

TURNING PUBLIC INTO PRIVATE PARTICIPATION IN GCC STATES'  
INFRASTRUCTURE: SUSTAINABLE INSTITUTIONS IN A WORLD OF  
INTERNATIONAL INVESTMENT STANDARDS

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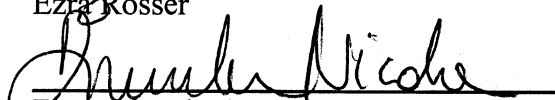
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ABSTRACT

Financing resources are necessarily finite. State governments may envision prospects that entail the most developed infrastructure which provides residents of the country with paramount welfare. The Gulf Cooperation Council (GCC) States of which this study is premised are undergoing a pivotal period where oil rents have experienced volatile phases and the same government means of financing promising large infrastructure projects are no longer sustainable. The study focuses on Kuwait, Saudi Arabia, and the UAE of the GCC States. The introduction of the private sector as a major actor in these countries' development plans is a shared accord amongst the three states. This study looks into the utilization of public-private partnerships (PPPs) as a tool for the Arab Gulf governments to implement their anticipated projects by empowering the private sector. By using law and development theoretical frameworks on regulations and institutions, the study asserts that the structure of the economic systems of the GCC States as largely welfare states must be well comprehended and outlined in terms of what empowering the private sector through PPPs involves. There are key aspects in light of international investment standards that would shape Gulf States' institutional practices when adopting PPPs. These standards may nevertheless be balanced with notions like public interest to mitigate the extreme transformation to private sector lead in state development schemes.

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## CHAPTER I

### INTRODUCTION

“The state is defined precisely by its mastery over social relations. The signs and instruments of its preeminence are the public rules it lays down. Insofar as these rules palpably influence social practices, people may come to view these practices as artifacts of human will.”<sup>1</sup>

The purviews of a State’s vision for what it aspires its future to be can in some instances be summarized in two words, a dream. A dream, according to Sigmund Freud, is regarded as but a façade that conceals a greater more complex underlying system of beliefs.<sup>2</sup>

States are entitled to dream. The contents of such dreams have no glass ceilings to shatter. Often though, dreams could be misinterpreted with real life goals. Countries in this respect devise what they perceive as road maps reflected in development plans that help a country achieve multi-year aims or even multi-decade targets. The substance of which are sometimes obscure and may be better understood in terms of attainable outcomes.

Key Arab Gulf State members (GCC States)<sup>3</sup> have been signaled by geopolitical and precise economic conditions that seem to have triggered identity transformations in the realm of

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<sup>1</sup> ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD CRITICISM OF SOCIAL THEORY* 59 (1976).

<sup>2</sup> C.G. JUNG, *DREAMS* 16 (Collected Works of C.G. Jung Vol. 4, 8, 12, 16, 2010). Jung explains Freuds account of a dream as embodying “A creation, a piece of work which has its motives, its trains of antecedent associations, and like any considered action it is the outcome of a logical process, of the competition between various tendencies and the victory of one tendency over another. Dreaming has a meaning, like everything else we do.” *Id.*

<sup>3</sup> The Gulf Cooperation Council (GCC) State members are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. *See Member States*, GULF COOP. COUNCIL, <https://www.gcc-sg.org/en-us/AboutGCC/MemberStates/Pages/Home.aspx> (last visited Feb. 15, 2016).

publicly led initiatives.<sup>4</sup> With oil prices often plummeting and so volatile,<sup>5</sup> governments appear to perceive the same means of exclusive public finance for development projects as not being all so sustