudi five year plans, http://countrystudies.us/saudi-arabia/37.htm

\footnote{424}A new terminology came between 2000-2002 which signified a conscious effort by the government to replace all the non-Saudis by Saudi nationals in the workforce. Available at: http://www.saudiaramco.com/content/dam/Publications/Saudization%20Guide_Contractor.pdf accessed 19 February 2012.}
largest industry in Saudi Arabia, the non-national labour force reflects an error in the long-term developmental plans of the country. A larger, stronger, capable, and more experienced Saudi workforce in oil and gas as well as other professions would be more prominent and will make much more significant national impact than if the knowledge and know-how remains concentrated in the hands of a temporary foreign workforce.

During the 1980s and through much of the 1990s, Saudi Arabia undertook a rapid process of modernization based solely on the purchasing power that oil revenues could provide. But, if that process were to be broken down into its constituent components, it would find more of a process of advancement than of actual development. That was only to be expected, perhaps, as the involvement of Saudi nationals in the professional and technical groups may have naturally been impeded by the delay factor – due to the time it takes for people to filter through the various levels of education provided by the schools, universities, and colleges that proliferated during the 1970s and 1980s.\textsuperscript{425}

By making a conscious effort to limit the number of foreign workers in the country and slowly but steadily educating and training its own nationals to replace them, Saudi Arabia is providing the way to a future where its people will be stronger and more secure in the knowledge that they are increasingly contributing to their own economy. This is seen as the means of strengthening the foundation for its own development. This new drive became noticeable when a recent phase of national development ended when the main cause for importing and maintaining such a large foreign workforce, namely for the creation of infrastructure was more or less eliminated. For that reason, it was predicted that the number of non-Saudis in the labour force would decline to less than 30 percent by the year 2005.\textsuperscript{426} It is important to note that this ambitious objective has not been reached. The American government’s estimation is that 80% of the labour force as at 2011 remains non-

\textsuperscript{426}Since 2006, there has been a decline of Saudi nationals in the workforce, due to the reforms by King Abdullah. See Al-Jazeera, “Saudi King to Announce Reforms,” Al-Jazeera, March 18, 2011, Available at: http://english.aljazeera.net/news/middleeast/2011/03/20113187145714459.html accessed 20 February 2012.
national.\textsuperscript{427} The uninspiring situation revealed here goes a long way to prove the position of this thesis that neither FDI increases nor genuine economic development will take place without holistic reconsideration and reengineering of the socio legal status of the Saudi Society. Without the whole gamut of human rights including women's rights and political freedoms being better respected the Saudi state and indeed many other OPEC and GCC member states will struggle to achieve their developmental targets.\textsuperscript{428}

The main reason for Saudi Arabia's new 'Saudi-sation' drive has been explained; the following presents additional factors that the Saudi decision makers had to consider:

Firstly, a global recession in the early 1980s led to a slump in oil prices and this curtailed some of Saudi Arabia's more ambitious projects, and forced it to try and obtain the maximum return on its investment. One of the clearest ways of doing so was for it to invest more in its own people rather than just spend its income on projects run by a transient workforce, who on the whole, took their earnings with them back to their own countries instead of putting it back into the Saudi economy.

Secondly, Saudi Arabia's increasing influence and prestige following the 1973 oil embargo compelled some Saudi decision-makers to believe that although foreign labour would always play a role in Saudi life, it could not be allowed to be essential to development. There was an increasing need for Saudi Arabia's expanding international role to be firmly backed by an active, experienced, and diversified native workforce.

It is due to these and other aforementioned reasons that the Kingdom felt that a decisive action was needed to train and employ more Saudi nationals and to replace the majority of the foreign workforce. It has not been an easy or fast aim to achieve, but the Saudi efforts to improve the quality of its workforce was further strengthened by the policies of 'Saudi-sation' and are beginning to pay dividends. Saudi Arabia has

taken the initiative in providing training to Saudi nationals in its economy’s modern sector by providing vocational colleges to cater for the non-academically inclined Saudi males. The college’s second intention was to train those Saudis that had left agriculture, which became one of the main sources of the industrial workforce.429

6.3. The Diversification Strategy

Saudi Arabia had to work hard within OPEC’s policies to achieve its own goals and to ensure the stability of oil prices at a certain level. It needed a long-term guarantee of income with which to maintain the continuity of its development plans. It was working toward adopting new policies to change the old task of constructing a model budget based purely on the price of oil. The authorities recognized a high dependency on oil, and as such, Saudi Arabia, as a member of OPEC, understood that the role of its development was to reduce its dependency on oil by adopting a capitalistic economic system.

Beginning in 2005, Saudi authorities started to reveal their new diversification strategy process.430 As an example, they announced the undertaking of mega projects and developments of some financial facilities as a master plan to transform Riyadh into an international financial centre. In May 2005, the Capital Markets Authority (CMA) announced a plan for the creation of a mega financial city – the King Abdullah Financial District (KAFD) – located on 1.6m square metres of undeveloped land close to the city centre, with around 3m square metres of office space. The idea was to bring the Kingdom’s banks, stock exchange, and the CMA along with the central bank and the Saudi Arabian Monetary Agency (SAMA) under one roof. Riyadh is not the only new financial centre in Saudi Arabia. The $27 billion King Abdullah Economic City under construction at Rabigh, will also have a ‘Financial

Island’ or ‘city-within-a-city’ with 500,000 square meters of office space.\textsuperscript{431}

This project should be seen as a reflection of the regional development in the gulf and not based on pre-existing plans. Such errors can be easily identified when we look at the legal structure to such projects. In fact there are no legal guidelines that could govern such investments. In the past, Saudi Arabia has pursued an industrial policy at home that is aimed at diversifying the economic base of the state and to tap into its natural resources of oil and gas. Compared with other Arab oil producers it has made comparatively little investment abroad. The industrial area that has received the most attention in Saudi Arabia is without doubt the petrochemical industry. Moreover, no other Arab country has planned its industrial development in such a detailed fashion. Its petrochemical plants have been successfully developed to be export-oriented, protected, subsidised, capital intensive, and unburdened by labour costs.

This thesis argues that Saudi Arabia has been able to pursue such an industrial policy more readily than its Arab neighbours because of the country’s unique attributes, including its ability to earn more, simply because it was allowed to sell more. Its annual export earnings potential reached a peak of 120 million barrels, which allowed it to build up huge monetary reserves in the 1970s and 1980s. Secondly, it invested in the skilled management to carry out its intended policies of ‘Saudi-sation’. It has also proved to be a low absorber of funds and is, therefore, in a strong position to diversify its funds into development plans, unlike high absorbers such as Iraq or Iran. Saudi Arabia enjoys close and co-operative contacts with a number of Western companies, which have helped through the technology transfer processes; its strategic relationship with the USA also assisted in this regard.\textsuperscript{432}

Although the 1970s were marked by capital accumulation, even Saudi Arabia was not immune to the inflationary effects of the 1980s global recession. As a result, in the 1980s, development was carried out with more caution and the reserves were drawn down to stem the effects of the economic recession.

\textsuperscript{431} See, The King Abdullah Economic City. The Economic City leads the master-planning and development of the 168 million sq m King Abdullah Economic City (KAEC) http://www.kingabdullahcity.com/en/Home/index.html accessed 25 February 2012
During the period of the first two five-year plans (1970-1980), the emphasis was placed on developing the infrastructure, on social welfare projects, and in the non-oil industries. The share of non-oil manufacturing in GDP remained low during the 1980s and 1990s, and was further impeded by the impact of the Gulf War. This era heavily concentrated on the production of building materials and other intermediate goods, but was constrained by the lack of skilled Saudi personnel, and instead had to rely on foreign labour. There was a high growth rate in non-productive sectors such as trade and services during the 1970s, and it has been argued that this reflected rising spending on imports.

During the 1980s the Saudi authorities’ industrialization program ascribed the responsibility for major projects to state enterprises in partnership with foreign companies. The Saudi private sector was encouraged to lead the way in creating small industries. At the same time, the state enterprises concentrated mainly on the development of capital-intensive hydrocarbon-based industries aimed at reducing the heavy dependence on crude oil exports. Two industrial cities were built: Jubail and Yanbu. These housed new oil refineries and gas-based petrochemical plants.

The importance that diversification played in the Kingdom’s industrial and economic base can be appreciated by considering two of the basic broad objectives contained in the last five-year development plan of 1990 to 1995:

(a) To reduce reliance upon the production and export of crude oil as the main source of national income;

(b) To continue the structural changes in the Kingdom’s economy so as to establish a diversified economic base, with due emphasis on industry and agriculture;

The industrialization of Saudi Arabia is the responsibility of both the public and the private sectors. But it is in the private sector where Islamic lines have made their mark, because the private sector is operated by modern and conventional rules and regulations, which are not related to a large extent to any Islamic or Shari’ah applications. The authorities’ policy is to only intervene when absolutely necessary,
such as when funding the building of new heavy industries that require a level of investment that only public spending can provide.

Saudi Arabia's drive for industrialization has been motivated by the fundamental objective of building and maintaining a viable industrial base. In the long-term, assuming success, this industrial base is hoped to reduce the Kingdom's economic dependence on oil. Currently, the levels of such reductions are difficult to assess. Yet, despite the acute awareness of the Saudi planners and decision makers to ensure that the development process was compatible with the fabric of the society, areas of friction have developed. As has already been mentioned, Saudi Arabia is a very traditional society with deeply entrenched beliefs. It was therefore, not surprising that the prospect of industrialization and modernization was met with some suspicion.

The suspicions raised included a worry that industrialization was unlikely to run smoothly when spearheaded by foreign workers who had no commitment or obligation to the welfare of the country. Another suspicion was that industrialization would not be helpful if the industry formed a symbolically modern sector of the economy without developing ever-expanding links with the native economy and culture. The industrialization drive in Saudi Arabia has been fuelled by the wish to diversify away from a dependence on oil. Until the early 1980s, oil revenues consistently had a share of GNP of no less than 90 percent. The Saudis seemed to have realized that whatever influence oil offered, it also afforded influence to others over itself. An economy so vulnerable to fluctuations in oil prices could easily be weakened or placed in danger. So, the authorities moved toward diversifying income into other industries. This included investing heavily in agriculture with the aim of achieving self-sufficiency in food production and slowing the migration of its population from the country into big towns.

To summarize, the importance of the creation of a viable non-oil industrial base to the political and economic future, and hence the regional standing of Saudi Arabia, is essential. The diversification of the economic base of the Kingdom away from oil and its derivatives is the most essential aspect of the industrial base. It would be unrealistic to expect diversification to be a short-term goal for it is in fact a long-term one especially in view of the problems that have been discussed.
However, there are positive signs that this industrial base has begun to appear and the success of the petrochemical industries attest to that. However, serious and yielding decisions must soon be taken about how to take diversification even further. It cannot be denied that both agriculture and the export of wheat have limited success, but this can be attributed to heavy subsidization and the country’s lack of adequate water for irrigation, industrial, commercial, and domestic use. This does not bode well for future expansion.

To summarize the main points of the arguments stated above, it seems that the success of the heavy industries that will form the backbone of the industrial diversification base, are conditional on whether the national workforce can catch up with the pace of industrial development. If one is moving in the direction of modernization and the other is stuck with traditional ideas and methods, then the two will have difficulty merging and working together effectively. This is the most important obstacle that has faced the development of Saudi’s human resources. The reason for this is that little attention has been paid to the co-ordination of the two processes, with the result being the unbalanced development of the Kingdom.

The aim of Saudi-sation is to bridge some of the gaps between the needs of the modern sector and the existing human resource skills. But it will be difficult due to attitudes toward the modern sector, in areas such as work production and efficiency. If the only jobs that most Saudis are willing to take are in management then graduates are bound to outnumber the posts available. This can only result in serious unemployment levels.

Thus, it is likely that young unemployed and educated graduates will be forced to accept a lower status range of jobs. The result of this is in the long-term, they may vent their frustration through social problems. A problem that could face the development of the Kingdom’s alternative economy is that ‘Saudi-sation’ has been shown to have its limits. The Asians, mainly, at the present time, from Sri Lanka and Pakistan, are proving to be the largest sector of the working population because they
are cheaper to employ than the Saudis and many industries are taking advantage of that fact.433

A way for Saudi Arabia to reduce the large number of migrant workers in the Kingdom while maintaining the economic viability of its industries could be to follow the example of Japan. Like Japan, Saudi Arabia could start by creating export-orientated industries aimed at its immediate neighbours, or even finance the setting-up of Saudi industries abroad where raw materials are cheaper and more available, as Japan has done in South East Asia. In this manner, productivity and profit could be maintained without the competitive aspect of importing more workers. Industrial development has been shown to have both strengths and weaknesses. The Saudi petrochemicals industries are continuing to enjoy an unassailable advantage. With proven oil reserves of more than 200 billion barrels amounting to more than a century of oil left, Saudi Arabia will be providing, expanding and processing oil long after most, if not all, current oil reserves have lost their exploratory viability.

Saudi policy rests on the hope that it is only a matter of time before organizations such as the European Union reduce or drop the import tariffs against such petrochemicals. This is a persuasive possibility; because the GCC petrochemical industries are reaching such a level of competition that it makes financial sense to buy processed oil, rather than the crude oil of Saudi Arabia. By developing these industries, Saudi Arabia is consolidating its position as the main oil producer and exporter in the world.

It is, therefore, possible to conclude that the Kingdom’s future security cannot be discussed without linking it with relationships maintained with the West. The more important Saudi oil is to the West, the more Saudi Arabia’s security will be assured, and the stronger its position will be with respect to its neighbours. Yet, such industries continue to require co-ordination and co-operation amongst the GCC countries, given

the proliferation of petrochemicals plants in the Gulf. Otherwise, the new power of the petrochemicals industries will be much curtailed.

6.4. The Future of OPEC and Saudi Arabia

The victory over Iraq in the First Gulf War, in which the USA took the major role with Saudi and British assistance, signalled the dawn of a new era in international relations. No longer is the world divided into two distinctly antagonistic polar spheres. International co-operation and consultation have become more commonplace, particularly under the auspices of the United Nations.

OPEC's most recent meetings point to this greater sense of co-operation between the oil-consuming and the oil-producing countries where an exchange of information and ideas is on the agenda to promote more harmonious relations. 434 All the OPEC meetings during the 1990s had two major themes: the future pricing and production policies and the future of the Russian petroleum industry. As the Middle East oil producer's share of the world oil output is set to increase rapidly over the next two decades (from 12 percent to nearly 40 percent), oil demand by the consuming OECD nations is expected to rise slowly from 75 M-bpd to 85 M-bpd over the same period in which the OECD oil output is set to fall. The new statistics show that the Middle East accounted for 30.6 percent of world oil production in 2004, down from 31.5 percent in 1999. 435 Production in Iraq was disrupted by unrest in 2004, but production in other countries was not affected. Most Middle East oil production comes from a small number of very large fields; more than half of Saudi Arabia's production has come from the giant Ghawar field. The importance of Middle East oil peaked in the mid-seventies, when it reached 39 percent of world supply. Million-barrel-per-day producers in the Middle East are Saudi Arabia (8.9 M-bpd in 2004), Iran (3.9 M-bpd), the United Arab Emirates (2.4 M-bpd), Kuwait (2.4 M-bpd) and Iraq (1.8 M-bpd). 436

434 Indeed it is true that "Among all international trade organisations, OPEC has proved to be a good example of an alternative international political economy with an undisputed amount of bargaining power and one of the few powerful organisations not controlled by the West This gathering brings great benefits in both economic and political sense for oil exporting countries". Jamola Khusanjanova, "OPEC’s Benefit for the Member Countries", Vol. 2, Research in World Economy No. 1 (April 2011) available at www.sciedu.ca/rwe accessed 16 March 2012 pp. 14, 16.
The oil forecasting method is a completely new approach in predicting the oil production needed for nations, geographic regions, special categories, and the world. It evolved over a period of seven years with the purpose of superseding obsolete pencil-and-paper sketches and outmoded curve-fitting techniques, and to meet a set of rigorous design specifications. The method breaks world oil production into the top 42 oil-producing states, accounting for more than 98 percent of world production in 1998. The user then separately forecasts the oil production for each of the 42 nations. Next the Expected Ultimate Recovery (EUR) and the Oil Reserves (OR) are calculated by integrating each nation’s oil production curve (i.e. its complete life cycle of oil production from start to end). The national forecasts are then calculated, as needed, to get the forecasts for the regions and categories, and the world.

It would, therefore, seem that OPEC’s future is related to issues out of its control such as: world oil demands according to the latest revisions, world oil demand growth for 1999 has been adjusted up from the previous 1.20 M-bpd to 1.29 M-bpd. The adjustments are most noticeable in the growth rate of developing countries, which has been revised up by 0.3 percent from the previous 1.4 percent. OECD oil consumption is also up, by 0.01 mb/d, mainly to account for higher growth in North America. The figure for apparent consumption in the former CPEs has also been increased to stand at 0.18 M-bpd.\(^{437}\)

World growth of oil demand had to be revised down for the year 2000. Demand for the revision grew on average by 75.81 M-bpd for the year 2000. The quarterly data shows that compared with year-earlier figures, consumption declined by 0.4 percent during the first quarter; for the remaining three quarters, demand growth recovered rising by 1.4 percent, 2.0 percent and 1.5 percent, respectively. On a regional basis, OECD consumption registers a marginal increment of 0.1 percent to average 47.67

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\(^{437}\)See the official data at http://www.opec.org/opec_web/en/data_graphs/330.htm accessed 28 February 2012OECD countries, currently accounting for close to 60% of world oil demand, see a further growth of 4 M-bpd by 2030, reaching 53 M-bpd. Developing countries account for most of the rise in the reference case, with consumption doubling from 29 M-bpd to 58 M-bpd. Asian developing countries account for an increase of 20 M-bpd, which represents more than two-thirds of the growth in all developing countries. Nevertheless, energy poverty will remain an important issue over this period. By 2030, developing countries will consume, on average, approximately five times less oil per person, compared with OECD countries.
M-bpd. DC consumption is expected to show a rise of 2.7 percent; however, due to the limited reliability and availability of the data, no definite conclusion can be drawn yet. Finally, "other regions" apparent consumption growth derived from production and trade statistics, seems to have increased by 3.1 percent.\textsuperscript{438}

A recognized expert of the oil industry, Odell, predicted that oil demand would increase five times the amount demanded in 1979. European sources said that the oil cartel would propose a document setting a reference price of $20-23 a barrel for the period 2000 to 2010. As one of the new ideas to control oil prices and the production levels, the Saudi authorities hinted that OPEC should be replaced. This called for the US Energy Secretary to be contacted so that he could call for oil to be at a price of $20-25 a barrel, warning that at $30 price would be damaging to developing countries. "Thirty dollars is too high," he told a press conference on the second day of the International Energy Forum in Riyadh (this has in the international context proved to be completely outdated). "It hurts consuming countries, especially developing ones," Richardson said. "We should not accept $30 a barrel."\textsuperscript{439} However he added that $10 a barrel was too low and that the United States favoured a range of between $20 and $25 a barrel. The conclusion that may be drawn from this is that world markets will continue to cause oil prices to increase as long as speculators interest themselves in the market and unless governments in the oil producing countries alter their laws to contain what was seen as the inordinate rise of oil prices. The real question, however, is whether the oil rich states should concern themselves with keeping oil prices low or they should endeavour to make as much money as they possibly can to finance their own development.

Planners and policy makers are helped to make careful decisions and policies based on a continuous series of annual forecasts that helpfully reveal all of the critical events in the life cycle of world oil production:

\textsuperscript{438}CRS Report for Congress, World Oil Demand and its Effect on Oil Prices, Updated June 9, 2005. Available at: www.fas.org/sgp/crs/misc/RL32530.pdf#search=%22WORLD%20OIL%20DEMAND%22 accessed 23 January 2012.

1. The peak in world oil production was forecasted to occur in 2005, and by 2040 production is predicted to fall by 53 percent - an average decline of 2.1 percent per year over 35 years. More oil has, however, been produced beyond that produced in 2005.

2. The OPEC/non-OPEC crossover event was predicted to happen in 2007, which it did in September 2007, and by 2040 the OPEC nations are predicted to produce 75 percent of the world’s oil.\textsuperscript{440} It must be noted that both OPEC and non-OPEC nations will be in steep decline after the OPEC peak in 2011. Two more critical events are also predicted.

3. The Middle East/non-Middle East crossover event is forecasted to occur in 2023, and by 2040 the Middle East will produce 64.1 percent of the world’s oil.

4. The Muslim/non-Muslim oil production crossover event is forecast to occur in [sic] 2001, and by 2040 these Muslim nations will produce 73.0 percent of the world’s oil. The former USA President Clinton was advised of this situation.\textsuperscript{441}

It is believed that around 2050, Saudi Arabia will still have enough oil in the ground for domestic consumption and for a respectable petrochemical industry. Because of this, while most observers of the petroleum scene have focused their attention on the price of oil, the Saudis were thinking about long-term marketing structures.

Crude oil prices were expected to remain at around $35 PB through the year 2005. The share of oil in total world energy demand is expected to decline also: from 38 percent in 1989 to 34 percent in 2005. In addition, there will be a shift toward alternative sources of power such as natural gases and hydroelectricity. In reality the price of oil increased dramatically in 2005. Since the First Gulf War, Saudi Arabia is


clearly seen to be in the dominant position at recent OPEC meetings. It has refused to relinquish its hold on pricing and output decision-making. Therefore, an OPEC dominated by Saudi Arabia, with its emphasis on long-term strategy can moderate prices, which it hopes will increase consumption and satisfy Western policy-makers and consumers.

Saudi Arabia has a strong influence over the GCC members and other Arab countries. It also has an ever-increasing influence in the Islamic world especially given that it is a key member of OPEC. All these elements will add more power to its position as the biggest oil producer in the world. This option has been shaped by the power of the decision-makers to guarantee the stability of the price and production of oil to cope with world demand. However, as an Islamic state, Saudi believes that the oil wealth was granted by God, and is, therefore, conscious of its responsibility and is working with other producers and consumers to ensure a level of stability on the international oil markets (as King Abdullah bin Abdul Aziz has said).

On the other hand, the state’s system has helped to process the development of Islam into a comprehensive system with a flexibility suited to developmental and economic growth locally and globally. This point is developed further in Chapter 8 but it suffices here to say that this is achieved through consensus building with liberal scholars and careful politicking with the existing rivalry between Islamic Schools.

The government working together with some moderate Islamists agree with liberal reformists on the need to press for reform, but they all seem to come from different directions and have different end destinations in view. Moderate Sunni Islamists, mostly religious scholars critical of the fundamentalist Wahhabi interpretation of Islam, place more emphasis on reforming the religious establishment. They believe that without garnering religious approval and without ensuring the full compatibility of reform demands and sharia provisions, broad segments of the Saudi population will ultimately view any reform measures as endangering their values and way of life.

Scholars such as Abdel Aziz al-Qasim, a lawyer based in Riyadh, and Hassan al-Malki, a former instructor at the religious Imam Muhammad bin Saud University, advocate an innovative interpretation of religion that can help ground the modern ideas of accountable government, political participation, human rights, and formation of civil society organizations into a legitimate Islamic framework. Their position rightly is that without opening the mosque and the school—the two strongholds of official Wahhabism—to moderate thinking, the battle for reform and the struggle against extremism cannot be won. A similar position to that of liberal reformists is adopted by Moderate Shiite Islamists. Having had to endure Wahhabi discrimination in the last decades, they, however, place no hope in the possibility of reforming the religious establishment. To an extent they have succeeded in their attempts to get the royal family to limit the powers of the Wahhabi clerics and promote the plurality of Islamic schools of thought.444

In the context of the religious nature of holy writings we can see how God - "Allah" - distinguishes between heavenly benefits and secular benefits. For Muslims, this argument is more than logical because it comes from their religious faith. However, for non-Muslims it is difficult to comprehend, because it is not based on a recognizable theory or science. However, we will conclude this part of the thesis with this verse from the Holy Quran:

\[
\text{And seek by means of what Allah has given you the future abode, and do not neglect your portion of this world.}^{445}
\]

In other words, Muslims should not become deeply involved in a materialistic way of life. They should look at all the materialistic opportunities as permissible, but not profoundly justified. Moreover, the King's speech about oil prices and the future of OPEC described the position most succinctly.

444 Hamzawi op.cit., p. 9.
445 Holy Qur'an, 28:77
Islamic beliefs radically conflict with the materialistic approach of gaining economic growth and development. The materialistic theory represents the core idea of Western progress, such as in the fields of economics and technology. Nonetheless, this is not recognized in an Islamic system. We will focus on Saudi Arabia as an example of an Islamic state because of the significance that oil has had on its development. Their faith in Islamic principles can be said to be the prop to their political, economic, and developmental progress. Worship is a simple structure in Islam and is based on the right to a basic standard of life. It is one of the economic rights of the individual in the Islamic system. The Holy Quran states:

*And in their wealth there is acknowledged right for the needy and destitute.*

The order here comes from God, and it does not include unfair justice or the sacrificing of other people's rights without reason or legitimacy. Yet, God shapes it as worship 'Ebadh.' Therefore, we can see the clear meaning of these verses. In Islam, no one should suffer from poverty or deprivation, regardless of origin, race, or religion. This (Islam) would "guarantee the interests of both the producers and the consumers," as the Crown Prince said in an opening address to the 7th International Energy Forum. As the world's biggest oil exporter, he renewed the Kingdom's commitment to:

Continue supplying the oil necessary for world economic growth and its readiness to increase production if such a measure were needed.

Nonetheless, urging co-operation with consumers, he added:

It is worrying to us when we are blamed for the rise of oil prices to the final consumers.

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446 Holy Qur'an, 51:91
448 Ibid.
It would appear from later actions that the reason for such increase might rest with international speculators rather than the producers.

The Crown Prince called for a permanent secretariat meeting to be set up to promote co-operation, which some observers considered a first hint by Saudi Arabia to reform OPEC. Relations between consumers and producers need not be one where one benefits and the other loses. This occurs when oil is priced at only $10 a barrel under the current highs and below the cartel’s $22-28 price band mechanism. Such modest results have in fact become history and the price of oil and the expectations from oil investment have over the last ten years increased tremendously for many reasons some of which go beyond the enquiry of this thesis.

The main conclusions of the world’s oil forecast are summarized as follows:

1. World total liquids production remains on a peak plateau since 2006 and is forecast to fall off this peak plateau in 2009. Increasing numbers of oil experts are forecasting impending peak production plateaus. According to the International Energy Agency (IEA), the current peak production of 87.2 mb/d occurred on January 2008. As long as demand continues increasing then prices will continue increasing.

2. Forecast world crude oil and lease condensate (C&C) production retains its 2005 peak. The forecast to 2100 shows declining C&C production, using a bottom up forecast to 2012. The forecast to 2012 shows a slight decline to 2009, followed by a 3%/year decline rate to 2012.

3. World oil discovery rates peaked in 1965 and production has exceeded discovery for every year since the mid-1980s. Discoverable reserves in giant fields also peaked during the mid-1960s. The time lag between world peak discovery in 1965 and world peak production in 2005 of 40 years is similar to the time lag of 42 years for the USA Lower 48.

\textit{Ibid.}
4. World C&C year on year production changes to October 2007 and November 2007 show significant declines for Mexico, North Sea and Saudi Arabia and significant increases for Russia, Azerbaijan and Angola. As Russia is likely to be on a production plateau and Saudi Arabia, Kuwait and the UAE have probably passed peak production, the world C&C production will continue to decline slowly.

5. Saudi Arabia retains its 2005 C&C peak, which is the same as the peak year for world C&C (Fig 2). Saudi Arabia C&C production has dropped to 9.0 mbd which is 0.6 mbd less than its peak in 2005. It is now almost a certainty that Saudi Arabia passed peak C&C production of 9.6 mbd in 2005

6. Kuwait retains its 2006 minor C&C peak. Kuwait C&C production has now dropped to 2.5 mbd which is less than its peak in 2006. There is a strong likelihood that Kuwait has passed its minor 2006 peak. Kuwait’s major peak was 3.3 mbd in 1972.

7. UAE retains its 2006 C&C peak. UAE C&C production has now dropped to 2.6 mbd, adjusted for maintenance, which is just less than its peak in 2006. There is a reasonable likelihood that UAE passed its 2006 peak.

8. World natural gas plant liquids are forecast to increase due mainly to new OPEC projects (Fig 15). World ethanol and XTL production is forecast to almost double by 2012. World processing gains are forecast to decline slowly to 2012. 450

The forecast method disaggregates world oil production into the top 42 oil-producing nations of the world (together producing over 98 percent of the world’s oil). 451


importance of these predictions, therefore, is that the fundamentals of Saudi Arabia’s oil fortunes are strong. The same remains for some other neighbouring oil states. Their supplies will remain very much sought after by traditional investors in the oil and gas sector as well as newer players in the field from China and India. While predictions for Saudi Arabia are good they also reveal serious emerging competition from within and outside OPEC.

OPEC’s oil has been a critical source of petroleum during the last century, and will continue to be throughout the 21st century. According to oil industry analysts, the collapse of the Soviet oil industry – the world’s largest producer – resulted in a complete disintegration of the previous system. This led to OPEC returning to the spotlight as the leading and largest source of petroleum in the world. It is, however, fair to note that in the last decade, the Russian oil industry has somewhat revived through a number of joint ventures with Western firms. This, therefore, is the more reason that Saudi Arabia cannot afford not to reform as competition may really not be totally weak. If the price of OPEC’s oil soared with respect to its share of world production, consumers would be provided with an incentive to conserve supplies and simultaneously look for alternative sources of energy. However, some potential alternative sources such as nuclear power and coal do not have the support of public opinion. Yet, efforts are mounting around the world to curtail the combustion of all fossil fuels (oil, coal, and natural gases), because of the resultant air pollution, acid rain, and the emerging evidence of climatic change.

When we try to project the future of OPEC within a Saudi Arabian context, the picture is positive. Yet, it needs to be understood in its wider perspective because
what has emerged from one’s understanding is a picture of a country tied between the demands of its fellow Arabs who seek political concessions and the demands of its consumers, the Western countries who seek economic concessions and favours. Saudi Arabia has continuously sought to pursue its own national interests. It has attempted to optimize the benefits and minimize the drawbacks of its contacts with its Arab and Western friends, an endeavour which has necessitated concessions to both its friends and foes at different times. The 1973 oil crisis was an instance in which Saudi Arabia submitted to the demands of its Arab neighbours to impose an embargo on the USA, but it also managed to display a sufficient degree of restraint to indicate the reluctance with which the action was taken so as to minimize the impact on the West.

Indeed, Saudi Arabia has proved adept at considering all the allies with the right sentiments and policies. However, on the other hand, the procuring leadership of the Arab community espoused moves toward Arab economic independence and vociferously attacked Western hegemony. In general terms, Saudi Arabia has not tied itself down to a restrictive model of development. It has managed to maintain a degree of flexibility and compromise in an effort to reach its long-term goals. It offered the Western companies based in the state the choice to be either overtaken slowly and willingly, or forcefully when the oil business was nationalized. When all the other countries severely curtailed oil activities in the land, Saudi Arabia retained Western companies as partners. This has resulted in a successful petrochemical industry. It raised the price of oil whenever it saw fit and necessary, but always took care to sugar the bill with favourable terms.

It is thus, important that whatever reforms being discussed Saudi Arabia’s careful international relations with its international investors and their host states must be protected just as much as its obligations to OPEC. It is indeed because of the existence of the latter that there are reasonable returns to Saudi Arabia to finance its development. OPEC ensured that the oil prices rose profitably to unprecedented levels in the last few years so much so that discussion moved dramatically from a decade long projection of $20 to $30 per barrel (by 2010) to what has been referred to as a $100 per barrel crisis in 2008? The role of OPEC in securing financial benefits to developing states and maintaining market supply and demand is clear in the following quote:
Economists have estimated that the competitive market of oil would be under $20 per barrel if not for OPEC. OPEC has administered control by limiting its production to a staggering degree. From 1973 to 1979, OPEC’s average annual production was not very different from that during 2001 to 2008, even though today member countries claim to hold over twice the global reserves that they held at the end of the prior period.\footnote{S.M. Gorelick, \textit{Oil Panic and the Global Crisis: Predictions and Myths} (Sussex: Wiley and Sons, 2010) pp. 2-5.}

As a result of the OPEC diplomacy its members are said to be in a position where they could continue producing oil for 80 years at its 2008 rate given its identified and profitable oil resources (without any discoveries). By comparison non OPEC oil producing states are projected to be able to produce their collective reserves only for the next 27 years. While OPEC has maintained the production capacity to satisfy oil demand it is equally true that “it is primarily interested in maintaining high oil prices by controlling production”.\footnote{Ibid. p. 5.} Thus, as the price of oil fell in July 2008 from $145 per barrel toward $100 per barrel in September of 2008, OPEC responded by cutting its production by up to 520,000 barrels per day (which is less than 2 percent of total OPEC production).\footnote{Ibid.}

In the framework of OPEC, Saudi Arabia never hesitated to take advantage, i.e. by raising prices when it appeared that it was acting within a general OPEC consensus or when it felt it had a legitimate reason for doing so. It was also keen to increase its production at the time of the shortfall caused by the Iranian revolution.\footnote{See Al-Farhan (2003) opcit., 36-38} On the other hand, Saudi Arabia’s general moderate position on prices is well-known and often stated by its representatives. In its relationship with the West, it has sought to strengthen bilateral ties, but these too have not been flexible.

When it comes to investments, Saudi Arabia has invested in such a way as to build up its own infrastructure and viable export-orientated industries. Its petrochemicals and associated plastic industries are a case in point. It did not follow many other countries that invested significantly in overseas equities and property, both of which can be at the mercy of stock markets. Indeed, this was a very clever position to take because
Saudi Arabia is well aware that these are prone to seizure and other types of international politics. The seizure of Kuwaiti, Libyan, and Iranian investments and assets are cases in point. OPEC must be considered as a continuously strengthening force in the oil industry, resisting political and inter-state differences, reconciling at the same time the member states’ interests with worldwide stability and progress.

However, world stability is not based on a simple supply of lower cost crude oil to consumer countries, but on a favourable price that allows global economics to function and a common understanding between producers and consumers to develop. In fact, in an oil war, the danger is that political matters usually come before economic or industrial issues. Moreover, the latest event in the international arena that evolved around Iraq can give a clear indication that to some extent a country like Saudi Arabia may not need to focus on military expenditure in the future. The case of the war on Iraq offers clear evidence that the international society and the weak system of the United Nations are to some extent powerless in such events.\footnote{See for example, Dietrich Kappeler, “Iraq: Have Diplomacy and the UN Really Failed?” \textit{Letter from Blonay}, March 27, 2003, Available at: textus.diplomacy.edu/thina/TxGetXdoc.asp?IDconv=2979; Ibrahim I.M. Oweiss, “Why Did the United States Fail in its War on Iraq?”, \textit{Address before Model United Nations,} January 11, 2007) available at: www9.georgetown.edu. Accessed 24 February 2012.} When it comes to international law or United Nations resolutions, Western powers can divert or achieve their goals without paying any consideration to others. Therefore, the international law ought to be reformed or allow for the creation of a new era of cooperation based on more equality, to reduce Western hegemony while promoting global trade.

Membership in OPEC and GCC among others is helpful to Saudi Arabia because it makes the participating states stronger and more capable to represent their individual and collective interests in international relations. Western authorities are willing to pay huge sums to their own experts and organizations, in order to pursue strategic “futuristic studies” particularly in various American universities, think tanks, paid for mainly by the military-industrial complex, and big business, including oil groups. This is done in order to help countries such as the US and the EU in finding new energy supplies or renewable energy so that their dependence on the Middle East oil is diminished. If this becomes the case, countries like Saudi Arabia have to work harder to support their own scholars and students and to secure the new generation’s
economic stability through diversification. In the same way that the West is looking forward to finding a replacement for oil, the Saudis have a great chance of achieving their goals, which can be seen since 2006 due to the economic progress and the reform agenda. It is to be believed that this can work in reality and that it is not just a dream. It is to be wished that the wiser authorities and leaders would take this into consideration for the foregoing reasons.

All Islamist movements aim to present Islam in a pure form founded upon Quranic judicial principles. It is not possible to cite all movements with an Islamist agenda. Numerous movements are active globally such as Ikhwan ul Muslamin, Jamat eIslami, Hizbul Tahrir, and Khalaifa. Yet, the groups have considerable diversity regarding their viewpoints, ideals, and methods for their implementation. Despite these differences, these movements present grave challenges to the existing power in most Arab oil-producing countries and all have a demand for the implementation of Islamic law. The fundamental problem that the Muslim world faces today is that of the established western model of separating the church from the state. The movements do not recognize this model and thus, believe it to be the root of the social and economic harm in the Muslim world. The claim is that this lost power can only be regained via a return to true Islam. The duty of the state is to introduce a Shari'ah-based law to create a just society. Should the authorities fail to uphold the unity of the Ummah and provide harmonious living to its subjects, it cannot be considered Islamic and therefore, must be replaced. As Henry Sigman writes "at the heart of Islamic political doctrine lies neither the state, nor the individual, nor yet a social class, but the Umma, the Islamic community tied by bonds of faith alone." The problem is exacerbated by the fact that the voices of democratisation are increasingly confused with voice of Americanism creating an instinctive reaction of disapproval even among those who believe in forward looking reforms.

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460 M. Ottaway, "Promoting Democracy in the Middle East: The Problem of U.S. Credibility", Carnegie Paper No. 35 (March 2003) p. 13. Ottaway writes: "Although Arab writers have had little good to say about the U.S. intention—or pretense, as they saw it—to promote democracy in the Middle East, at least a few writers have been willing to go beyond the anti-American diatribe. Some writers like Uraib
The Islamic economic system stems from Islamic law becoming the focal point of Islamic economics. Mostly, it has developed on a reactionary basis to the neoclassical economic systems of Western colonialism and it is an attempt on the part of the Muslim societies, to develop an original path.461

In the Middle East specifically, the legacy of a predominantly Islamic civilization is inextricably linked with its political and economic ideology.

The following tables display figures showing proven oil and gas reserves in Islamic countries. The data shows that Islamic countries possess about 75.9 percent of the world’s proven oil reserves and about 47.3 percent of the world’s proven natural gas reserves. It must be noted that the figures only display proven reserves, allowing for the possibility of the presence of vast unproven reserves:

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(Proven reserves in billions of barrels)

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Al-Rantawi however, note in “the need for political, economic, administrative, and fiscal reform in the Arab world is real, even if it is the Americans that tell us about it.” See Uraib Al-Rantawi, Al-Dustour quoted in U.S. Department of State, “Middle East Partnership Initiative (MEPI): Arab Press Wary”. Cited in Ibid.

461 See, Øystein Noreng .Oil and Islam: Social and Economic Issues (Chichester, New York: Published for the Research Council of Norway by J. Wiley & Sons, 1997) p. 34.
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<td>0.9</td>
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<td>Total Muslim Countries**</td>
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<td>822.1</td>
<td>66.2</td>
<td>855.6</td>
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<tr>
<td>Total Western World (EU, North America, Australia)</td>
<td>4.1</td>
<td>44.8</td>
<td>16.5</td>
<td>213.3</td>
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<td>214.9</td>
<td>17.3</td>
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<td>World Total</td>
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<td>1,081.8</td>
<td>100.0</td>
<td>1,292.5</td>
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It becomes clear therefore that the Middle East is a particularly rich area in terms of oil and gas reserves. This fact is not lost to the countries that desire oil and gas reserves. In a sense, in fact, Muslim countries like Saudi Arabia become victims of their oil blessing. They also become hostage to the fluctuating fortunes of oil pricing. Subsequent to the Gulf War in particular, falling revenues and internal pressure were felt in the GCC countries. In Saudi Arabia, the budget deficit has always approximately been $12 billion since 1990. The resulting cut backs indeed forced authorities in the region to look to non-oil revenue sources. A significant effect of reforms, introduced by the authorities to attract foreign investment, would be reducing the amount of people in the public sector. This effect would be vast due to the demographic shift trebling in Saudi Arabia from 1970-1992. With more than 78 percent of the population younger than the age of 34, water resources, food consumption, and investment into education has been increased. However, with less than half of that Saudis graduating from universities able to find jobs, and the authorities wanting to attract large foreign investment in the gas sector, the job market has yet to increase, causing discontent. This shows that it is not enough to aspire towards educational participation of the citizenry but that the state must consider seriously how to provide quality jobs for the population of graduates. It also underlines the position that development is a holistic exercise with many interlinking factors.

This has resulted in the population being more aware of the oil wealth not being utilized properly in the development of critical economic sectors. The rise in Islamic tendencies, particularly the fundamentalist groups in North Africa and Egypt, would appear to correlate with falling oil revenues although whether an increased oil price

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has reduced this trend is difficult to ascertain. In order to fully understand the situation, it is necessary to have background knowledge of the recent political history of the Middle East and North Africa. Britain and France, who colonized these regions, contribute substantially to the post World War II political composition, as did the United States, which surfaced as an influential force both militarily and economically. The installations of stable political regimes were of the utmost importance due to the geo-political and economic strategic significance of the region. Thus, monarchies were placed throughout the region and were supported by the West even after the departure of Britain and France. As a result, the majority of ruling families have been pro-West in their attitudes.

In light of Western and US military presence being motivated by protecting oil interests, it is then logical to assume that Islamists in these countries view the West as aiding the existence of non-Islamic regimes. Islamists see oil as a ground for which the West infiltrated local societies and corrupted leaders, and hence, the presence of American forces in the Middle East is a source of much opposition to the regimes in Saudi Arabia. Thus, in an Islamic culture, oil is considered to be a negative force that has attracted Western hegemony. One of the more extreme views on the subject states as follows:

The oil lies in Muslim lands. Vilification of the enemy is part and parcel of Eurasia energy geopolitics. It is a direct function of the geographic distribution of the World's oil and gas reserves. If the oil were in countries occupied predominantly by Buddhists or Hindus, one would expect that US foreign policy would be directed against Buddhists and Hindus, who would also be the object of vilification....The collective demonization of Muslims, including the vilification of Islam, applied Worldwide, constitutes at the ideological level, an instrument of conquest of the World's energy resources. It is part of the broader economic, political mechanisms underlying the New World Order. 464

Unfortunately the existence and animosity of such fundamentalist religious thinking makes the whole project of increasing investment in Islamic societies even more difficult both for Westerners and for the liberal and moderate scholars as well as governments in countries like Saudi Arabia.

464Metaexistence Organisation, "Report Analysis Battle for Muslim's Countries Oil" (Metaexistence Organisation Geo-Political Think Tank, 2008).
6.5. Conclusion

The importance of the creation of other viable non-oil exports is given. The push towards a sophisticated industrial base for the country with the advent of industrial cities and economic cities is also crucial to the political and economic future of the Saudi Kingdom. The diversification of the economic base of the Kingdom away from oil and its derivatives is the most essential aspect of the industrial base. Successes in this area are also important to the regional standing of Saudi Arabia as a leading nation in the Middle East. The device of economic cities and industrial cities are also further reasons why the Saudi state must provide a believable regime of protection for investors.

Membership of the OPEC and the GCC is of beneficial importance to the participating states. The suspicion that cartel behaviour and closer coordination by the Gulf states may somehow be of negative effect to investors and the states where they emanate from has not proven true. In fact the close coordination and diplomacy between the participants of these organisations only assures them of a fair representation in international relations. It allows them to set their priorities right through processes of peer pressure and recommitment to best practices. Indeed the many directives and standards set among these states towards increasing effort at education, industrialisation and the protection of weaker societal groups such as women and the youth all go towards assuring a more rational business environment for investors. More importantly the diplomacy played at these organisation and the standards set have a way of reinforcing the resolve of the states towards impressive socio economic changes. This in the case of Saudi Arabia is of great importance in creation of socio legal changes that will assure a better society for all.

The fact that OPEC and the GCC have an impressive representation of Muslim societies among the member states goes to prove that there is nothing incompatible between Islamic traditions and modernisation or progress. It also shows that Islamic states based on the Sharia are also capable of diplomatic processes and commitment to International law and particularly international economic law. In sum the economic diplomacy played by the OPEC states and the GCC states has been a positive force in the experience of Saudi Arabia. It is in fact necessary to add that closer commitment
to these bodies and their ideals must go hand in hand with other reforms that have been suggested in this thesis so far.

It is obvious that the Saudi authorities keep repeating the same scenario in their reluctance to apply clear and written constitutional guidelines to their financial and economic sectors. It is also possible to note that the current trends in the international legal system seem to encourage transparent legal policies. This is promising in that there is awareness among the new educated generations who are eager to break from the 'old school's policy' practices of non-transparency and move with global trends which are not necessarily promoted by Western societies but are championed by intergovernmental organisations in which Islamic states feature prominently. Some of these efforts are to create strategic advisory services and link up with organizations outside Saudi Arabia in order to provide a transparent policy to foreign investors and to guide them through the domestic domain. Moreover, such organizations can pressurise the authorities to reform their out-dated policies.  

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Chapter 7: GLOBALIZATION, DISPUTE RESOLUTION AND THE ROLE OF THE INTERNATIONAL SOCIETY IN THE SAUDI LEGAL REFORMS

7.1. Introduction

We have examined in the last chapter manifestations of regional integration and the advantages and imperatives of this trend for Saudi Arabia. It is also necessary to examine the attempts of the Saudi Kingdom to integrate with the global economy by engaging with global institutions and the country’s efforts to submit to international dispute resolution mechanisms. Globalisation is the process enabling financial and investment markets to operate internationally, largely as a result of deregulation and improved communications. Globalisation internationalises the international business place makes it worldwide in scope and application. The carving out of an international law on foreign investment itself may be said to be a manifestation of globalisation. In a sense globalisation and neoliberalism are both perplexingly and ubiquitous phenomena. The orthodox understanding of globalisation is based on a notion of increasingly borderless market extension, an apparently all-encompassing ‘condition’ in which market rules and competitive logics predominate, while the political leverage of nation-states recedes into insignificance. In view of the globalisation phenomenon it is not possible to discuss Saudi Arabian investment regime outside the “new constitutionalism” which applies to most states. This refers to the removal of “key aspects of economic life from the influence of domestic politics within nation states. A manifestation of this new orthodoxy is the network of bilateral investment treaties and arbitration agreements designed to ensure foreign investors security from “discrimination” and “expropriation,” and conferring standing on investors to sue in the event that their investment interests are impaired.

Globalization emerges, therefore, from the treatment of international issues commonly as affecting the ‘global village’ and increases the homogenization of tastes

and attitudes, deregulation, and the elimination of legal, physical, fiscal/financial, technical barriers, rapidly developing scientific and technological innovations, and predictive uncertainty. These are just some of the factors that underline the importance of the emerging economic integration of approaches and relationships amongst blocks of countries. The main argument here is that most countries and organizations cannot ignore the reality of an increasingly complex global environment. These must include appreciation of: the political environment, the importance of both legal and economic aspects, and the complete ideological understanding. We will thus, focus in the next few sections upon the facets of the economic environment as they represent the starting point of the development process along with greater emphasis on legal aspects. We will then highlight the importance of the phenomenon on the engagement of Saudi Arabia with the WTO. Although the WTO is seen as epitomising the economic strand of globalisation to understand the shortcomings of the organisation from the perspective of a developing country like Saudi Arabia we will focus specifically on the institutional aspects of the WTO and especially its dispute settlement systems. The dispute resolution rules and the experience of states in using it betray a lot about the relationships of power that subsist amongst the state members. Finally, we will consider the different political systems and regimes embraced by the member countries and their relationship to the development process. It is hoped that this analysis will help fine tune our analysis to make it more relevant to a multilateral trade regime which is crucial for economic success of a state such as Saudi Arabia aspiring towards economic progress via trade and investment.

470 Soyoung Kim, Jong-Wha Lee, and Cyn-Young Park Emerging Asia: Decoupling or Recoupling No. 31 | June 2009. Asian development bank. Available at: http://aric.adb.org/pdf/workingpaper/WP31_Decoupling_or_Recoupling.pdf. accessed 21 February 2012. Globalisation has cast the institutions created in the aftermath of the Second World War to oversee global economic and political governance into stark relief. Improved economic integration has increased the vulnerability of countries towards economic events taking place beyond their borders. Some authorities, however, have failed to develop the global institutions needed to oversee and regulate global markets for the public good. As a result, the tendency to produce outcomes ‘inimical’ to the public good has been left unchecked. This tendency includes increasing levels of inequality and instability. It follows that any attempt to develop a model of globalisation capable of meeting the human development challenges of today must include an agenda for institutional reform in order to cope with political regimes, other institutions, and new economic trends in the international arena.
7.2. WTO, and the Trend towards Economic Integration

The diplomacy of integration has become recognisable as a key strategy of emerging-market countries that were not previously adequately included in the core of global economic discussion and governance. Hand in hand with developments in regionalism is the need to embark upon an encompassing engagement with the global world of trade. This may take the form of regional integration with the GCC as in the case of Saudi Arabia and it may take the form of global integration with global institutions such as the WTO. WTO reports confirm that integration remains a strong feature and objective of the General Agreement on Tariff and Trade (GATT) and WTO regimes. In many ways economic success and the ability to engage with the benefits of international trade especially for developing nations requires more and more on the ability to engage with the WTO. The WTO is an international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably, and as freely as possible. Like the GCC, the WTO has both formal and informal rules that shape decision-making. Formal rules are brought into force by the consent of states, and in theory they have an inherent legitimacy. However, the consent itself may not have been achieved by

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472 All nations in Latin and North America, the Caribbean, Africa, the Pacific, South East Asia and almost all European countries are members of an integrated organisation. Although countries such as Japan, China and India have seemed unaffected by the mood of integration for a long time, the recent attempts of APEC have included Japan and China in a new regional economic cooperation organisation since 1989. M. Trebilcock and R. Howse, The Regulation of International Trade (London: Routledge, 1999) pp. 353-378.

473 The rationale of integration between developing countries stands on the creation of regional markets with the primary consideration of an economic basic development rather than taking into account a more specific field of trade transactions. Such integrations are to be considered the starting point of Free Trade Agreements (FTA), customs unions, common markets, and economic unions.

474 Corinne Bagouilla and Nicolas Peridy, "Regional Integration and North-South Industrial Location: An Application to the Euro-Mediterranean Area," World Trade Organization, " (2011); Yousif Khalifa Al-Youdis, "Oil Economies and Globalization: The Case of the GCC Countries," Available at: www.luc.edu/orgs/mees/volume6/al-yousif.doc accessed 4 March 2012. The World Trade Organisation came into being in 1995. It is the successor to the General Agreement on the Tariffs and Trade (GATT). The GATT celebrated its golden jubilee in Geneva on 19 May 1998 and the past 50 years have seen an exceptional growth in world trade. Merchandise exports grew, on average by 6% annually. Total trade in 1997 was fourteen times the level in 1950. GATT and the WTO have helped to create a strong and prosperous trading system contributing to unprecedented growth. The system was developed through a series of trade negotiations, or rounds, held under GATT. The first rounds dealt mainly with tariff reductions, afterwards with other areas such as anti-dumping and non-tariff measures. The latest round the 1986-1994 Uruguay Round led to the WTO's creation. Many deals have been concluded for tariff-free trade in information technology products, financial services deals covering more than 95% of trade in banking, insurance, securities and financial information.
legitimate means. Hence the question posed by Pascal Lamy: "Do developing countries have their rightful place in WTO priorities"? The answer is "no- not yet".474

He rightly noted that

Clearly, there is a feeling of discontent amongst a large number of developing countries that the odds in the trading system are stacked against them, a conviction that the Uruguay Round imposed substantial obligations on them without delivering commensurate benefits. I agree with this to some degree. Although globalisation brings a lot of benefits to emerging economies, it has not done so thus far for most sub Saharan African countries.475

Singapore for instance had occasion to state that although the WTO's trade liberalizing rules and commitments bring a new dynamism to world trade there remains good reason for growing discontent amongst certain countries that the system has failed to deliver for all states in fair measure. For instance exports from developing countries continue to face significant market access in the developed world.476

Nonetheless, WTO rules have a de facto legitimacy to the extent that they reflect the interests of all participating states. The WTO Charter sets out the formal rules and institutions that govern the WTO's decision-making, which in essence provides for one vote for each member state and the universal participation of all members in all meetings. The votes of all the member states are equal. If consensus should fail, various rules of One-Member-One-Vote (OMOV) majority voting can be invoked.477

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475 Ibid., pp. 1-2.
476 The Singaporean Minister for Trade and Industry stated: "It is important for the WTO to address this discontent. We need to find effective mechanisms to permit developing countries to address their concerns and thus secure their continued active participation in the system". Lee Yock Suan, "Singapore: Statement Circulated by H.E. Mr., Lee Yock Suan Minister for Trade and Industry (at the Working Session on Implementation)" World Trade Organisation Ministerial Conference Second Session Geneva, 18 and 20 May 1998 WT/MIN(98)/ST/37 18 May 1998 available at accessed (18 March 2012) pp. 1-3.
477 Marrakesh Agreement Establishing the WTO, Articles IX: 1 (and footnote 1) and XII:2. See also Gulf Research Centre Foundation, "WTO and Globalization: GCC Impact". Workshop at Cambridge University 6 – 9 July 2011. Available at http://grcevent.net/cambridge2011/pdf/2/ws5.pdf accessed 23 February 2012. Most of the GCC members are also the dominant members in the most important energy organisation in the world OPEC. Therefore, one of the paradoxes in the development of the Gulf Co-operation Council (GCC) is the strong economic dependency on foreign labour. The
At face value, these rules appear to reflect a model of democracy. Yet there are views such as that expressed by Pascal Lamy and the Singaporean Minister of Trade mentioned above (and others addressed below) that argue that there is a continuous problem of democratic deficit in the WTO, that its benefits are unequally distributed and that its dispute resolution mechanisms remain skewed in favour of companies from powerful states.

The WTO is rapidly assuming the role of a global authority, as 144 nations, including the US, have joined the organization. The WTO represents the rule-based regime of the policy of economic globalization. Commercial interests represent the central operating principle of the WTO. It is for this reason that it was completely unavoidable for a state like the Saudi Kingdom not to engage with and join the WTO. Not doing so would have very seriously jeopardised the economic potential of the state. Saudi Arabia has indeed ratified eight bilateral investment promotion and protection agreements other than agreements under the GCC and the Arab League. Bilateral investment treaties (BITs) generally are intended to promote and protect foreign direct investment treaties. These instruments are a relatively new element in international economic relations. The existence of a bilateral investment treaty is in practice a condition for national insurance against political investment risks as to guard against risks such as dispassion, impossibility of currency transfer and war

underlying problem could be solved by long term plans and internal policies with the main idea of reaching an average economic level of development (UN Development Report 1999). The lack of a local labour force is the result of an imperfect educational system, which is the quintessence for responding to the needs of development plans. The development in GCC is based on the oil industry; thus, the real need is to work on human development to replace the huge amount of foreign skilled labour. The following point will clarify the statement, "GCC countries are facing profound changes and transformations in different areas, such as politics, economies, social status and culture." especially within globalisation trends.

A brief explanation of the GCC voting system will be introduced. In Article Nine of the Charter, each member of the Supreme Council shall have one vote, while the resolution of substantive matters shall be carried by the majority’s vote. However, to enhance and support our argument some of articles of the GCC and the WTO charters will be presented.


damage. The practice has been growing steadily in importance during the past few decades. It has been correctly observed that:

It should be recalled that these are only one element in a bundle of measures destined to encourage and protect foreign investment. Developed countries consider them part of their policy towards developing countries. The latter normally conclude them, among other reasons of a political or legal nature, because they need resources for development. These resources are largely in the hands of transnational corporations and the developing countries seek to attract them by a variety of measures, including guarantees under bilateral treaties with the home countries of the transnational corporations concerned.

Saudi Arabia accession to the WTO dates back to 11 December 2005. Membership in the WTO has helped to remove many obstacles in the path of expansion of global business enterprises. Membership and the trend towards global economic integration has arguably encouraged and increased respect for democratic processes and increased respect for labour rights, environmental protection, human rights, consumer rights, social justice, local culture, and national sovereignty. Moreover, it can be stressed that international agreements, like that mentioned between the WTO and the GCC, encourage legal protection for multinational companies to operate in developing countries.

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481 United Nations on Transnational Corporations, *Bilateral Investment Treaties*, (New York: United Nations, 1988) p. iii. Saudi Arabia’s BITs are, thus, a modest haul when compared with a state like India a State that has signed till date BITs, with 57 countries since negotiations were commenced in 1994. Agreements have also been finalised with 4 other countries and negotiations have being held with number of other countries. Press Information Bureau, "Bilateral Investment Promotion and Protection Agreement with the Kingdom of Saudi Arabia" Government of India Press Release 12 January 2006 available at http://www.bilaterals.org/spip.php?article3541 accessed at 18 March 2012.


483 The Kingdom had been negotiating its terms of accession to the GATT, and then the WTO, since 1993. Accession negotiations proceed on two tracks: (1) bilaterally to open up KSA’s markets to US exports and investment; and (2) multilaterally to focus on WTO rules issues that include agriculture, customs protection of intellectual property rights (IPR), treatment of state-owned enterprises and services. Fact Sheet Accession of the Kingdom of Saudi Arabia (KSA) to the World Trade Organisation (WTO) available at http://www.bilaterals.org/IMG/pdf/Saudi_Arabia_accession_fact_sheet.pdf accessed 17 March 2012.

484 Trebilcock and Howse, op.cit., p. 48; It is true that “The WTO has become the vehicle for liberalisation, with the multinationals at the wheel. It has the power to punish governments who ‘interfere’" See World Development Movement, “World: Multinationals and the World Trade
7.3. Adapting to the Modern Dispute Resolution Regimes: WTO Dispute Settlement System.

The dispute settlement mechanism of the WTO is a legacy of the GATT. However, the WTO package is much more sophisticated. The Members of the WTO decided to strengthen the GATT rules on dispute settlement. The result is said to be the first supranational arbitration body. Three bodies compose the dispute settlement system of the WTO. The General Council is the executive body of the WTO and it has to meet as the Dispute Settlement Body (DSB). The DSB was established to administer the Dispute Settlement Understanding (DSU). The DSB also have the authority for establishing Panel procedures, adopt Panel and Appellate Body Reports as well as power to agree in and allow suspension of trade concessions in case of non-implementation of the DSB decisions. The second body is the Appellate Body, which has the responsibility of reviewing Panel’s recommendations with regards to issues of law. The Appellate Body members shall broadly represent the Members of the WTO universe. The third body is the Panel. The Panel is an ad hoc group appointed from a list of experts in each field of the “Covered Agreements.” The panel is, therefore, an independent body established by the Dispute Settlement body, consisting of three experts, to examine and issue recommendations on a particular dispute in the light of WTO provisions.


487 Vide Article 17.3 of The Dispute Settlement Understanding.

488 The Understanding on Rules and Procedures Governing the Settlement of Disputes explains the Working Procedures of the Panel. It contains Inter alia that: 1. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply. 2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it. 3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. See WTO official
After the DSB adopts a report of a panel (and the Appellate Body), the conclusions and recommendations contained in that report will automatically become binding upon the parties to the dispute. The DSU indeed provides that, when the parties cannot find a mutually agreeable solution, the first objective is normally to secure the withdrawal of the measure found to be inconsistent with the (WTO) Agreement (Article 3.7 of the DSU). Wherever a violation complaint is successful the panel (including the Appellate Body) will have found an inconsistency with the WTO Agreement and expressed this finding in its conclusions. The panel (and the Appellate Body) then concludes by recommending that the Member concerned must bring its measure into conformity with WTO law (Article 19.1 of the DSU). Article 21.1 of the DSU adds that prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes.\(^{489}\)

In relation to the Saudi Kingdom the process of transplanting international treaty provisions into national norms is being intensified with the operation of the WTO’s agreements. The kingdom’s experience is still very bare and it is possible to assert that there will be many surprises ahead. There are limitations upon the states’ freedom of choice that will only become clear in the future. A lot of the issues that will come up for decision may run against Islamic jurisprudence but perhaps more importantly will involve sensitive issues of sovereignty. The areas of possible impact are diverse and they include: manufacturing, information technology, service sector, banking industry insurance, telecommunications. In its Accession Protocol, Saudi Arabia finally agreed in 2005 that the issuing of licenses to insurance companies would be with no economic needs test or quantitative limits. This brings the Kingdom more in conformity with its obligations under the WTO rules.

The Accession Protocol also stipulates that in connection with the authorization of foreign banks and financial institutions to operate in Saudi Arabia, the criteria that the authorities should have adopted a long time ago, however, only few European banks have been granted licences and only one bank has obtained a full retail banking

\(^{489}\) Ibid.
What is then the effect of this provision on the Saudi reformed legal systems? In the absence of the restraints imposed by the international agreement, the Saudi legislative and judicial organs may interpret the word "prudential" in accordance with their own understanding and Islamic culture. With the stipulations of the international agreement, however, the interpretation of Saudi law must take into account the understanding and interpretation of the same term or words by the WTO and international community, as well as the possible reactions of other members.

If a member considers that the Saudi authorities failed to comply with the prudential criteria in issuing business licenses to foreign insurance companies or banks, it may invoke the WTO's dispute resolution mechanism. Upon the pronouncement by the WTO Dispute Settlement Body, the losing party will have no choice but to obey the ruling. If Saudi Arabia loses the case, it must rectify the defects in its law enforcement mechanisms, including the interpretation of its own local laws, otherwise, there might be major difficulties in attempting to use international legal remedies until the laws of the state have been aligned with internationally recognized trade standards.491

When the laws and legal systems of most of the WTO members have common provisions with identical interpretations, or at least a similar basis, the laws, or at least the laws falling into the purview of the WTO will be globalized. As WTO agreements cover most economic sectors, it can be said that the process of the globalization of the law is becoming true, if not already a reality.492 Under these circumstances, the traditional power of sovereign states is now significantly and substantially restrained even though it may be argued that it has taken place with the explicit agreement of sovereign states.493

The member state must implement basic and lasting reforms in relation to international trade and other aspects such as human rights and employment law

491 WTO official website op.cit.
(particularly to foreign workers) to achieve and produce simpler and less burdensome set of regulations for the implementation of technology exchange and the provision of access to commercial redress in cases where a breach of contract, intellectual property matters, and patent law may arise.

For Saudi Arabia just as in the case of most other developing states it is important for policy makers to realise that they have to familiarise themselves with this sophisticated regime and that engaging with the law and practice requires well informed strategies and intelligent approaches. Negotiation at this level is sophisticated and requires careful preparation. In a sense developing countries would have only themselves to blame if they are repeatedly losing their cases at the WTO DSS. In the first place they could have insisted on some important concessions in the areas of their own interest at the time the regime was being put in place and furthermore they ought to have come to grips with the use of the system after these many years of practice in the area. A developed country hardly ever makes a concession in the multilateral forum without getting anything in return. The trick appears to be in careful presentation of issues and preparation for the event. Dedicated teams are maintained for this sort of sensitive jobs and adequate training is given.

It has already been mentioned that there was under-participation by developing States at various stages in WTO negotiation processes. This meant that the negotiation outcomes of the Uruguay Round were unlikely to be in their interests. Indeed the Director-General of the WTO, Pascal Lamy had conceded that the current WTO rules are in clear favour of the rich and economically powerful States over the poor and comparatively powerless States.

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In terms of past and continuing negotiating capabilities and dexterity at dispute settlement the situation remains skewed against the interests of developing states. It is noted that:

The negotiating culture of the GATT served to exclude numerous Members from important aspects of deal-brokering. Policies and treaties were negotiated in notorious ‘Green Room’ meetings to which only certain Members were invited, and in which discussions are secret. Green Room decisions were then presented to other Members as *faits accomplis*.497

To the best of the understanding of this author representation of Saudi Arabia in this area remains ad hoc and sporadic. The problems in this area, however, go beyond the WTO but are found in other multilateral arrangements.

An account of discussions of the stabilisation of greenhouse gas emissions at the Rio Convention has been used by Philippe Sands in an illuminating account to describe the relative ease with which the wishes of developing states, including Saudi Arabia, can be side-lined and compromised.

The OPEC countries signalled their objection. It has never been clear to me whether the United States might secretly have been hoping they would succeed. On the last day of negotiations, late into the night, the French chairman of the negotiations, the avuncular French diplomat Jean Rippert, met with a representative group of states, the so-called ‘friends of the chair’ He appeared the following morning to present to the assembled plenary a compromise text. This was to be taken up or rejected, it was not open to further negotiation or discussion. The clock had stopped. We had an hour to review the draft. When we returned Saudi Arabia, Iran, Nigeria and other OPEC countries objected. To adopt the text as it stood would undermine their economic prospects, they insisted. The chairman asked whether there were any formal objections to the adoption of the text. He looked around the large conference room at the United Nations headquarters in New York packed to the rafters with official delegates and observers from industry and the NGOs. Many OPEC countries vigorously waved their nameplates in the air, trying to attract M. Rippert’s attention. He did not see them although everyone else did. Declaring that he could see no objections, the chairman announced the Convention’s text to have been adopted, to great applause and relief. This was consensus in international law-making –not the same as unanimity. International law on global warming was up and running.498


However, it is interesting to note that some developing states are faring well under the system. For instance, writers like J. Jackson have noted that since 1995, the LDCs seem to be in a better position than ever before, due to the new Dispute Settlement Understanding (DSU) system within the WTO agreement.499 The WTO is indeed attempting to provide greater technical support to improve the negotiating and technical capacities of developing countries through, for example, the Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries.500 This instrument coordinates policy efforts in this regard between the WTO and other international financial and development agencies, and identifies technical assistance needs in relevant States.

7.4. Arbitration and Saudi Arabia’s Bilateral Investment Treaties

Apart from the regional agreements concluded under the Arab League and the GCC, discussed in the last chapter the Saudi Kingdom has concluded investment promotion and protection agreement with the eight countries: Italy, Germany, Belgium, Taiwan, China, France, Malaysia and Austria. These agreements aim towards mutual promotion and protection of the investments of the nationals and enterprises of both contracting parties in their territories. They also aim at providing appropriate regulatory environment to stimulate and increase investment, trade and industrial activity between the parties.501 It has been correctly noted that with the global recession especially as it affects the leading Western economies Saudi Arabia has assumed the role of a capital exporting country just like the US and the UK. Saudi Arabia has, for instance, unveiled plans to develop large-scale overseas agricultural projects to secure food supplies. Progress in this direction is being made with Ukraine, Pakistan, Sudan, Turkey and Egypt.502 In a partnership between the Kingdom’s government and private sector projects of at least 100,000 hectares will be set up in several countries to grow crops such as wheat, corn, rice, soyabeans and alfalfa, a feed for livestock. It is perhaps interesting that in reversal of situation, some

500 Joseph op.cit., p. 64.
countries, such as the US, are, however, concerned that bilateral agricultural agreements could distort world food markets. 503

Developments have been so dramatic that certain erstwhile capital exporting western states now are interested in inviting Saudi Arabia's wealth to invest in their territory. 504 It is, however, notable that the various BITs entered into by Saudi Arabia place dispute settlement by arbitration as a central feature of the cooperation and agreement between the participating states. Importantly the Agreements provide for arbitration under ICSID for the settlement of disputes between the host state and the private parties of the other state as well as ad hoc arbitration under the UNCITRAL arbitration rules to settle disputes between private parties. Examples of this include article 9 of the agreement between the Kingdom of Saudi Arabia and the Belo Luxembourg economic union (b.l.e.u.) concerning the reciprocal promotion and protection of investments signed in Jeddah on April 22, 2001 and article 10 of the Agreement between the Kingdom of Saudi Arabia and the Republic of Austria concerning the Encouragement and Reciprocal Protection of Investment signed in Riyadh on June 30, 2006. Others include Article 10 of the Agreement between the Government of the Kingdom of Saudi Arabia and the Government of Malaysia concerning the promotion and reciprocal protection of investment signed in Kuala Lumpur on October 10, 2000. There are slight variations such as the provision for ad hoc arbitration tribunal under 11.2.b of the Agreement between Saudi Arabia and Austria using the rules of UNCITRAL for the purpose of settling disputes between host states and private parties. The importance of these developments apart from giving assurances to those who enter into BITs with the Saudi Arabia state include

503 Ibid.
504 James Kirkup, "Gordon Brown Invites Saudi Arabia to Invest in Britain's Nuclear Industry", The Telegraph (20 Jun 2008) p. 4. Louisa Bojesen and Catherine Boyle, Saudi Arabia's sovereign wealth funds are examining acquisitions around the world. Louisa Bojesen and Catherine Boyle, "Saudi Arabia Looking at Buying Opportunities: FinMin" cnbc.com available at http://www.cnbc.com/id/44900277/Saudi_Arabia_Looking_at_Buying_Opportunities_FinMin accessed 17 March 2012. It is not the first time that Saudi Arabia's oil money has been put to the service of western powers. The dramatic growth of Saudi oil revenues over the last three decades allowed the kingdom to become a major financial contributor to the global struggle against communism. Formerly a recipient of U.S. aid, Saudi Arabia began to send its own money abroad in the mid-1970s, including collaborations with the Americans in sponsoring anti-communist rebel movements in Angola, Ethiopia, and Afghanistan. Josh Pollack, "Saudi Arabia and the United States, 1931-2002" Vol. 6 Middle East Review of International Affairs No. 3 (2002) pp. 77-78.
that the domestic business community also begins to pay more attention to arbitration as a fast, cheap and effective dispute settlement mechanism.\textsuperscript{505}

7.5. Saudi Arabia and the ICSID Convention

An important feature of the Saudi Arabia involvement with the World Bank and its related global financial institutions is the acceptance of the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID).\textsuperscript{506} ICSID is an autonomous international organisation with close links with the World Bank. All of the members of the ICSID Convention are also members of the World Bank. The ICSID Convention, which came into force on October 14, 1966, provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID’s jurisdiction is voluntary but a party to the dispute cannot withdraw its consent unilaterally and member states are required to enforce ICSID arbitral awards.\textsuperscript{507} The acceptance of ICSID jurisdiction has been seen as one of the most significant steps taken by Saudi Arabia in its history of economic diplomacy.\textsuperscript{508} This is particularly true in that it has given “investors confidence to continue with their existing investments” and it remains” a tool for attracting further investments”.\textsuperscript{509}

Article 25(4) of the Convention, allows any contracting state to notify ICSID of the class or classes of disputes that it may or may not be willing to submit to ICSID arbitration. Pursuant to this provision the Kingdom, in its ratification instrument, reserved the right not to submit or accept the jurisdiction of ICSID in relation to all

\textsuperscript{506}Casses and materials about the International Centre for Settlement of Investment Disputes (ICSID) are available at <http://www.worldbank.org/icsid>, accessed 6 March 2012.
\textsuperscript{509}Baamir (2008) p. 140.
questions pertaining to oil and to acts of sovereignty to ICSID whether by way of conciliation or arbitration.  

Investment arbitration in Saudi Arabia is therefore, liable to be governed by the ICSID rules in contrast to commercial arbitration, which is governed by the Arbitration Act of 1983 or other rules provided that the rules are recognised by the Saudi authorities. It must be said however that nothing prevents an investor from submitting claims to a Saudi Commercial arbitration proceeding although it will probably take some time for such level of confidence in Saudi Commercial Arbitral route to become routine for foreign investors. It is for this reason that most likely disputes in relation to the oil and gas investment field will continue to go for ICSID arbitration. The Saudi government became a party to an ICSID arbitration for the first time in the Ed. Züblin AG v. Kingdom of Saudi Arabia case. Far from being in the glamorous world of oil and gas investment the dispute related to construction the case related to the construction of university facilities.

On January 28, 2003, the Secretary General of the ICSID registered a request for the constitution of the arbitration panel. It is however crucial to note that a settlement was reached by the parties and the proceeding discontinued at the request of the claimant in accordance with article 44 of the Arbitration Rules. It has been suggested that the settling of disputes out of court and very quickly represents the maturing of the Saudi Kingdom and is a lesson learnt from the bitter experiences of the Aramco case. This approach, which promotes quick amicable resolution, is indeed commendable and should be continued well into the future. Baamir indeed thinks "It is also the reason for the very small number of disputes against the Saudi government, bearing in mind the intensive constructions and governmental contracts during the 1970s and 1980s".

511 Ed. Züblin AG v. Kingdom of Saudi Arabia. ICSID case No. (ARB/03/1).
512 A list of the concluded the concluded cases of ICSID, Case No. (ARB/03/1) are at <http://www.worldbank.org/icsid/cases/conclude.htm>, accessed 5 March 2012.
7.6. Developing a More Responsive International Commercial Arbitration Regime with the Influence of the Shari’ah

We have argued extensively in this thesis as to the importance of dispute resolution mechanisms to the regime of FDI. We have also looked at the DSU mechanism and will adopt the view that Saudi Kingdom must seek to develop capacity in its relevant Ministries and departments in order to properly engage with this regime. It will of course prove crucial to the country’s chances in appearing before DSU in cases. Important bilateral disputes will be settled in this way and the issues will turn on significant sums of monies. We may reiterate in this section that reforms to the dispute resolution practice of the Saudi Kingdom in international commercial law generally is a central component of the task of any serious reforms to the FDI regime. Whereas it is also true as we have shown in earlier chapters that International commercial arbitration law had a difficult start in the Saudi experience. As a writer put it

Saudi reaction to the ARAMCO case indicates that the Saudis have little confidence in the ability of foreigners, especially non-Muslims, to apply correctly the Shari’a and to identify the real differences between it and the general (mostly Western) principles of international commercial law.\textsuperscript{514}

Despite this reality it is also true that from the early days of oil exploration until the 1950s arbitration was the primary means of resolving disputes between Saudi and foreign companies.\textsuperscript{515} Arbitration also continues to be the best tool for resolution of such disputes of which there will be many in the forthcoming decades.\textsuperscript{516} State and public entities are increasingly attuned to international arbitration to resolve disputes in financial, economic or commercial and even diplomatic matters.\textsuperscript{517} It is for this reason that we will devote the next few pages to the particular relevance that arbitration has to the proposed reforms. Indeed arbitration must move away from its


\textsuperscript{515} For commentary on the arbitration climate in Saudi Arabia prior to 1983, see generally A. Lerrick & Q Mian, Saudi Business and Labour Law (1982).


sporadic nature and become systematic in Saudi Arabia and, therefore, symptomatic of its many improvements in terms of a more responsive legal regime for FDI.

The modest achievements of the Arbitration Regulation of 1983 must be recognised. The Arbitration Regulation of 1983 ("the Regulation") serves two important objectives of the Saudi government. First, it provides a comprehensive, uniform set of rules which are accessible to foreign business persons and their legal counsel. The Regulation is designed to allay their fears over the previous lack of judicial and legislative support for commercial arbitration. Second, it established governmental control not only over arbitration procedure in general, but also over the actual arbitration proceedings by providing for supervision by governmental agencies, parastatals, courts, or perhaps the Chambers of Commerce and Industry.518

The Arbitration Act of 1983 repealed the related provisions in the Code of Commercial Courts of 1931. It can however be said that the Act is a codification of the Hanbali law of arbitration. Regardless of the religious restrictions, the Act and the Implementing Rules were described as clarification and simplification of the traditional Islamic system. The Act provides a framework for commercial arbitration in a flexible way that makes arbitration a real alternative dispute resolution mechanism.519

The adoption of international legal standards in arbitration will require courageous changes in the law some of which will not sit quite so easily with prior Islamic jurisprudence. Compromises will therefore have to be made across a host of issues even within the field of arbitration itself. For instance, in international arbitration generally arbitrators can emanate from various backgrounds or professions. The arbitrator is in a sense an ordinary man. In Islamic jurisprudence however the arbitrator is required to possess all the qualifications of a judge ‘Qadi’. Indeed there is difference in Islamic jurisprudence as to whether arbitration, is in act tantamount to litigation, agency, conciliation or whether it is a combination of all of these.

The schools of Islam and their relation to Saudi Arabia have been explained in chapter two of this thesis.\textsuperscript{520} The Maliki School believe that arbitration is litigation. This opinion is also shared by some Shafi'ies and the Hanbali School. The Hanbali School added that the arbitral award is a binding judgment on all the parties.\textsuperscript{521} Some Malikies, however, believe that arbitration is an agency contract while the Hanafies, hold the belief that arbitrators are conciliators as they are appointed with the disputants' acceptance and each party can decline and deny the arbitration before the issuance of the award, exactly like conciliation.\textsuperscript{522} The Hanbalies consider arbitration as litigation; therefore, an arbitrator must possess the same qualifications as a court judge and arbitral awards should carry the same strength as a court judgment. Arbitration is indeed according to some of the views a combination of litigation and agency such as among the Hanafies'.\textsuperscript{523} The Shafi'ies considers arbitration an inferior system compared to the judiciary. This is because the appointment of the arbitrator can be revoked at any point up to the time of the issuance of the final award, which shows that an arbitrator is at a lower grade than a court judge.\textsuperscript{524}

Clearly thus, there is no real unanimity in the understanding of the very nature of arbitration. In this case it will be difficult to forge a pan Arab understanding of how to take arbitration forward in the region as a whole. In this sense Saudi Arabia must develop its own national understanding, which of course must be forged within international understanding and standards of international commercial law.\textsuperscript{525} Some writers have expressed their frustration with the predominant western view of arbitration and the seeming refusal to admit the contributions of Islamic jurisprudence to enrich arbitral practice. One such view hold it that Islamic law is more developed, settled and complete than the \textit{lex mercatoria}:

... it strikes as rather surprising that the tribunals and Courts seem willingly to accept an 'inferior' or deficient system of law, but when it comes to the Shari'ah, which suits perfectly the needs of the parties (otherwise, they would not have chosen it), they refuse determinately to apply it... two reasons: the first, far more antagonistic, is that the tribunals and the Courts have some kind

\textsuperscript{520} See above chapter 2.2. Saudi Arabia and Islam in the Twenty-First Century.
\textsuperscript{521} ibnQodamah, Almoghni (1st edn., Hajar Publications, 1992), vol. 10, p. 263
\textsuperscript{522} Baamir (2010) op.cit., pp. 60-61
\textsuperscript{523} The Encyclopedia of Islam 72 (2d ed. 1960).
\textsuperscript{524} Baamir (2010) op.cit., p.61.
of grudge against the Shari'ah or the countries it is present in, or the Islamic civilization in general. This sounds far too hostile. The remaining justification and the only one so far it seems acceptable, is that the tribunals and Courts which refused the application of the Shari’ah as the governing law of the merits of the arbitration simply got it (the Shari’ah) wrong. This in fact would constitute a reasonable explanation. They got it wrong because they don’t know the Shari’ah, what it is, how diverse and multifaceted it is, and how akin to any other ‘hard law’ legal systems it actually is. 526

The difficulty of an arbitration practice that is based entirely on Islamic understandings are, however, patently clear. It is, therefore, important to state that any modern Islamic state must be prepared to move as close as possible to the common understanding of arbitral law and institutions as possible. This may mean significant compromises on key issues such as gender representation on arbitral institutions among others. The preferred view of this study however is that Islamic principles is already a part and parcel of world civilisation and has impacted upon laws at any rate. Islamic law is indeed one of the streams that flow into the lex mercatoria. It is for this reason that some Leboulanger points out that “...the doctrine can serve to accommodate important third-world concerns”. 527 Hence it is important for compromises that make Saudi Arabia a desirable arbitral forum to be made at this stage.

The task before the lawmakers in increasing the relevance of international commercial arbitration with considerable influence of Islamic law is huge and cannot be underestimated. Yet doing so is possible. As put it: “Even promoters of Islamic arbitration may at times ground their arguments in terms of the lex mercatoria. They argue that the lex mercatoria and Islamic law are perfectly consistent.” 528 Hence although there are many models to choose from and there is indeed a lex mercatoria that reflects a truly international practice of arbitration the country not only has to develop its own national competences but it must also sit well and engender confidence in foreign parties before Saudi Arabia becomes a favoured forum for

526 Ibid
There is in some instances a more liberal approach in the Shari’ah law than in modern approaches. For instance, on the issue of the permissible age of an arbitrator western law if not practice may learn a few lessons. Under Islamic law a person who acts as an arbitrator can even be below the usual age of legal capacity under for example English law. Shari’ah scholars distinguish between the age of maturity and the age of discernment. Scholars disputed about the age of maturity as some fixed the age at 15-18 and the majority of scholar’s recognised maturity to be attained by physical puberty. All scholars in all schools agreed on the age of 7 to be the age of discernment. Following this distinction it is possible to argue that a 16-18 year old can have the capacity to be an arbitrator. Whereas the possibility of this situation occurring under English or American law will be negligible.

Developments and strategies must however be deep and decisive and cannot just be cosmetic. To convince the sceptical international business and investment community that arbitration has come to stay in Saudi Arabia will require genuine gestures. Evidence of the governments appreciation of the need to address arbitration specifically as an issue in attracting and managing FDI may be seen in the development of a unique body known as the Saudi Arbitration Team. A Royal Decree issued in 2002 established the Saudi Arbitration Team and the body is tasked with the functions of promoting as wide as possible arbitration in Saudi Arabia as an auxiliary mechanism to litigation. Its members attend conferences and acquire specific training and competence in international arbitration. In principle this thesis is in support of this creation and in fact argues that the team ought to be expanded both nationally and in the various component units of the Kingdom. The task of popularising arbitration and in fact alternative dispute resolution mechanisms is a central component of the drive towards a modern commercial economy. It is, however, the case that there is some scepticism among scholars in the field who seem

529 The validity of the lex mercatoria as the law, or rules of law to inform international arbitration is clear and all countries may indeed tap into this source to govern the resolution of disputes which arise between parties.
530 Baamir (2008) op.cit., p. 64.
to see the development of the Saudi Arbitration Team as meaningless diversion and perhaps a waste of resources. One such scholar wrote:

In reality, problems related to the Saudi law in general and arbitration in particular cannot be solved by forming such teams as Saudi Arabia is in need of developed arbitration centres instead of the time-consuming proceedings before DiwanAlmazalim. The problems related to the legal system in Saudi Arabia need at least another generation before they can be solved. Personally, I believe that this team as well as some other committees benefit its members only for the reason that after six years of its creation i.e. in 2008, many of the members of the Saudi Arbitration team have been studying in the UK for the last five years. 533

This criticism may indeed appear overly harsh and cannot be followed completely. Indeed the author himself appeared later to water down his position in a later publication but the point is well taken that formal mechanisms is not the end of the road to creating meaningful respect for arbitration both as an institution and as a field of legal practice. Much more has to be done by the state to make respect for arbitral awards sacrosanct and to create a general milieu for the rule of law in Saudi Arabia. Hence Baamir’s revised criticism is valid when he wrote that:

The legal community is expecting more from the team than just advertising, because it is only organised entity, which is able to develop and work on the idea of establishing independent arbitration courts and centres. 534

To make Saudi Arabia an attractive forum it is suggested that the following strategies must be adopted and expanded upon. The role and functions of the Saudi Arbitration Team must be expanded. Capacity building in this area is crucial. It is suggested that even more members have to be appointed and a regional structure developed. The Saudi Arbitration Team must be charged with the purpose of targeting their expertise and service to the economic cities and industrial cities we discussed in earlier chapters. Saudi Arabia must ensure that its national courts particularly the Board of Grievances are aware of their increasing international role and reputation. This is in that they must be seen to be very professional in their dealings and the quality of justice they mete out must be unscrupulous.

Guzman and Sykes were correct in noting that "A state that created a reputation for courts that were scrupulously even handed might be able to capture" arbitral business as an attractive forum. 535

Because jurisdictions also compete over the quality of their contract law in terms of promoting their territory as a better forum it is important for the Saudi state to develop in a more holistic fashion its contract laws and also fine tune its regimes for agency, franchising, distributorship etc. 536 It has been noted that "...if lawyers want their forum to be selected they will have some incentive to ensure that the substantive law is attractive to the parties." In essence a more sophisticated legal regime is needed to operate an emerging economy the size of Saudi Arabia. The public policy exception to enforcement of judgments must be rarely resorted to and in the most exceptional cases. It is in fact necessary to argue that it is actually good public policy of Saudi Arabia that it is seen to be a desirable and attractive forum in international commercial arbitration as this will attract investment and economic progress. 538

On the whole Saudi Arabia has to realise that particularly in this area it is in fierce competition not only with its immediate neighbours within the GCC but indeed with the rest of the world including western advanced jurisdictions. These states are equally vying for relevance in the area of international commercial arbitration. Legislative reform of Sweden's arbitration legislation was embarked upon in the last decade based primarily on the desire to maintain Sweden and to strengthen Sweden's position as an attractive venue for international arbitration 539. Similar developments are embarked upon all over the world and the emergence of many competitors may have their impact on Saudi jurisdiction both positively or so perhaps negatively.

7.7: Conclusions

From an optimistic perspective, the membership of the Saudi Kingdom in the WTO is a major advancement in the Kingdoms economic reform programme and its

535 Andrew T. Guzmán and A. O. Sykes, Research Handbook in International Economic Law (Cheltenham: Edward Elgar, 2007) p. 120.
536 ibid., p. 172
537 Ibid., p. 291
539 Ibi.d
integration as a member of the global economy. However, while membership within global institutions provides for Saudi Arabia's commitment to WTO international trade laws, much work remains to be done domestically to reform the country's internal economic and legal order to ensure the full benefits of the agreements entered into are implemented. The reform and development of Saudi Arabia's domestic industry and service sectors will also have an impact on foreign investment. Other critical considerations include a determination that the Saudi Kingdom will open its markets and reduce to some extent the level of control the government will seek to exercise to protect national and even certain religious interests.

It may be argued that with the zeal at which Saudi Arabia has been embracing regional and international economic integration and particularly international dispute resolution techniques and regimes, the attitude of the Saudi Government toward international arbitration is no longer strongly influenced by the outcome of the Aramco award of 1958.

Although international arbitration appears to continue to be 'a useful tool of favour by western parties' it is also the case that the severity of the situation can be reduced by substantial improvements in capacity of arbitrators, arbitral institutions and lawyers from Saudi Arabia in the law and practice of international commercial arbitration. In this way it should be recommended that further institutional development and training should be embarked on particularly in the requisite ministries and the Saudi Arbitration Team.

The need to ensure that dispute settlement is a central component of the reforms to Saudi law and economy cannot be overstated. The creation and operation of the economic and industrial cities and the arbitration is next to impossible without investors having confidence that dispute settlement will be conducted under internationally acceptable rules and that the awards and decisions of panels and tribunals will be respected by Saudi courts as well as the Saudi state. The general

540 This argument has been impressively raised by when he wrote that some western companies have engaged in the arguably unfair tactical use of arbitration. The disappointing outcomes of the Aramco arbitration were expected due to the lack of legal experience and the naive or the "too honest" conduct with Aramco, which was also a normal result for being the weaker party in the dispute" Baamir (2008) op.cit., p. 146.
direction of Saudi Arabia policy in this area is good and the use of clauses in the Gas Concessions of 2004-show openness toward the outside world in this area.
Chapter 8: CONSTITUTIONAL ENGINEERING AND ECONOMIC REFORM

8.1. Introduction

This thesis has maintained that there are imperative socio economic and socio-legal considerations that the Saudi state must grapple with in its drive towards economic transformation through a successful harnessing of its FDI potentials. It is suggested in this chapter that without exploring the possibility of changes within the Saudi constitutional framework genuine changes and reform in trade and development will be rendered extremely difficult. This chapter explores the case for an overhaul of the Saudi Constitution. It argues that there are benefits of introduction of transparency into the Saudi constitutional system. The relationship between the Saudi legal system in its current structure and the question of whether it has been suitably reformed after the many changes outlined in earlier chapters. It discusses how reforms can be welcomed or encouraged by the international society. Focus will then be directed on the impact of such reforms on FDI applications, and how the Saudi society can benefit from it in the long-term. It is argued here that without significant changes to the constitutional order in Saudi Arabia, the many efforts at modernising the Saudi economy and improving upon Saudi law and practice including arbitration; will lead to only modest results.

Development and constitutional reform are, therefore, inextricably linked. The absence of deep-seated constitutional reform will make further and more dramatic economic success next to impossible. The Saudi legal system will also continue to attract suspicion and non-acceptability among the legal schools and systems around the world. The connection between constitutional reform and economic success has also been made elsewhere and the reasons are equally persuasive in relation to the Saudi kingdom. For instance, it has been said of the Philippines that it:

...requires the revision of the economic provisions of the Constitution if it is to become a major recipient of foreign investment flows like other high growth economies in East Asia. These economic provisions were adopted in
1935 and have helped to reduce the country's ability to achieve a strong economic development record for seven decades. Reforming these policies can be undertaken by making the specific policy issues the subject of ordinary legislation rather than through constitutional provisions that are hard to change.\textsuperscript{541}

Like the Philippines and indeed many struggling developing economics the very nature and order of the constitution may make the country inherently unfit for the level of integration into the world economy that is desired after.\textsuperscript{542} It is often the case that constitutional reform may be necessary to provide the legal order that permits certain desirable economic activity to take place or provide regulatory environment or macroeconomic circumstances for investment to flourish. Hence constitutional reforms were needed in Mexico in the 1980s allowing Corporations (domestic and foreign) to be able to acquire land, but the holding was limited to no more than twenty thousand hectares. The constitutional reform provided a basis for the establishment of plantations and general restructuring of the forestry sector to improve productivity. It was envisaged that "in the long run (around the year 2010) one can expect the supply of wood to increase".\textsuperscript{543}

Thus while it is true is that the reasons for constitutional reform in most countries would appear to have nothing to do with the economic sphere and more to do with political issues (e.g. ethnic conflicts or independence), it is indeed true that most constitutional reform will have some effect in economic terms. It is, therefore, true of Saudi Arabia also that the most obvious benefits of constitutional reform would be increased foreign investments, higher rate of economic growth and employment; rising incomes for the population; and sustaining the fight against poverty. As in the case of Philippines considered above provided the changes are genuine and well executed other less obvious benefits may follow in the nature of changes to the macroeconomic fundamentals of the country: reduction of the fiscal deficit; lessening


\textsuperscript{542} In the Philippines, for instance, foreigners cannot own land. They have to adjust their investments, without prospects of owning land, except through mechanisms that involved majority control of the land by nationals. Foreign capital is also restricted to 40 percent equity contribution in any corporation if these companies are to engage in public utilities and in the exploitation of natural resources. Ibid., p. 4.

of the external debt burden; improvement of trade and payments and stabilization of the national currency increase of the saving rate; and improvement of the country’s financial markets.\textsuperscript{544}

Constitutions are documents for the statements of general principles and objectives of a nation. They are not the place for detailed approaches to specific issues and questions. Constitutional reform in any country may be painful to bear by some sectors in the society and may not be well received especially by the elites that the prevailing situation may serve. Constitutions provide not only statements about their political structure, the duties of their officers, the relationship of state and local governments, the political and duties rights of citizens, but it also allocates the privileges and advantages. In this way economic advantages and often disadvantages are shared among the citizenry without expressly stating it as an aim to do so.\textsuperscript{545}

It is, however, important to state here that constitutional reform must not subvert the grundnorm of society.\textsuperscript{546} It must not endanger the cultural and religious makeup of the society in a way that wastes the heritage of the state. It must also not be so reckless as to endanger the very careful internal and external alliances and relationships that the Saudi state has developed over the past decades. Constitutional reforms for the sake of economic progress must be not be unduly rushed as history shows us that it may indeed take some time to make meaningful, economically focused constitutional reforms.\textsuperscript{547} In other words constitutional changes may have to take into account external relations as well. An example may be made of the anxiety of the US that future changes in Saudi Arabia may create a situation where China assumes control over Saudi oil resources in the long-term. This was discussed at a US

\textsuperscript{544} Sicat op.cit., p. 2.

\textsuperscript{545} Ibid., p. 4.

\textsuperscript{546} The grundnorm or basic norm is the highest form of validity in Kelsen’s system of legal norms. The reason for validity of a norm is another norm, which is the basic norm of the highest authority. See Tayyab Mahmoud, “Kelsens Constitutions, Coup d etats and Courts” available at jalsnet.org/meetings/constitution accessed 26 February 2012.

\textsuperscript{547} It has been noted that “liberal democracy emerged from a series of constitutional reforms, rather than as a quantum leap from authoritarian to democratic governance.” Roger D. Congleton, Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy (Cambridge: Cambridge University Press, 2011) p. i.
Congress committee discussion of the threat of China’s ascendancy and energy demands.\textsuperscript{548}

It is necessary to state here that these recommendations are purely academic in nature and with every respect to those who drafted the Saudi Constitution in 1993 they are not meant to subvert the state but to improve upon the economic and social wellbeing of Saudi Arabia. Recommendations will be stated first then a comparison with the recent constitution and other constitutions will follow. There will be a chosen format along with selected wordings to enable the implementation of some ideas, so that they may be fitted into the suggested constitution and to create transparency in the text.

8.2. The Saudi Constitution

It has already been mentioned that Saudi Arabia operates a monarchical system of government and is run under Islamic law. The Islamic state is based on principles prescribed by the Quran (Islam’s Holy Book) and the Shari’ah (Islamic system of jurisprudence), Provincial Council, a Consultative Council (Majlis Al-Shura), and a Council of Ministers.\textsuperscript{549}

It is nearly impossible to discuss reforms in Saudi Arabia without at least considering the monarchy and its relations with other major political actors in Saudi Arabia. Recent reform measures in Saudi Arabia have stemmed from power relations among the major political actors. The interplay is correctly described as follows:

To a great extent, the interplay between the royal family and the Wahhabi religious establishment has determined the pace as well as the scope of implemented reforms. Other actors, however, have also entered the political arena and now play an important role in shaping the reform process. Although far from organized and viable opposition movements, these dissenting groups—most notably liberal reformist groups, moderate Islamists, and conservative religious scholars critical of official Wahhabism—have increasingly placed reform issues in the public space and as such have induced the royal family and the religious establishment to address their demands.


\textsuperscript{549} See above 2.1: Background of the Study: The Kingdom of Saudi Arabia.
Apart from a few confrontational moments, the newcomers have avoided direct clashes with these two giants of Saudi politics. Instead, they have pushed for gradual government concessions in key spheres and tried to sustain the momentum of political opening.\textsuperscript{550}

The most important provisions of the constitution on the monarchical systems are as follows:

\textit{Article 5:}

(a) \textit{The system of authorities in the Kingdom of Saudi Arabia is that of a monarchy.}

(b) \textit{Rule passes to the sons of the founding King, Abd al-Aziz Bin Abd al-Rahman al-Faysal Al Sa'ud, and to their children's children. The most upright among them is to receive allegiance in accordance with the principles of the Holy Koran and the Tradition of the Venerable Prophet.}

(c) \textit{The King chooses the Heir Apparent and relieves him of his duties by Royal order.}

(d) \textit{The Heir Apparent is to devote his time to his duties as an Heir Apparent and to whatever missions the King entrusts him with.}

(e) \textit{The Heir Apparent takes over the powers of the King on the latter's death until the act of allegiance has been carried out.}

This article gives members of the Royal Family the constitutional rights via the authorities' system to be represented as the Royal Family Council and in one of three councils:

1. The Royal Family Council (see House of Lords in UK) \textsuperscript{551}
2. Consultative Council (see House of Commons in UK)
3. Municipal Councils (see the City Councils in UK)


\textsuperscript{551}AsmaAisharif, Amnesty: Saudi Plans Anti-Terror Law to Stop Dissent Reuters Fri, Jul 22, 2011. Available at: http://news.yahoo.com/amnesty-saudi-plans-anti-terror-law-stop-dissent-112454023.html.Accessed 2 March 2012. Saudi Arabia of planning a crackdown on public dissent with new anti-terror legislation that it said was a cover to stop further pro-democracy protests in the absolute monarchy. The reason to the recommendation of this new division is to avoid the international critics of the Saudi monarchy and to give the royal family an international right via the constitution as well as playing a major role in day-to-day authorities policy. Yet this shall be controlled via the King and the senior members of the royal family and the representatives shall be from the young and educated members of the family prepared for future duties. Also see, The Centre for Democracy and Human Rights in Saudi Arabia, "Saudi Response to Arab Uprising Newsletter" July 27, 2011 http://www.cdhr.info/ accessed 4 March 2012.
In a sense the Saudi Arabian state has run quite impressively with the current system. Yet it cannot be said that there is no scope for improvement. As argued above there is a trend towards democratisation the world over. There is also an emerging right to development which traditional way of doing things in a state may prevent.\textsuperscript{552} This reality has not been lost to the powerplayers in Saudi Arabia. These include the royal family, the religious establishment, the Shura and municipal councils (discussed below). There is also the positive reality that the political players in all sectors realise the need for reforms. The problem is that the power players exploit the weakness in each other's position. This makes it difficult for rapid changes to occur.

Saudi intellectuals and observers differ in their assessment of the balance of power between the royal family and the clerics. Some liberal reformists contend it is the royal family that retains the upper hand. To the outside world, however, it may appear that it is the opposite and that it is the religious factions alone that dictate the speed of reform. The position of this thesis is that the slowness of reform is a product of both spheres. In fact it is true that the Wahhabi clerics do move along with change.\textsuperscript{553} The problem is that the pace of introduction to change particularly in the area of democratisation of the political space is slow. Several tentative steps towards liberalisation have been approved by the religious clerics without problems. This includes when late King Faisal introduced a decree in the 1960s to permit female education despite fierce Wahhabi opposition.

The latter reduced their opposition hence the education of females in Saudi Arabia goes on with full force and with dedicated universities today. Recently there has also been introduced a decree to end the ban on mobile telephones with cameras. These instances show that the Wahhabi clerics will ultimately accept modernisation and reform if the monarchy offers leadership especially in economic sectors.\textsuperscript{554} They would not venture to openly oppose current reforms should the royal family demonstrate a resolve to pursue such a course. This view holds it that the tension between moderates and conservatives within the royal family has enabled Wahhabi clerics to restrain the reform drive and influence the power balance between the two

\textsuperscript{552} See above 4.3. Globalization, Liberal Democracy and Right to Democratic Development of the Saudi People
\textsuperscript{553}Hamzawy, op.cit., p. 4-6.
\textsuperscript{554}Hamzawy, op.cit., p. 5.
factions in favour of the conservatives. Yet, an opposing view, held most notably by moderate Islamists, stresses the autonomy of Wahhabi clerics. Although the religious establishment is sustained by generous royal allocations, the religious establishment itself has not been co-opted, but instead continues to defy the royal will. As a writer put it:

Regardless of which view is most accurate, in today's Saudi politics the religious establishment remains anti-reform and the only major political force that is not substantially influenced by moderating trends.\textsuperscript{555}

The Royal Family has apparently effectively constructed international and regional alliances thus far. But it is suggested that many of its postures are aimed at preserving its power. Most significant, its strategic alliance with the United States since the discovery of oil in 1938 has protected its rule in moments of regional turmoil, in particular during the confrontation with pan-Arab Nasserism in the 1960s and in the aftermath of Saddam Hussein's invasion of Kuwait in 1991.\textsuperscript{556}

Theoretically, therefore, implementing reform and attaining development will occur only if the monarchy continues to see the reason for progress in this direction. The modernising agents of change such as Non-governmental organisations, civil society groups, intellectuals and the younger generation have provided relatively significant pressure on the authorities to ensure that the monarchy does continue to favour gradual changes.

As a western commentator wrote after the recent onset of the Arab spring:

Saudi Arabia is scarcely immune to protest and dissent, and has long struggled with the challenges of reform. What is most striking about the Kingdom over the past weeks of crisis, however, has been the lack of any major challenge to government and the way it functions. This may well not continue. More secular Saudi intellectuals and youth are already sending letters and petitions, and calling for more rapid reform. Some more extreme voices are going further and calling for "days of rage"—mirror imaging similar calls in Tunisia and Libya. In today's Middle East, some demonstrations seem inevitable in

\textsuperscript{555} Ibid., p. 7.
\textsuperscript{556} Ibid., 5.
every country, and no one can guarantee Saudi Arabia's future stability in a
time of turmoil.\textsuperscript{557}

At the same time, there are good reasons to hope that Saudi Arabia will continue on
the path to peaceful reform and change. It is important to note that with the show of
dissent during the Arab spring crises the Monarchy did not react with a wave of
stringent security measures. Instead, his government issued a series of royal decrees
that provided a multi-billion dollar investment in stability by meeting the people's
needs. The economic carrots offered the population are significant and they include:

(a) $10.6 billion (SR 40 billion) in new funding for housing loans through the
Real Estate Development Fund.
(b) $7.9 billion (SR 20 billion) in funding to increase the capital of the Saudi
Credit Bank
(c) $266 million (SR 1 billion) to enable social insurance to increase the number
of family members covered
(d) $319.9 million (SR 1.2 billion) for expansion of social services.
(e) $933 million (SR 3.5 billion) to help the needy repair their homes and pay
utility bills
(f) $126.9 million (SR 476 million) to support programs for needy students at the
Ministry of Education.
(g) $3.9 billion (SR 15 billion) to support the General Housing Authority
(h) A 15% pay increases for state employees.
(i) 50 percent increase in the annual allocations for recognised charity
organizations to the tone of $120 million (SR 450 million).
(j) $26.7 million ($100 million) annual allocation to projects of the National
Charitable Fund is awarded SR 100 million.\textsuperscript{558}

Although these are considerable commitments and indicative of willingness to change
the position of this thesis is that more needs to be done. The changes cannot be

\textsuperscript{557} Anthony H. Cordesman, "Understanding Saudi Stability and Instability: A Very Different Nation"
(CSIS Center for Strategic and International Studies, Feb 26, 2011) available at
17 March 2012.
\textsuperscript{558} Ibid.
economic alone but must be deeper in a political sense. Political changes will, however, depend on two important factors:

(1) Whether the monarchy is willing to work closely in bringing other political players on board and

(2) most importantly whether the monarchy is willing to devolve more democratic powers.

Although there is generally an appetite for reform as a result of the Arab Spring it is suggested that revolutionary reform exemplified by the kind of chaotic and militant events witnessed in Libya and Syria among others is not desirable.\(^{559}\) It is suggested that reform must not be forced by confrontation or by violent means. What is required is a painstaking process of gradual reformation. Studies about the nature of constitutional reforms of the nineteenth and early twentieth centuries reveal that:

> In no case did parliamentary democracy emerge in a single great constitutional leap. The gradual emergence of modern parliamentary democracy is evident in the core architecture of contemporary constitutional democracies. The most obvious are those in which a monarch still occupies the national throne, as in the United Kingdom, Koninkrijk der Nederlanden (the Kingdom of the Netherlands)... (Kingdom of Sweden) and ... (the Kingdom of Belgium).\(^{560}\)

Saudi reform to the monarchy and the way and manner by which more participation of citizens in government should progress must emerge out of genuine negotiation between the political players.

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\(^{559}\) Osman and Nour, op.cit., Lisa Anderson op.cit., supra note 18 Chapter 1.

\(^{560}\) Ibid., p. 6.
8.2.1: Social Capital Engineering

Though often criticized as a feudal system, Saudi Arabian society has a character that can adapt and cope easily with new theories. When searching deeply into political theory, one could find that the principle that needs to be the starting point in the Saudi constitutional reforms agenda is that of the social capital. If these assets are engineered to fit within the Saudi new political society, they will help to generate a political movement under the supervision and wise control of the monarch.

Therefore, this power should be given to the Royal Family Council since it still maintains its trust, network, and norms within the cultured Saudi society. This can be seen and reflected by the shape of Saudi society and the tribal alliance and loyalty to the monarch. If such powers are implemented, the result will be the creation of civil associations that can secure and guarantee the monarch’s long-term control of the democratic and constitutional agenda; which started since the Municipal Councils in 2004.

The idea of advocating critical approaches to reform of the legal system is in order to provide much needed social justice and freedom, which the world over is linked to economic development.

The Royal Family council has been engaging in social engineering and many of the reforms are reflections of the intention to make the country progressive while still recognising traditional linkages and institutions: Recognition is given to the relationships between political power blocs. These include:

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561 Examples of these since 2000 include reform of the Shura Council, the holding of municipal elections, legalization of human rights organizations and professional syndicates, educational reform measures, institutionalization of the national dialogue conferences. In September 2011, King Abdullah inaugurated the 60,000-student Princess Nora bint Abdulrahman University. This is the largest all-female university in the world. He also announced that women would be allowed to serve as full members of the appointed Consultative Council and would be allowed to vote and run for office in the next municipal elections. See United States Department of State, “Background Note: Saudi Arabia” available at http://www.state.gov/r/pa/ei/bgn/3584.htm accessed 3 March 2012; See also Hamzawy op.cit., pp. 10-14;
1. Networks: the relationship between the Royal Family and the tribes, local people and commercial activities within their district.

2. Norms: it is well known that the Saudi Royal Family is dominated by the Arabic cultures and that they have been continuously supporting nation (see Article 43 of the Saudi constitution). This norm is adopted by most of the Royal Family members. These norms will preserve those who will be members of the council and will give those rights and duties to the constitutions according to their district.

3. Trust: if the citizens knew that it is within their constitutional right to go and present their concerns and wishes, a true value will be created in people’s consciences.

If these changes are applied, Western writers or politicians will find less to criticize about Saudi Arabia since this level of power sharing has also being their experience and sometimes up till today. Yet, it must be admitted that the Saudi situation is quite different due to both historical factors and culture. In this study, the examination of the political arena cannot go any further, yet the aim is to identify the need for such development and to support the arguments presented with theoretical and historical evidence in order to maintain the suggested legal-constitutional approach and its reforming applications. The theocratic basis of the Saudi monarchical system is much stronger than in most other monarchical states. Anthony Cordesman makes the point clearly when he wrote:

The King’s title of Custodian of the Two Holy Mosques is not a hollow honorific. The Saudi government’s success in honoring and supporting Islam, in support the global flow of pilgrims to Mecca and Medina, and in honouring the Koran is absolutely critical to its popular legitimacy.

562 The Queen of England must be briefed nearly on a weekly basis on all government business. She accepts resignation of Prime Ministers and even the Commissioner of the London Metropolitan. She has a say in the appointment of the Archbishop of Canterbury among other significant powers. See the English political structure and constitutions, Queen’s powers and the House of Lords history. Available at: http://www.rogerdarlington.me.uk/Britishpoliticalsystem.html accessed 2 March 2012.

563 It is interesting to note that there is a view that Saudi Arabia is not a theocracy, due to the fact that the King and its administration do not possess any religious titles and have nothing to say regarding the interpretation of holy texts and the actual organisation of the mosque internal affairs. See Daniela Pisoiu, Mosque and State: Comparative Analysis (Netherlands: GRIN Verlag, 2009) p. 13. This view is, however, not appreciative of the full understanding of Saudi State, culture and heritage.

564 Cordesman op.cit.
Article 7:

Authorities in Saudi Arabia derive power from the Holy Quran and the Prophet's tradition.

This article did not classify the state's powers and its duties. Therefore, clarity must be present with regards to the different powers, duties and limitations of the state, for example:

The authorities of the state consist of the following:

The judicial authority is comprised of:

(a) The Constitutional court as the top and Supreme Court in the country;\textsuperscript{565}
(b) Local judicial authorities deal with local state affairs and the individuals;\textsuperscript{566}
(c) International, commercial, and economic judicial authorities only governed by the King and the constitutional court;\textsuperscript{567}
(d) An executive authority;\textsuperscript{568}
(e) A regulatory authority;\textsuperscript{569} and
(f) consultative authority.\textsuperscript{570}

\textsuperscript{565} Compare with the Supreme Court of the USA, see article 70. In 2007 a law created a new Supreme Court to replace the Supreme Judicial Council (SJC) as Saudi Arabia's highest court authority. The same law transfers powers that the Ministry of Justice formerly exercised to the SJC, such as the authority to ability to establish and abolish courts, and name judges to the Courts of Appeal and First Instance. The doctrine of independence of the judiciary applies and this independence is protected by law. The king, however, also has the authority to hear appeals and has the power to pardon in cases where the punishment is not ordained in the Qur'an. United States Department of State, "Background Note: Saudi Arabia" op.cit.

\textsuperscript{566} This is what Islamic law deals with, see Articles 45-50.

\textsuperscript{567} This issue is not within the local judicial authorities, see article 70.

\textsuperscript{568} This is according to the related issues within the constitution and the King's authorities. It refers to the Executive-King (chief of state and head of government; rules under the title Custodian of the Two Holy Mosques). United States Department of State, op.cit.

\textsuperscript{569} See Articles 50,55,56,57,58

\textsuperscript{570} See Articles 7 recommendations and Article 68-69. Legislative-a Consultative (or Shura) Council with advisory powers was formed September 1993. Op.cit.
Article 8 [Authorities Principles]:

Authorities in the Kingdom of Saudi Arabia are based on the premise of justice, consultation, and equality in accordance with the Islamic Shari’ah.

This article can be used as a safeguard to establishing the separation of powers within the judicial system and to divide the judicial system into three dimensions:

1. The Constitutional Court, which shall be comprised of seven judges. Three with expertise in Islamic law and three with expertise in international law, (sitting according to the nature of the case). It must be a balanced court, and the head of the court’s vote must finalize the decision if the voting is tied. The judges do not have to sit separately but the existence of judges with demonstrable competence in the areas mentioned is of great value.

2. The Shari’ah court, which deals with individuals and all issues regulated within the territory under the Shari’ah.

3. The commercial and economic court. This court deals with international issues such as treaties, arbitration, FDI, and all other issues that are not under Islamic law due to their special nature and their effect on the national economy and development plans.

Chapter 4 – Economic Principles

Article 15:

No privilege is to be granted and no public resource is to be exploited without a law.

This article is the cornerstone of any development or reform in the legal system in Saudi Arabia. This means that even when the Islamic clerics try to stop some development projects or specific aspects which can increase the state’s revenue, the
(FATWA) will find its way into this article. If there is any dispute with regard to the constitution, the religious clerics theoretically can go to the court and appeal (a situation which has not arisen). So, the project can maintain its progress without any delay and if the constitutional court issues a judgment in favour of the religious clerics, their rights will only be limited to financial compensation, which goes to the state's treasury. This procedure gives immunity to commercial activities as if these disputes have arisen in international law. However, in this case the government shall publish to the general public the cost of the royal court expenditure or issue a law to justify the privileges and financial allowances provided to the project.

It is important to note that this provisions does share a lot in common with the western concept of the Rule of Law. Although the idea of rule of law has clearly been aspired to in all major cultures and civilisations throughout the centuries, the concept was popularised by A.V Dicey in his book *Introduction to the Study of Law of the Constitution* written in (1885). In it he summarised the rule of law under three main heads.\(^{571}\)

(a) That no man could be punished or lawfully interfered with by the authorities except for breaches of law. It is for this reason that moral wrongs like adultery are not punishable under criminal sanctions in many Western societies, whereas the opposite is true of Islamic societies. In other words as long the actions or prohibition of action is authorised by law government may thus act or refrain from acting accordingly.

(b) That no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land.

(c) That there ought to be compliance with the general principles of the constitution and the results of judicial decisions determining the rights of the private person. In this way the society would be inherently protected and can do without a specific bill of rights.

To state that the rule of law is an unqualified good is to state the obvious. The benefits are numerous. The idea that governments should have restraints, and that everyone should be governed by and under the law protects the weak from unrestrained governance and protects the powerful from the corruptive influence of power itself. It is suggested that the more Saudi Arabia is seen to adhere to this particular constitutional provision the more western states will feel comfortable to engage in business with the state in its territory.

**Chapter 5 – Rights and Duties**

Article 23 [Islam]:

> The state protects Islam; it implements its Shari'ah; it orders people to do right and shun evil; it fulfils the duty regarding God's call.

This article should be stressed more and identified with other judicial branches and hierarchy in the Saudi legal system. It shows clear indications that the Islamic law can only govern individuals and local disputes. This is the main reason as to why the Saudis apply the new norms of both the constitutional and commercial and administrative courts in order to be governed by new schools of thought and modern laws that maintain the Saudi development process. Consequently, these are mere actions and they need to be observed within the constitution as well as make others assured of their rights. It is notable that the text mentions “shun evil” and does not forbid reforms. Thus, it is argued here that reforms that are not evil can be followed as far as possible and practicable. Although it is admitted that it is difficult to objectively understand the concept of evil, nevertheless it may be said that reforms, in the direction of liberty, and legal development cannot be said to be evil, subject of course

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572 In *Entick v Carrington* 95 Eng. Rep. 807 K.B. 1765, the courts affirmed that a warrant issued by a Home Secretary for entry into private property and seizure of allegedly seditious material was against the law and amounted to trespass. In this way the judiciary in England affirmed its role as protector of the weak (individuals and private organisations) against the ever-increasing oppressive tendencies of the executive arm of government.
to the finding by appropriate religious clerics that any particular set of reforms or Act introduced may be correctly regarded as an evil act. It is also necessary to say that the manner in which any authority arrives at the determination of evil must not be such that it allows people to be deprived of their fundamental human rights.

Article 26 [Human Rights]:

The state protects human rights in accordance with the Islamic Shari'ah.

This article can be used not only to support individual rights and freedoms but to protect property rights by the entire judicial system. It elaborates on much more than just the King’s rights and powers when it concerns matters of national security and economic interest.

It reverberates with the notions of natural justice which gave birth both to human rights law and the rule of law in the modern sense.\(^\text{573}\) It is, thus, no wonder that a society, which is generally deficient in relation to the rule of law, will soon enough find itself running low on its human rights record. Similarly it is clear that wherever human rights comes under systematic attack by agents of the state, the rule of law, if it still exists at all, will soon be a thing of the past. Businessmen from foreign lands will normally prefer jurisdictions that do not run low on both human rights and the rule of law.

Article 29 [Science, Culture]:

The state safeguards science, literature and culture; it encourages scientific research; it protects the Islamic and Arab heritage and contributes toward the Arab, Islamic and human civilization.

\(^{573}\) Modern political scientists have also stated “historically the idea of human rights derived from the idea of natural rights, which itself derived from the idea of natural law”. See Peter Jones and Albert Weale Rights: Issues in Political Theory (London: The Macmillan Press, 1994) p. 96.
his article needs to be interpreted over the next decade and more in a way that protects intellectual property of the proceeds of scientific research. In this way Saudi Arabia will also distance itself from countries like China that have a reputation for not granting full protection for patents and copyright which emanate from investments in scientific research and technological products. Liberal interpretations in this manner will put Saudi Arabia in conformity with other civilizations and encourage confidence in investment in high tech areas. This however does not mean that Saudi Arabia must go ahead and accept controversial changes that are not linked to business and investment such as euthanasia, stem cell research and genetic modification. On issues such as this conformity with the Koran may continue to guide progress.

Chapter 6—"The Authorities of the State"

Article 44:

*The authorities of the state consist of the following: the judicial authority; the executive authority; the regulatory authority. These authorities cooperate with each other in the performance of their duties, in accordance with this and other laws. The King shall be the point of reference for all these authorities.*

It can be argued here that the constitution lacks clarity and left many issues covered in ambiguity. These ambiguities include continuing overlapping of functions and no strict separation of powers. The judiciary for instance, includes the executive. The door also remains open to the religious clerics to exercise significant powers over the legislature and to reshape and direct the aim of the constitution's powers and authorities. As a result of the strong influence of the religious cleric on the executive and the membership of the executive in the judiciary there can be an undue religious
influence of the interpretation of the constitution. Therefore, it is an immediate necessity to arm a constitutional court with expertise in constitutional law.\textsuperscript{574}

Article 45:

*The sources of the delivery of fatwa in the Kingdom of Saudi Arabia are the Divine Book i.e. the Quran and the Sunnah of His Messenger. The law will define the composition of the senior ulema body, the administration of scientific research, delivery of fatwa and its (the body of senior ulema's) functions.*

In this article, one could argue that no limitations to power are outlined, thus presenting a threat to the state's entire system. It can be viewed that it is recommended to relate this article to religious issues, to any disputes between individuals, and religious enquires which may need more guidelines or advice from the senior Ulemas.\textsuperscript{575} This process must be governed by law, which means that the fatwa must go through constitutional processes and that the King must approve of it.\textsuperscript{576} This would help individuals gain more confidence in the state and its powers as well as serve as a practical method of shifting trust and faith towards the state.

Article 46:

*The judiciary is an independent authority. There is no control over judges in the dispensation of justice except in the case of the Islamic Shari’ah.*

\textsuperscript{574} It could be that it would not harm the Saudi legal system to start with foreign expertise and some Saudi scholars to establish the important field of the legal system. Modern scholars must dominate the legal system since there has been an unfavourable experience with the religious ones.\textsuperscript{575} The *ulema*, or Islamic religious leaders exist in Saudi Arabia and indeed many other Islamic Countries. They serve a unique role by providing religious legitimacy for Saudi rule. Except for Iran, where the *ulema* participated directly in government, Saudi Arabia was the only Muslim country in which the *ulema* constituted such an influential political force. The kingdom's *ulema* included religious scholars, *qadis* (judges), lawyers, seminary teachers, and the prayer leaders (imams) of the mosques. As a group, the *ulema* and their families included an estimated 7,000 to 10,000 persons. However, only the thirty to forty most senior scholars among them exercised substantive political influence. These prominent clergy constituted the members of the Council of Senior *Ulema*, an official body created by Faisal in 1971 to serve as a forum for regular consultation between the monarch and the religious establishment. Fahd continued the precedent set by Faisal and Khalid of meeting weekly with Council of Senior *Ulema* members who resided in Riyadh.\textsuperscript{576} See the recent *Ulema* Fatwa in the jihad in Iraq and in Saudi Arabia and the latest terrorist activities in Saudi Arabia. In such a case the King would have a strong argument against the *Ulema*, since they argue that the Islamic law is the basic constitution to the state then they need his approval to any Fatwa they issues since he is head of the state.
Islamic law only governs individuals and local issues; it does not interfere with international relations, foreign policy, development plans, or any aspects of the state's sovereignty in international economic law and relations. If Article 8 is revisited, the terminology gives a clear indication that it is related to the individuals. Therefore, the King has the rights to enforce any applications which he sees useful to the country.

Article 48:

*The courts will apply the rules of the Islamic Shari'ah in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler, which do not contradict the Book or the Sunnah.*

Hypothetically, if the constitution is reformed, this article would be redrafted according to the new constitutional powers. In addition, new specialized courts and Islamic rules will maintain the main concepts to govern individuals and other aspects according to the limitations of the constitution.

Article 50:

*The King, or whoever deputizes for him, is responsible for the implementation of judicial rulings.*

This article underlies the position of this study that the separation of powers in Saudi Arabia is not clear. If for instance, a series of controversial judgments are issued against the state, it would appear that implementation will not occur automatically but will depend on whether the King or whoever deputizes for him are desirous of going ahead despite their contrary view and ordering implementation. Where the issue turns upon hundreds of millions of dollars investors may not be confident that rational and impartial implementation would still proceed. The possibilities of this doubt have already been demonstrated by the *Aramco case* discussed in earlier chapters. It is, therefore, necessary to enhance further the separation of powers and the rule of law by tinkering with the constitutional order to shore up a separate judiciary.
Article 53:

*The law establishes the seniority of the tribunal of complaints and its prerogatives.*

This article seems formless as it uses the law as the method of interpretation. There is a need to firstly to decide which law governs what. Where is the expert who will be in charge of such interpretations? Within state’s departments there is the ‘Expertise Committee’. This is a committee having mainly recommendatory functions. It is not a specified court of constitutional affairs. Moreover, it is not independent and it has no supremacy above the other courts.

Article 55:

*The King carries out the policy of the nation, a legitimate policy in accordance with the provisions of Islam; the King oversees the implementation of the Islamic Shari’ah, the system of authorities, the state’s general policies; and the protection and defence of the country.*

This article must include two more aspects: national interests and the state’s welfare. The sacredness of the supremacy of the constitutional court and the independence of other authorities, while the King maintains the last word in anything related to the state’s international affairs, security, and economic issues, because these elements are within the state’s protection and defence.

Article 62:

*If there is a danger threatening the safety of the Kingdom or its territorial integrity, or the security of its people and its interests, or which impedes the functioning of the state institutions, the King may take urgent measures in order to deal with this danger. And if the King considers that these measures should continue, he may then implement the necessary regulations to this end.*

This article is well written in that it provides the King with the authority to supersede any other power in the country and to apply the applicable laws or functions to
maintain state sovereignty and welfare. It is argued that the state will be under economic danger in the long-term if it maintains its reliance on one source of income i.e. oil. The state needs more investments and investors to flourish the local economy and to diversify the Kingdoms' economy from oil.\textsuperscript{577} The state must, therefore, do more to stand out within the region and indeed internationally as a safe destination for investment not only in the field of oil and gas but other areas as well.

It is however argued here that this provision does not mean that disapproval of government's actions or mere political dissent is the same as "threatening the safety of the Kingdom or its territorial integrity". As argued extensively above in Chapter 4 there is an emerging right of democratisation and respect for human rights which while it does not mean that every demand must be met with approval does guarantee that there is more scope for dissent.\textsuperscript{578} It can be argued that Saudis' recent scandal with regard to the academic reformists and their jail sentences raised many questions about the Kingdoms commitment to its own constitutional commitments and in relation to its conformity to democratic reforms.\textsuperscript{579} In other countries, such actions would lead to a huge debate about legality. The high court dictates and indicates the right to supersede fundamental rights granted via the constitution. However, who gives this power to do so, and who passes this power to the judge to act on King's behalf? It can

\textsuperscript{577} American Congress Committee sessions about the Chinese bid to buy the American oil company and their scenarios for the Oil productions and consuming in the long-terms and how they see Saudi Arabia as their target. C-SPAN 14 July 2005.
\textsuperscript{578} See above 4.3. Globalization, Liberal Democracy and Right to Democratic Development of the Saudi people. See also Sen.op.cit., p. 1-5;
\textsuperscript{579} Amnesty International, Saudi Arabia: Lengthy Sentences for Reformists a Worrying Development, 23 November 2011, available at: http://www.unhcr.org/refworld/docid/4ecf3bd82.html accessed 19 March 2012. The nine academics were arrested in February 2007: Dr Saud al-Hashimi - 30 years' imprisonment, 30 years' travel ban following release and a fine of 2 million riyals (approximately US$534,000); Abdul Aziz al-Kharji - 22 years' imprisonment, 20 years' travel ban following release and a fine of 1 million riyals (approximately US$267,000); Dr Musa al-Qimri - 20 years' imprisonment and 20 years' travel ban following release; Dr Sullaman al-Rashudi - 15 years' imprisonment and 15 years' travel ban following release; Abdul Rahman Khan - 20 years' imprisonment and 20 years' travel ban following release; Essam Basravi - 10 years' imprisonment and 10 years' travel ban following release; Saif al-Din al-Sharif - 10 years' imprisonment and 10 years' travel ban following release; Fahd al-Qurshi - 10 years' imprisonment and 10 years' travel ban following release; Abdul Rahman al-Shumayri - 10 years' imprisonment and 10 years' travel ban following release. The other seven: Waleed al-Amri - 25 years' imprisonment and 25 years' travel ban following release; Abdullah al-Rifa'i (Syrian national) - 15 years' imprisonment and deportation to Syria following release; Ali al-Qimri - 10 years' imprisonment and 10 years' travel ban following release; Mutassem Mukhtar - 10 years' imprisonment and 10 years' travel ban following release; Ridat al-Majayshi - eight years' imprisonment and eight years' travel ban following release; Khaled al-'Abassi - eight years' imprisonment and eight years' travel ban following release; Saleh al-Rashidi (Yemeni national) - five years' imprisonment and deportation to Yemen following release.
be observed that the court itself may have committed an unconstitutional act. If the Saudi judges had properly directed themselves, they ought to have refused such cases as falling outside their jurisdiction.⁵⁸⁰ Even more recently Saudi reformists continue to be jailed under circumstances raising doubts about the fairness of the Saudi judicial system.⁵⁸¹

There are, thus, obviously some worrying developments in Saudi Arabia which clearly are not in conformity with its important status as a major political and economic force in the region. The income from its vast oil resources has primarily funded its strong influence, and the Kingdom has, in turn, sponsored poorer developing Arab nations. What remains is for the Kingdom to offer clear moral leadership by applying its own constitution in a way that avoids oppression of dissenting voices. Furthermore, such leadership will only improve its Islamic influence the broader Muslim world. It will also improve its standing as a safe economic jurisdiction for investment. The future of economic security in Saudi Arabia depends upon its ability to grapple with some of the reforms discussed above. These include changes to its political, educational, administrative, social, and legal sectors.

Article 68 [Consultative Council]:

_A Consultative Council is to be created. Its statute will specify how it is formed, how it exercises its powers and how its members are selected._

The Majlis al-Shura, or Consultative Council, is a legislative body that advises the King on issues that are important to Saudi Arabia. It is a modern version of a traditional Islamic concept—an accessible leader consulting with learned and experienced citizens—which has always been practiced by Saudi rulers. The

⁵⁸⁰ Human Rights Watch, "Saudi Arabia: Court Confirms Jail for Reformers Royal Pardon Needed to Free Constitutional Monarchy Advocates" July 27, 2005. Available at http://www.hrw.org/news/2005/07/26/saudi-arabia-court-confirms-jail-reformers accessed 3 March 2012. This is one of our constitutional errors and it is carried out by religious clerics. In other words these three academics practiced their rights via the Saudi constitution see, Articles 29, 43. However the court went against Articles 38-39 and imprisoned them without any indication of the legal breach or unlawful actions.

Consultative Council currently consists of 150 members appointed by the King for a four-year renewable term. Based on their experience, members are assigned to committees. There are 12 committees that deal with human rights, education, culture, information, health and social affairs, services and public utilities, foreign affairs, security, administration, Islamic affairs, economy and industry, and finance.\textsuperscript{582}

Originally the Consultative Council was restricted to discussion of regulations and issues of national and public interest, but the mandate of Majlis Al-Shura was broadened in 2004 to include proposing new legislation and amending existing laws without prior submission to the King. This of course is a commendable step and perhaps the inclusion on April 7, 2003 of the Majlis Al-Shura as a full member of the Inter-Parliamentary Union symbolically marks the maturing of the Council as a modern legislative chamber.

Despite these changes there is still much scope for improvement. This article can be improved via the inclusion of extra consultative councils, which would provide the state with adequate counsel and transparency to the people. It is suggested that a state the size of Saudi Arabia both in size and population cannot meaningfully be legislatively covered by only 150 people in one chamber of this sort. The UK for instance, has a bicameral legislature and there are more members in the houses of parliament than the Saudi Kingdom. In essence even more members are recommended for inclusion into the Royal Family Council; the Consultative Council and the Municipal Councils.

Article 70:

\emph{International treaties, agreements, regulations and concessions are approved and amended by Royal decree.}

This article makes it very clear that in anything related to the state's development projects, the King must approve the economic aspects. In Article 62, the King

\footnote{Royal Embassy of Saudi Arabia Washington DC., "Majlis Al-Shura (Consultative Council)" available at http://www.saudiembassy.net/about/country-information/government/Majlis_al_shura.aspx accessed 17 March 2012.}
maintains the same powers and they are within his command. Therefore, it is questioned where the religious clerics are getting their power in this case?

8.2.2: Critical Analysis to the Saudi FDI

Foreign direct investment (FDI) or inflow of foreign capital to a country to promote economic growth to the benefit of foreigners and the national economy is a hot topic in developing countries. The Saudi Arabian government has sent some strong signals that it welcomes such an inflow by establishing an empowered entity the Saudi Arabian General Investment Authority (SAGIA) to spearhead the FDI efforts.

Saudi Arabia is in a fortunate position whereby its political stability is an asset both in the Kingdom and abroad. One of the impact of reforms is the size of liquidity surpluses generated by the most recent initial public offerings of shares on the Saudi stock market illustrate this; the routine over subscriptions of new listings in the multiples of 40 or 50 occur nowhere else in the world. As such, questions concerning foreign direct investment into Saudi Arabia have to be discussed in terms of what is the right legal reform would bring to the Kingdom what it is currently missing.

The advantages associated with foreign direct investment for the Kingdom are many. Firstly, foreign investments into a country are assumed to lead to higher productivity and labour standards through the demonstration effect of foreign multinationals in the way they manage advanced production processes and systems. Domestic companies benefit from modern know-how and technological transfer, as well as the creation of a pool of a domestic skilled labour force that foreign companies have trained, and who could be employed in domestic companies. Such advanced knowledge depends on the

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development of the legal system\textsuperscript{584}

Secondly, FDI in a country's infrastructure will not lead to banking or debt crisis compared with financing lending from abroad such as happened with many Latin American countries that saw inward flows of capital, not in projects, but to government lending. Some economies become so dependent on foreign loans that it takes decades to remove the debt servicing obligations and gain better borrowing credit ratings.

Thirdly, unlike international loans, part of the profits of the FDI is reinvested in the country of investment, which leads to further growth in project investments. In additions if we apply the income tax criteria then the local economy will flourish and the government budget will be able to focus on advanced reforms in the future.\textsuperscript{585}

The disadvantages of FDI should not be overlooked. The first disadvantage is that successful foreign operations could drive domestic competitors out of the market and this might be the case with sophisticated financial services. Secondly, if the FDI sector is large enough and they borrow from domestic banks to expand, their action could drive borrowing rates up causing problems to domestic operations. Again, if the FDI sector is large in a country, this could cause balance of payments problems for the domestic economy with large profits being repatriated by the foreign companies. Finally, one of the major criticisms of FDI is that they could concentrate on a narrow base of investment in the economy, which could benefit a small section of the population, or concentrate in special economic enclaves such as mining or other natural resources extraction.\textsuperscript{586}

It is however necessary to point out that all the above are sensible possibilities but there are sceptical views as well which must be considered Prakash Loungani and Assaf Razin offer a critical view stating:

\textsuperscript{585} Ibid.
The resilience of foreign direct investment during financial crises may lead many developing countries to regard it as the private capital inflow of choice. Although there is substantial evidence that such investment benefits host countries, they should assess its potential impact carefully and realistically...Despite the evidence presented in recent studies, other work indicates that developing countries should be cautious about taking too uncritical an attitude toward the benefits of FDI. 587

Fortunately for Saudi Arabia, some of these potential negatives of FDI are minimized as the oil sector is in state control, and most mineral activity is through joint ventures. While there is some concentration of foreign investments in petrochemical industries, foreign participation is also evident in many sectors, and the Saudi financial services sector does not seem unduly worried at the opening up of this lucrative market to FDI, post the Saudi WTO entry. FDI has forced Saudi financial institutions to become more competitive and identify core niche areas such as Islamic financing to compete with foreign institutions. The major FDI benefit that the Kingdom has acquired is to be considered in terms of the transfer of technology and management expertise, rather than capital inflows.

The emphasis on technology transfer has been recently emphasized in the Saudi government's invitation for foreign investment participation in the Kingdom, coupled with parallel initiatives to ensure a more transparent administrative, judicial and regulatory regime. SAGIA must also do more to listen to the feedback that foreign firms give about existing obstacles to doing business in Saudi Arabia. Other government agencies and bureaucracies must attempt to adapt to the needs of FDI if the Kingdom is to remain competitive.

Furthermore, targeted reforms of specific statutes are also desirable. The Saudi Arabian Foreign Investment Act arguably needs some re-examination.

(a) Article 1, ought to provide in the clearer and more accurate definitions of several terms and expressions.

(b) In all the Articles making up the body of the Act the search for brevity has exacerbated the likelihood of misinterpretation and misconstruction. In the case of acts of government the more detailed the clauses and articles making up the body of the act the better for the understanding of both native and foreign lawyers in the interpretation of any function of the act. Article 16, having considerable bearing on foreign investors currently extant, should have been the subject of greater explanation and more concise wording.

(c) Article 17, does not allow for pre-advice of such Regulations as are envisaged and therefore may cause difficulty in enforcement as the Rules come into full force and effect upon the date of publication. In many jurisdictions a grace period of several days or weeks and allowed in order that the effect of the Rule as published does not cause hardship to law abiding investors.

(d) Under the Executive Rules of the Foreign Investments Act, there seem to be several contradictions or conflicts within the body of the text.

(e) The point in Article 5, beginning “Prohibition and ending at “compensation” is vague and inexplicit in that the court’s ability to issue confiscation orders is not specified and no definition of public interest or any suggestion of detailed calculation of “fair compensation” is provided.

(f) In Article 6, in the paragraph commencing “The intended” and ending with “Production processes” the very breadth of suggested legal acceptance of the Laws of Saudi Arabia being equal to those of the United States of America or the European Union would lead to the almost impossible determination of right as the potential conflict of laws would lead to interminable litigation. The Laws of the United States are not defined; does the paragraph mean the Federal Uniform Commercial Code or the laws of the various States
making up the Union? When dealing with the laws of the European Union, is the intention to refer only to those laws current as accepted by all member states or to each member's trade and financial laws? The "standards and specification" would lead to many disparate determinations of "usual and acceptable trade practices" as each nation has developed such practices over the centuries and according to the professional or trade bodies which make up the commercial/industrial framework of that particular nation.

(g) In the paragraph beginning "The Foreign" and ending "The Act" there is no definition of "substantial" which would, again, cause considerable room for argument. The last sentence of this Article is open to very many interpretations and, as such, should be redrafted to preclude the ambiguity.

Without entering into a lengthy examination of the rest of the Executive Rules, it will be seen that the Act was drafted in a manner which leaves very considerable scope for litigation and was drafted, as was usual in the past, with the major interpretation left to such governmental authorities, as are or would be, from time to time, in power. This being only one example of current law in need of revision it will be the task of future generations to make certain that laws are drafted in accordance with international best practice and not drafted in outline and left to the determination of ministers of judges without proper guidance within the laws themselves.

There are several examples on which to draw in the modernization of laws in Middle Eastern nations, as some have already taken advantage of internationally renowned legal draftsmen and specialists in trade, financial and commercial law. These have been retained as advisers to governments and have achieved great success in formulation laws, regulations, and operating instructions for newly created stock exchanges and investment programs.
8.3. The new rights and opportunities for foreign investors to own property in Saudi Arabia

As Saudi Arabia grew, its reliance upon its investors diminished. Again, this is most graphically evidenced by the privatisation of ARAMCO and the introduction of rules and laws in relation to the way that foreign companies and investors conducted their business within Saudi Arabia. As Saudi Arabia becomes more familiar and efficient at the exploiting its own national resources, so it comes to rely on the American expertise in its partnership with ARAMCO brought to bear on the development plan. Like a child learning to walk, it was not long before the Saudi authorities decided that they no longer needed the stabilizing, guiding hand of the United States and broke away from the partnership. What started as a slow implementation of increased taxation was that the Saudi authorities echoed similar moves that were being made around the world by other oil producing countries and effected an enforced nationalization of ARAMCO, bringing it entirely under the wing of the Saudi authorities, or more precisely, the Saudi people.

While this was of undoubted benefit to the Saudi authorities, and the nation as a whole, it had negative and far-reaching effects on foreign investment in Saudi Arabia. What incentive is there to make a substantial capital investment in a country that would, arguably, breach agreements and contracts and potentially nationalize a company as it saw fit? These are not the rules of capitalism that the rest of the world was playing with, if such a situation were to arise how any dispute would be determined? The system of Shari’ah law with Saudi Arabia does not did lend itself to the determination of such conflicts and has not evolved in the way that many of the other legal systems around the world have done. To many outside the faith of Islam the findings of the Shari’ah courts would be seen as alien to that which may previously have been deemed common sense. In this sense the Saudi Arabian authorities still has a lot of work to do in providing a transparent and consistent legal framework for the resolution of commercial disputes.
Saudi Arabia has now grown to be a key player within the world economy and that growth has meant that has to adapt to occupy a new place in a global economy. In an effort to adapt it has to review its policy toward foreign investment and become more of an attractive package to foreign investment. The Saudi authorities are now actively encouraging foreign investment and implementing systems that go towards offering foreign investors inducements, or at least relaxing those restrictive rules that, until recently, were particularly onerous on incoming capital investors. One the most dramatic ways in which this is being affected is through the introduction of capital market and insurance company control laws. The authorities also revised and reduced the taxes that had been previously levied on foreign owned capital. These measures have, together, provided for a more attractive climate for foreign investors and helped to reduce the economic reliance on the petrochemical industry.

The steps that Saudi Arabia is taking toward embracing its commercial potential and actively developing alternative revenue streams to the petrochemical industry are illustrated in the adoption of new laws. At the heart of these new laws is the desire to encourage foreign investment in the Kingdom.

In April 2000, King Fahd passed a royal decree approving the Foreign Investment Law, which changed the manner in which the Kingdom managed foreign investment. Before the King issues his royal decree, the law must be approved by the Council of Ministers who also approved the formation of the General Investment Commission. The General Investment Commission is the body that oversees and is responsible for introducing authority’s policy to encourage foreign investment within the Kingdom. They are also the organization that issues investment licenses to foreign investors.

The Foreign Investment Law updates previous legislation and is a major step toward global commercial integration. Perhaps the most significant is that it allows foreigners to own 100 percent of their businesses that are located in Saudi Arabia. There are also provisions for foreigners to own real estate in the Kingdom so that they have the means to own the property that their business functions in and that they, or their

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employees, live in. They are also able to enjoy significant incentives and subsidies that were previously only available to Saudi companies, or those companies that were majority Saudi owned. One of the biggest incentives is the availability of access to loans from the Saudi Industrial Development Fund. As well as providing financial incentive and subsidy in the form of favourable authority’s loans, the Foreign Investment Law also allows for a significant reduction in the corporate tax rate. Previously the rate of corporation tax had been set at 45 percent on profits over SR,590100.000, the Foreign Investment Law reduced that to a rate of 30 percent. In addition, foreign companies were now allowed to carry forward corporate losses for an unspecified amount of years.\(^{591}\)

It is perhaps worthy exercise to compare the Saudi legal regime described immediately above to that of the UAE. There are similarities such as the 100% foreign ownership but the UAE has more attractive features for investors across many grounds. For instance, in contrast with the Saudi situation there are no corporate or personal income taxes and there are Low tariffs (around 5% for virtually all goods) and there are no minimum capital investment requirements. There are no restrictions on repatriation of profits or capital and excellent infrastructure, support services, and communications. This is one area which Saudi Arabia although improving cannot as of present match the UAE. There are also at least 40 double taxation agreements and at least 30 bilateral investment treaties. Access to the UAE also creates an opportunity to penetrate fast growing neighbouring markets.\(^{592}\)

Indeed it is fair to say that there is quite disparate approach taken by the states in the region. Some are arguably more responsive and others perhaps lagging behind. While Saudi Arabia may lag behind the UAE’s attractions across many areas of investment it does come ahead of others as well. Hence a writer noted.

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590 Saudi Riyals
...analysis of the legislation, legal doctrines and policies of Saudi Arabia, UAE, Qatar, Bahrain and Oman shows that all of these countries made an outstanding progress in liberalizing foreign investment regulation. Thus, national treatment of foreign investment was established, 100 percent foreign ownership was allowed, negative lists have been reduced, contribution restrictions have been eased, etc. Further liberalization is expected due to the worldwide processes of globalization and integration as well as requirements that might be imposed by WTO.593

In Saudi Arabia it has been the job of the General Investment Council to implement these changes and encourage their adoption by foreign investors. In improving the efficiency of this process, the General Investment Council have made the process by which foreign companies apply for their investment license much easier and quicker. The Council must deal with all licence applications within a 30-day period and, in the event that the application is declined, there is now a right of appeal against the refusal. The Saudi Arabian General Investment Authority (SAGIA) later updated this rule.594 The majority of these changes are intended to make the provisions of the Law to be more business friendly by providing more flexibility to foreign investors and bringing the ability to obtain legal redress, with particular reference to property ownership, in line with that enjoyed by Saudi nationals. A further change is adopted when the Shoura Council approves a decision to reduce the tax payable on the profits generated by foreign companies from 45 percent to a maximum of 25 percent.

In tandem with the Foreign Investment Law, April 2000 saw the introduction of the Saudi Arabian General Investment Authority (SAGIA) by the Council of Ministers. The aim of SAGIA is to promote, and provide information to foreign investors about foreign investment in the kingdom. SAGIA assist in the formulation of authority’s policies in relation to investment activity and opportunity, they comment and advise on future authorities policy and initiative in an effort to make the Kingdom more attractive for foreign investment. As part of their remit SAGIA will review and evaluate investment proposals, and ultimately license them. SAGIA provides the licenses necessary for foreign investors as well as ancillary support services. The

program is designed to offer advice and assistance in regarding overseas investors, and to ensure that they have access to the correct advice necessary to ensure compliance with authorities regulations and to ensure that SAGIA set up an Investor’s Service Centre (ISC) to provide licenses to foreign companies, provide support services to investment projects, offer detailed information on the investment process, and coordinate with authorities ministries in order to facilitate investment procedures. The ISC must decide to grant or refuse a license within 30 days of receiving the application and supporting documentation from the investor. However, in 2010, Saudi Arabia was listed as one of the top 10 most competitive economies.\textsuperscript{595}

Of these, 1,686 projects are valued at $10.5 billion and are 100 percent foreign-owned.\textsuperscript{596} Unfortunately, to date SAGIA does not appear to have lived up to the high expectations engendered by its creation. Investors complain that impediments remain, many of which are outside SAGIA’s capability to correct. SAGIA is, however, trying to make it easier for businesspeople to visit the Kingdom and is able to provide sponsorship for visa requests directly without having to ask a local company to sponsor such visits.

Areas of continuing concern to investors include the 1996 regulation requiring each company employing over 20 workers to include a minimum of five percent Saudi nationals. This number increases by five percent per annum, and has now reached 40 percent of a firm’s workforce. Companies not complying with the Saudi minimum personnel rule will not be given visas for expatriate workers. Few firms have been able to meet these requirements. Foreign firms are under constant pressure to employ more Saudis.\textsuperscript{597} The list of jobs/positions that may no longer be held by non-Saudis is expanding. Investors are not currently required to purchase from local sources or export a certain percentage of output and their access to foreign exchange is unlimited. There is no requirement that a share of foreign equity be reduced over time. The authorities do not impose conditions on investment such as locating in a specific geographic area, a specific percentage of local content or local equity,

\textsuperscript{596}Ibid., SAGIA reports are available at www.sagia.gov.sa.
\textsuperscript{597}See the new royal decree A/121 7/2/1432H. Available in Arabic at: http://www.saudigov.sa/wps/portal/lut/p/c4/04_SB8K8xLLM9MSSzPzPy8xBz9CP0os3iTMGenYE8TiWN3X0cLA8_q4JDAwEB3Q3djU_3gxCL9gmxHRQB7Zmod/ accessed 3 March 2012.
substitution for imports, export requirements or targets, or financing only by local sources. Investors are not, however, required to disclose proprietary information to the Saudi authorities as part of the regulatory approval process.

Local companies that sponsor visiting businesspeople need to have the Saudi Chamber of Commerce authenticate the sponsor letter prior to the visa being granted. SAGIA opened a Women’s Investment Centre in Spring 2003. In February 2001, SAGIA developed a negative list of sectors off-limits to foreign investment. The sectors currently closed to foreign investment include three manufacturing categories and 16 service industries. The list includes real estate investment in Mecca and Medina, some sub sectors in printing and publishing, some sub sectors of telecommunications, audio-visual and media services, distribution services in wholesale and retail trade, land and air transportation services, fisheries and toxic centres, blood banks, and quarantines. Although these sectors are off-limits to 100 percent foreign investment, foreign minority ownership in joint ventures with Saudi partners may be allowed in some sectors.

Insurance and telecommunications sectors were opened to foreign investors in 2004. Other authoritative bodies, such as the Royal Commission for Jubail and Yanbu, and the Riyadh Development Authority, have also been active in promoting opportunities in Saudi Arabia’s industrial cities and other regions. In addition to the majority authorities-owned Saudi Arabian Basic Industries Corporation (SABIC), private investment companies, such as the National Industrialization Company, the Saudi Venture Capital Group, and the Saudi Industrial Development Company have also become increasingly active in project development and in seeking out foreign joint venture partners.

The Saudi Industrial Development Fund (SIDF) is an important source of financing for investors. SIDF is a development finance institution affiliated with the Ministry of Finance. The main objective of SIDF is to support the development of the private

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598 See ibid. Saudi Arabian General Investment Authority (SAGIA) is the prime facilitator of the KAEC development. Established by Royal decree in 2000, it is the Saudi government body responsible for promoting investments in the Kingdom and providing ‘One Stop Shop’ services to the investors. SAGIA’s ‘10 X 10’ and ‘20 X 20’ initiatives focus on raising Saudi Arabia’s living standards and achieving rapid, sustainable economic growth within the Kingdom.
industrial sector by extending medium to long-term loans for the establishment of new factories and the expansion, upgrading and modernization of existing ones. Foreign investors are eligible to receive low cost financing for up to 50 percent of project costs (i.e., fixed assets, pre-operating expenses and start-up working capital). Loans are provided for a maximum term of 15 years with repayment schedules designed to match projected cash flows for the project in question.

8.4. Legal Protections Available to Overseas Property Owners

In a further attempt to encourage and embrace foreign investment in the Kingdom, the Saudi Arabian authorities introduced the Real Estate Law seven months after the Foreign Investment Law is implemented. Both laws complement each other and can be seen to provide a solid base for inward foreign investment. The Real Estate Law is perhaps the most radical, in as much as it makes provision for foreigners to establish interests (i.e. property ownership) within the Kingdom that had previously been unavailable. The law entitled, and devised a means by which, non-Saudis could own property within the Kingdom. There are caveats, such as the property must be the private residence of an individual applicant and permission must be received from the Interior Ministry. Businesses can also benefit from the new law. A business may purchase property to house their business in or to house its workers and owners. There is also provision for developers or landowners to rent out their property in an effort to encourage long-term investment in the Kingdom. It is also hoped that major companies and industry will be enticed into Saudi Arabia.

The Real Estate Law consists of eight articles, which are summarized as follows:

Article 1:

Non-Saudi investors, either persons or companies, may own the required real estate for their licensed businesses provided the approval of the licensing authority is obtained. This includes property for personal residences and workman’s housing. The property may also be leased to other entities.

If the concerned license allows for the purchase of real estate or land for construction, investment, and sale or leasing, the total cost of the project, both land and construction will not be less than SR 30million. The investment will have to be carried out within the first five years of ownership.
Article 2:

Non-Saudi expatriates enjoying normal legal residence status in Saudi Arabia may own real estate for housing purposes, provided they acquire a license from the Ministry of Interior.

Article 3:

Foreign accredited Missions in the Kingdom may, on the basis of reciprocity, own the property where the Chancery and the official residence are based. International and regional organizations may also own property where their headquarters are based within the limits of the agreements that govern their operations. A licence from the Minister of Foreign Affairs is conditional in this case.

Article 4:

With the exception of inheritances, non-Saudis may not own real estate in Mecca or Medina unless the estate is endowed to a particular Saudi institution in accordance with the regulations of Shari’ah. However, non-Saudi may lease property in Mecca and Medina for a two-year renewable period.

Article 5:

The enforcement of these regulations will not override the following:

(a) Property ownership privileges acquired by citizens of GCC countries by virtue of GCC Ownership Regulations;
(b) Acquisition of ownership rights in terms of property by inheritance;
(c) Regulations, cabinet resolutions and royal decree prohibiting real estate ownership in certain locations.

Article 6:

The Notary Public and any other competent agencies are hereby prohibited from notarising any transfer or transaction that is not consistent with the provisions of these regulations.

Article 7:

Implementation of the provision of these regulations shall not prejudice the following:

(a) Ownership rights acquired by Non-Saudis under previous regulations. The provision of these regulations, upon their validation, shall be applied when ownership of the real estate is transferred;
(b) Privileges granted by the rules governing real estate ownership in the Arab Gulf Cooperation Council (GCC) states;
(c) Regulations, Cabinet Resolutions and Royal Decrees that prohibit real estate ownership in certain locations.
Article 8:
(a) These Regulations supersede the Regulations on Ownership of Real Estate by Non-Saudis in the Kingdom of Saudi Arabia issued by Royal Decree No. M/22 dated 12/7/1390H.
(b) These Regulations shall be published in the official gazette and shall become effective ninety (90) days following the date of their publication.

The success of these laws is evidenced by the current boom in building and development in the Kingdom and has pushed real estate to the forefront of the Saudi economy. Real estate is now the fastest growing commercial sector in Saudi Arabia and has drawn in over SR 1 trillion in investment. Furthermore, the exponential growth of real estate in Saudi Arabia is said to be second highest only to that of Shanghai. Despite the adverse changes due to the global recession Saudi Arabia property investments still bring in highly profitable yield and the domestic property market is still booming. This development takes the shape of shopping malls, opulent hotels, and shimmering office blocks and complexes. This is particularly so in the economic cities referred to in earlier chapters.

The Saudi Arabian construction industry is second only to the oil industry in terms of economic size and is estimated to have contributed over $15 billion to the Saudi national economy in the last year. This is not only due to foreign investors. Higher than expected oil profits have enabled the authorities to increase their budgetary spending on schools, hospitals, colleges, and other municipal buildings. Also, events post 9/11 have meant that Saudi Arabians are actively repatriating their funds, feeling that Western countries, in particular, are hostile and are no longer comfortable places to have funds invested or otherwise tied up.

This situation indeed comes in contrast with the trend explained earlier about leading western states expressly courting Saudi Arabian business and sovereign funds to

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600 Solaiman Al-Mayad, chairman of the Tanniyat Group told a symposium in early 2005 that the growth of real estate “is considered the second highest in the world after Shanghai”. The Saudi based Tanniyat Group are among the heaviest players in the burgeoning real estate game. In 2004 they joined the Gulf Finance House and backed $3.8 billion Legends Dubai land project last year as strategic investors, underwriting 40% of the $302 million private placement flotation for the project’s first phase – Financial Times business 14 August 2005.
invest in western industry. Although Western nations worry about the security implications of foreign countries, including Persian Gulf states, acquiring important positions in key industries and companies they are still in dire need of the oil money that is found in some Middle East states like Saudi Arabia. It is in this light that Western states need to realise that there is some reverse logic that they also must remain diplomatic and cautious with states like Saudi Arabia. There of course again is the fact that Saudi money and the money of other rich Gulf States may be spent elsewhere in the developing world as well. Hence experts advise:

With cash flows growing rapidly, it is neither prudent nor desirable for SWFs to invest entirely in safe, fixed-income assets such as U.S. Treasury bonds or even in individual, publicly-listed companies. Many SWFs have shifted toward a 2005 recommendation, made by an international consulting firm to the Kuwait Investment Authority, that it "decrease the fund's allocations to the traditional asset classes (such as publicly-listed equities and bonds) and increase the allocation into non-traditional and uncorrelated asset classes (such as alternative investments, private equities, and real estate)." In practice, this has led the Kuwaitis and others to shift investment targets from slow-growth economies like the United States, Great Britain, and Germany to rapidly-growing economies—namely, China, India, South Korea, and Turkey.

8.5. Conclusion

Development and constitutional reform are inextricably linked phenomena. This connection is not usually made in law but remains true to the extent that business will only go to countries with a stable social order. A stable social and legal order is, however, dependent on deep seated constitutional reform which will make further and more dramatic economic success possible. The Saudi legal system will also continue to attract suspicion and non-acceptability unless it transforms from a strictly monarchical system to a more stable representative democracy based upon the rule of law and respect for human rights. The connection between constitutional reform and economic success is therefore undeniable.

604 The former EU trade commissioner Peter Mendelsohn at a stage talked about "Europe's interest in maintaining control over important and politically sensitive key industries could be achieved via the instrument of the golden share," a mechanism that gives the holder veto rights in certain circumstances and can be used to protect a company from any takeover deemed to endanger national security.
605 Cited in Raphaeli and Gersten, op.cit. p. 52.
Despite welcoming foreign investment, in the real estate sector there are still ancillary measures that must be taken in order to make the package more attractive to foreign investors. At present, the Saudi legal system, or means for dispute resolution, is skewed in favour of Saudi interests - and unless there is a sizeable incentive for investors this could be seen as reason not delay investing in Saudi real estate.

Authorities such as SAGIA cannot fully utilise their potentials under the rule of law if the Judiciary continues to be perceived by the investment community as biased. Apart from political reforms towards better adjustments to the rule of law and democratic rule reforms in specific sectors such as intellectual property, and property markets law are recommended. The changes the Saudi authorities are making in an effort to enter the global marketplace, are tangible - and the protection of inward investors is evidently being addressed. How far this is able to develop within the strict regime and adherence to Shari'ah remains to be seen; but it will be a course of development eagerly watched by potential investors around the world.

The Saudi authorities seem to have taken a more 'correct' approach since 2000, by adopting and enforcing new laws that affect the constitutional order. The current developments have given a clear indication that the modern monarchy system is in need of further important legal review and guidance. The current constitutional reforms under the new Royal Family Council (Nezam AL-Bai'ah) are unique in that changes affect even the monarchy itself. For example, ideas being actively considered include the options of voting to appoint the king. Such a change will be groundbreaking but highly welcome.

Some argue that such reforms are a constitutional crisis; yet in reality, it is the opposite. Saudi Arabia needs more constitutional reforms in every field, starting with educational, judicial, legal, trade, and political appointments. This means that the decision to choose the future ruler of the Kingdom will no longer be in the hands of one person alone - the King - but a group of princes. Under the title "Thanks to a Humane King," the Saudi writer Turki al-Hamad writes in Al-Sharq Al-Awsat "for the first time in the history of Saudi Arabia, the head of the state has given up some of
his powers... for the sake of stability.\textsuperscript{606} The changes will go some way toward satisfying those who have long feared internecine disputes within the royal family that could trigger a major constitutional crisis. Crucially, in a royal family with several thousand princes, the law does not specify how many will be on the new commission, and that leaves the door open for future disputes. For Saudi reformers, the new law will likely be seen as nothing more than tinkering with a system they already consider deeply autocratic and which concentrates power within the royal family.

If Saudi authorities and stakeholders maintain such approaches, a new era of transparency and rule of law can flourish and give a clear indication to the international society of remarkable development; this would in turn encourage and boost the country's economic progress.

The current King seems motivated and confident of the partnership between the public and private sectors in order to support the nation's development and reforms. This perspective is the correct approach in which to invest in the new generation. Therefore, it can be asserted that Saudi scholars should work together to create new entities and research centres locally and globally in order to become an effective partner in the global economy. This could channel revenues to the Saudi local economy and reduce the pressure on the depleting natural resources.

Liberal minded scholars particularly in the younger generation must make themselves formidable through rigorous scholarship and they must be willing to make courageous contributions to national debates. Recently Ten Saudi scholars described as moderate took the courageous step of forming the kingdom's first political party and have asked the king for recognition.\textsuperscript{607} It is unlikely that this particular effort may succeed. It is, however, necessary to recommend that moderate activists and civil society must organise themselves into think-tanks and strategic studies institutes. Such institutions will provide legal, environmental and energy research facilities, focussing on the most recent trends within these fields.


Ultimately the demand for constitutional reforms will not succeed if the current Saudi authorities do not wish to move forward with more reforms starting with the constitutional field and seek to move towards globally recognised principles of democratisation, the rule of law and modernisation. The Saudi authorities cannot become prisoners to old traditions and impractical rules of law.

To conclude, the entire country must be carried along with the reforms and the entire country must be run with greater transparency. The rule of law must be encouraged and civil society must be given greater scope of operation. NGOs and the private sectors will help to lift the veil of ignorance and move the country towards much needed economic and social progress.
Chapter 9: GENERAL CONCLUSION

One of the most devout and insular countries in the Middle East, Saudi Arabia has emerged from being an underdeveloped desert kingdom to become one of the wealthiest nations in the region thanks to vast oil resources. But its rulers face the delicate task of responding to pressure for reform while combating a growing problem of extremist violence. 608

The above quote is quite apt in summing up the essence of the land of challenges and opportunities that is the Kingdom of Saudi Arabia. Saudi Arabia is the birthplace of Islam and home to Islam's two holiest shrines in Mecca and Medina. The king's official title as the Custodian of the Two Holy Mosques is indicative of the importance that the country has in the region and to the larger Islamic world. Saudi Arabia is also already an important investment destination in the Middle East and it is impressively high in recent World Bank's investment league table. The Kingdom is also an important diplomatic and political player in the GCC, the League of Arab States, OIC, OPEC and the United Nations among other intergovernmental organisations. The country has a unique opportunity as a result of its extensive oil and gas resources to lift its population out of poverty and to enjoy the full potential of its oil wealth. It is, however, clear that to achieve much greater successes and faster development that is commensurate to its potentials and natural resources, the country must address itself, to far ranging reforms of a legal, political, sociological and economic nature. A massive socio-legal and socio-economic reform that is aimed at sustaining current growth and achievement even more successes is required. To do this Saudi foreign direct investment laws must examine developments in the field at the global level and particularly the fate of other comparative developing state.

Saudi Arabia's effort to develop and to participate meaningfully in the world of trade and economic relations must be based on a thorough understanding of its traditions,

culture and its special Islamic inheritance. Thus the test of compatibility with Islamic principles and doctrines is a prerequisite of any longstanding reform. Islamic law is, fortunately compatible with progressive legal ideas and is accepting of change that is geared at lifting populations out of the danger of poverty. The major schools of Islam considered in this thesis are all compatible with the idea of legal reform. The predominant Wahabbi School in the Kingdom is comfortable with the idea of legal reform on many issues from property rights to rights of extraction and sale of natural resources. Islamic law also can clearly cope with complex jurisprudential concepts and issues and foreign direct investment.

Ownership is a critical incentive for engaging in economic activity, is also recognised as a concept in Islamic law. Indeed with regard to ownership of natural resources of a people or country, all four major schools of Islamic jurisprudence agree to the same fundamental principles which proceed from the premise that there is a possibility to own resources and to alienate such property in exchange or for sale. The anti-western inclination of conservative Islamist groups must not be allowed to succeed in equating modernisation economic growth and scientific progress with westernisation. The danger in allowing these views to go unchallenged is that the status quo will remain the same in many areas of national life and in terms of modest international trade involvement. There is a negative view of oil in Saudi Arabia, as its wealth has been restricted to a minority, and the majority have not received any monetary benefit.

The benefits of international trade and investments are, and ought to be, mutual. This has been the case from time immemorial. It is indeed true that the development of international trade is also reflective of power relations between states. Mutuality of interests certainly may not be tantamount to equality or fairness. Saudi Arabia as a developing state must, therefore, continue to explore its inherent advantages and challenges in the international arena in terms foreign direct investment.

The history of investment arbitration involving Saudi Arabia and the Middle East reveal the impact of power relations. The initial experiences of the Kingdom and some other Islamic state in Investment arbitration were one of suspicion and dissatisfaction. This is particularly true of the AMINOIL and ARAMCO awards among others. The era of suspicion and rejection is, however fortunately over and the region
as well as Saudi Arabia has now embraced arbitration as a choice means of resolving
their dispute in oil and gas as well as other investment areas. It may be concluded that
there is still a pressing need for legal reform in relation to arbitration regime and
investment laws of the Saudi Arabian state. Continuous modification and reform is
imperative in many areas. These principally include improvements in the area of
capacity development, in legal training and reform of the domestic arbitral processes
including enforcement of domestic and foreign awards. Although certain changes
have been made since the era of the cases highlighted above it is fair to say that
scholars still detect continuing failures of the Saudi Arbitration Law and its
Implementing Regulations.

The enforcement of foreign judgments is still seen as poorly adhered to. The
suggestion that; “the enforcement in Saudi Arabia of a non-Saudi judgment or non-
Saudi arbitral award remains the exception rather than the rule”. Is clearly
unacceptable and must be speedily addressed.609 Saudi Arabia’s commitments under
the New York Convention must be given full effect to. Such a commitment should
also reduce to the barest minimum instances of resort to the public policy exception
under Article 5 of the Convention. The possibility of the application of the public
policy exception and the application of demonstrable reciprocity provide basis for
suspicion of the Kingdom’s commitment to enforcement of foreign judgments and
will continue to affect confidence of foreigners in doing business with Saudi Arabians
and in the country as well.

It is clear that those countries that look towards the Shari’a as the supreme source of
all rules must consider that international law regulating FDI may constitute a
necessary exception to their reliance upon the Shari’a. Compliance with International
laws may dictate outcomes that go against both the national interest and the Shari’a.
Autonomy of the contracting parties is the bane of FDI relations and International
Commercial Arbitration accords sanctity to contracts, the emerging lex mercatoria
and pacta sunt servanda. The Saudi State must give effect to these principles and they
are arguably well provided for in the jurisprudence of Shari’a law. More frequent
resort to the Fiqh methodologies like Ijma (consensus) Qiya (Analogy), Istihsan (The

609 Ibid.
Public Interest), Istihab (presumption of Continuity) and Urf (Local custom)) will help remove ambiguities in newer areas of international commerce and industrial relations.

In relation to the idea that Islamic law is inadequate in dealing with modern commercial affairs, it appears that this view is erroneous. Every legal system just like every language is capable of being used to cover all human circumstances. The belief exists partly because of the ignorance of Western jurists and even some Muslim writers who do not sufficiently understand the true nature of the Shari' a. With appropriate resort to the *ijma* and *Qiyas* when the Qur'an and the *Sunnah* is silent upon a matter or in new and analogous situation Islamic law will be able to cope with any transaction that can occur on earth. However, the fault is not only upon Western scholars but it also lies on Islamic scholars who have not being sufficiently elaborating Shari’ a principles in a confident and competent manner.

Finding the right balance between the rights and responsibilities of foreign investors, on the one hand, and those of governments, on the other, is a key imperative of legal reform. There need to be a balance that combines the stability, predictability transparency and mutuality of interest between the host state such as Saudi Arabia and its investor community. It is important that the process of fairly and equitably rebalancing, the various interests in FDI situations is continually reviewed. 610. Even worse are the clerics and scholars who adopt a fixed and very conservative view of Islamic principles. These scholars do the most damage and truly make it impossible for the Shari’ a to perform its task in modern international relations. This is also not to say that there is no deliberate bias against Islamic law and other competing legal world view as a result of power politics in world affairs. As a result it may indeed be better for the modern international law to be used when the matter is of international commercial nature.

Ultimately, oil companies such as AMINOIL and ARAMCO are overseas investors and commercial trading entities. The increase in transnational transactions, both

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610 Al-Fadhel, ibid., p. 16.
between member states and commercial companies means that there will be a concomitant increase in transnational disputes. In light of current trends, arbitration will remain a choice mechanism for dispute resolution and management. It is however still true that many of the judgments emanating from international courts have shaken the confidence of the resource-rich states in referring disputes to these bodies. This, however, does not mean that developing states like Saudi Arabia could not have approached their cases with more expertise and due care. In fact, the prevailing situation, as we have argued above, simply shows the crucial nature of the resource-rich state to acquire better expertise across board to cover contract negotiation and dispute resolution phases. There is also the need for international lawyers and scholars to argue in favour of changes that will make dispute resolution fairer and more responsive to the needs of developing states.

Saudi Arabia’s membership and participation in the WTO is commendable. Yet procedures of its ad hoc tribunals have been shown to lean in favour of richer and more economically powerful countries and companies. Commendable improvements include the recently instituted WTO Legal Advisory Centre, which offers financial assistance to poor countries by co-financing their litigation. The better the legal advice a party obtains, the better the chances of its success.

It must also be argued that the Kingdom of Saudi Arabia must reform its constitution, and bring its state laws into conformity with international norms. This contention does not seek to make the Kingdom into a “Western Nation”, but to operate in a 21st century world of commerce and industry, the laws of which are in constant flux even traditional societies must adapt. As such, the Kingdom must consider the possibility of adopting constitutional reforms to allocate Islamic law for internal use, and embrace a parallel commercial private law program compatible with the international legal practice. In other words the Dubai approach ought to be adopted by Saudi Arabia.

It remains, therefore, to see how our conclusions may allow us to begin to understand the necessary holistic changes in Saudi Arabia’s regulatory environment that must be put in place given the determination of the government to move away from a past of suspicion of international law and particularly International commercial arbitration.
Given the unique natural gifts of oil resources that the country possesses the future must be planned for with all the seriousness it deserves in order to maximise the benefits of trade and investment and modern international relations. It is suggested that the changes must first of all come from within in a socio legal sense.

Saudi Arabia faces significant challenges in socio economic terms. Its developmental problems and immense and the demand for human and capacity development are quite daunting. In a sense however this creates both problems and opportunities for investment in the country. Investments are needed to provide amenities and to meet the needs of a fast developing middle class and its consumer needs. Related to this is the fact that the State is simultaneously aspiring to high technological relevance and heavy industrial infrastructure and transfer of technology. The level of formal education is still too low despite some improvement. This creates much scope for conservative and poverty driven hostility towards foreign and perhaps western involvement in the country.

This reflects in an arguably negative attitude to change. It is, therefore, necessary to advocate socio-legal development as a first step towards ensuring that the entire populace, state institutions and civil society are all ready for the effort of making Saudi Arabia an attractive destination for foreign investment.

There are important changes and reforms to be made to national laws and to human rights regime. The assumption that human rights are inherently Western concepts imposed upon other cultures takes a static view of moral and legal principles, and is, therefore, flawed. The contemporary concept of human rights has been greatly enriched by legal and political inputs from other cultures and civilizations. Better adherence to human rights law will also make the Kingdom much more attractive place for investors. It will also remove some of the misgivings among expatriates in the country and among those that wish to work there that Saudi Arabia is a difficult place to live and one, which is fraught with dangers.

The argument has to be successfully made that there should be greater participation of Saudi Arabians in the consultative assemblies.
In an appreciably brief time the Saudi state has engaged in an impressive number of BIT’s and MIT’s as well as agreements on foreign investments protection which must be given effect to. There is nothing in Saudi law broadly construed that prevents it from granting full recognition to its modern trade agreements made in good faith. The Shari’ah agrees with a general theory of contract. Verse 1 of Chapter V indeed instructs believers to ‘keep faith with contracts’. It has been shown above that the majority of laws discussed and agreements entered into foresee one way or another, that a contract should be negotiated in good-faith and with honesty.611

By way of conclusion we can see that Saudi Arabia may be perceived of as facing more serious difficulties in relation to its investment law and practice. While it must engender confidence of investors using modern day instruments of legal protection of investment and international trade law, it must also keep a close eye on its national interests as well as the dictates of Islamic law. The Saudi state is required to submit to a multi-tier legal regime. For non-Islamic, or non-Shari’ah countries, it is easier to reconcile their judicial process with findings couched in international law. This is considerably harder for Saudi Arabia as it is in a unique position.

The State must embrace the use of sophisticated modern day devices and legal regimes such as stabilisation clauses, renegotiation clauses and adaptation clauses. It must fashion these to assure investors of the prospects of meaningful participation in business within its territory as well returns on their investment. It must also reform its domestic, or day-to-day, laws of corporate governance. It must, however, be seen to be conducting itself in accordance with the principles of Shari’ah. It is hard to see how the current system could reconcile this conflict without significant modification or constitutional reforms.

There are therefore, a few things that can be recommended. The country’s international commercial arbitration practice ought to be elaborated upon and improved. Unless further development of arbitration can be achieved Saudi Arabia would appear to be at a continuing disadvantage. The improvements needed span the

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development of new and improved arbitral institutions; the development of capacity among its arbitrators and very importantly a strong respect for the enforcement of international awards.

Yet there are limits that the Saudi State must not exceed in its quest for FDI. For the Saudi state to accept a ruling that is in apparent conflict with Shari‘ah would not only be seen as unacceptable in terms of the country’s position as the presumed leader of the Islamic faith, but it would also be seen as encroaching on the sovereignty of the authorities in as much as they should be free to govern its country in any way they see fit. Islamic principles are there to protect the state against harm. Thus, stabilisation clauses, which have a very high likelihood of creating grave environmental damage may be un-Islamic and also against the true national interests. It is notable that throughout the Qur’an and hadith there are many general references to the environment (i.e. animals, plants, mountains, seas etc.). The environment is considered to be blessings from Allah. Islamic law generally requires that the environment be protected. Flora, fauna and animals must be treated with kindness, and land must be utilized sensibly. For specific wanton damage to the environment there are prescribed punishments.

For this reason, it may be of greater benefit to the Saudi authorities to consider the benefits of the less formal MOUs. MOUs are relatively informal in character and they can be adapted, or added to.

Viable non-oil exports should be given actively pursued by the Saudi state. This of course includes the application of laws that are targeted towards the creation of other export products apart from the usual oil and gas resources. The diversification of the economic base of the Kingdom away from oil and its derivatives is the most essential aspect of the industrial base. The push towards a sophisticated industrial base for the country with the advent of industrial cities and economic cities is one of the most significant developments in Saudi socio economic history. This special zones are also crucial to the political and economic future of the Saudi Kingdom. Successes in this area vastly improve the regional standing of Saudi Arabia as a leading nation in the Middle East. The device of economic cities and industrial cities do in fact provide a
A genuine way of reinvesting of the revenue that is generated by Saudi Arabia's current standing as the world's leading producer of oil and gas resources..

The suspicion that cartel behaviour and closer coordination by the Gulf states may somehow be of negative effect to investors and the states where they emanate from has not proven true. In fact the close coordination and diplomacy between the participants of these organisations only assures them of a fair representation in international relations. It allows them to set exchange best practices and attain the best prices for the export of their non-renewable resources. The diplomacy played at these organisations and the many legal standards put into operation between them allow for the peaceful management of competition and thereby contribute to world peace and security. Closer commitment to these bodies and their ideals must go hand in hand with other reforms that have been suggested in this thesis so far.

It is necessary to recommend more transparency in government and in business activities. This would involve adoption of international anticorruption standards. Some of these efforts are to create strategic advisory services and link up with organizations outside Saudi Arabia in order to provide a transparent policy to foreign investors and to guide them through the domestic domain. Out-dated policies financial standards and opaque practices must be expunged in official and business regulatory services..

Membership within global institutions such as the WTO and the United Nations create further basis for legal reforms and it also means that Saudi Kingdom will open its markets and reduce to some extent the level of control the government will seek to exercise to protect national and even certain religious interests. It may be argued that with the zeal at which Saudi Arabia has been embracing regional and international economic integration and particularly international dispute resolution techniques and regimes, the attitude of the Saudi Government toward international arbitration is no longer strongly influenced by the outcome of the Aramco award of 1958.
Although international arbitration appears to continue to be 'a useful tool of favour by western parties" it is also the case that the severity of the situation can be reduced by substantial improvements in capacity of arbitrators, arbitral institutions and lawyers from Saudi Arabia in the law and practice of international commercial arbitration. In this way it should be recommended that further institutional development and training should be embarked on particularly in the requisite ministries and the Saudi Arbitration Team.

There is great need to ensure that dispute settlement procedures especially in alternative dispute resolution and arbitration form a central component of the reforms to Saudi law and economy. The creation and operation of the economic and industrial cities and the arbitration is next to impossible without investors having confidence that dispute settlement will be conducted under internationally acceptable rules and that the awards and decisions of panels and tribunals will be respected by Saudi courts as well as the Saudi state. The general direction of Saudi Arabia policy in this area is good and the use of clauses in the Gas Concessions of 2004-show openness toward the outside world in this area. Authorities such as SAGIA cannot fully utilise their potentials under the rule of law if the Judiciary continues to be perceived by the investment community as biased. Apart from political reforms towards better adjustments to the rule of law and democratic rule reforms in specific sectors such as intellectual property, and property markets law are recommended. The changes the Saudi authorities are making in an effort to enter the global marketplace, are tangible - and the protection of inward investors is evidently being addressed. How far this is able to develop within the strict regime and adherence to Shari’ah remains to be seen; but it will be a course of development eagerly watched by potential investors around the world.

It is however recommended that the Shari’ah provides enough basis for judges and arbitrators to draw inspiration for unbiased and fair conduct. Much can be learnt from the following hadith:

612 This argument has been impressively raised by when he wrote that some western companies have engaged in the arguably unfair tactical use of arbitration. The disappointing outcomes of the Aramco arbitration were expected due to the lack of legal experience and the naïve or the "too honest" conduct with Aramco, which was also a normal result for being the weaker party in the dispute" Baamir (2008) op.cit., p. 146.
Following a dispute between them, the Caliph of the Muslims and an ordinary man chose to have their differences determined by an arbitrator and went to see him. When they arrived, the arbitrator, very astonished, came to greet them and asked the Caliph why he had not requested him to come to the Caliph, instead of the Caliph coming to him. The Caliph replied that one must go to the arbitrator to consult him. The arbitrator then invited them to enter and offered a cushion to the Caliph. However, the latter refused it and said that this was the first act of bias on the part of the arbitrator. (Mabsut: The Imam As-Sarsafi)

Development and constitutional reform are to be seen as inextricably linked phenomena. It is submitted that business will only go to countries with a stable social order. A stable social and legal order is, however, dependent on deep seated constitutional reform which will make further and more dramatic economic success possible. The Saudi legal system will attract more investment and financial success if transforms from a strictly monarchical system to a more stable representative democracy based upon the rule of law and respect for human rights. The connection between constitutional reform and economic success is therefore a central conclusion of this thesis. Constitutional reform must however be well managed and must be engaged in through rational and well planned political dialogue rather than violent means as witnessed in many other countries involved in the so called Arab spring.

The Saudi authorities seem to have taken a more 'correct' approach since 2000, by adopting and enforcing new laws that affect the constitutional order. The current developments have given a clear indication that the modern monarchy system is in need of further important legal review and guidance. The current constitutional reforms under the new Royal Family Council (Nezam AL-Bai'ah) are unique in that changes affect even the monarchy itself. Saudi Arabia needs constitutional reforms in every field, starting with educational, judicial, legal, trade, and political appointments. The move towards more collective appointment of future rulers of the Kingdom means that for the first time in the history of Saudi Arabia, the head of the state has given up some of his powers for the sake of stability. The changes will go some way toward satisfying those who have long feared internecine disputes within the royal family that could trigger a major constitutional crisis. For Saudi reformers, the new law will likely be seen as nothing more than tinkering with a system they already
consider deeply autocratic and which concentrates power within the royal family. The onset of a new era of transparency and rule of law would in turn encourage and boost the country’s economic progress.

The current King seems motivated and confident of the partnership between the public and private sectors in order to support the nation’s development and reforms. This perspective is the correct approach in which to invest in the new generation. Therefore, it can be asserted that Saudi scholars should work together to create new entities and research centres locally and globally in order to become an effective partner in the global economy. This could channel revenues to the Saudi local economy and reduce the pressure on the depleting natural resources. There should be a focus on scientific and technological development. The creation of scientific hubs and centres of excellence in educational research should be taken more seriously and at least one such scheme should be established in every province of Saudi Arabia.

Liberal minded scholars particularly in the younger generation must make themselves formidable through rigorous scholarship and they must be willing to make courageous contributions to national debates. Moderate activism is recommended for civil society and such groupings must organise themselves into think-tanks and strategic studies institutes. To conclude, the entire country must be carried along with the reforms and the entire country must be run with greater transparency. The rule of law must be encouraged and civil society must be given greater scope of operation. NGOs and the private sectors will help to lift the veil of ignorance and move the country towards much needed economic and social progress.
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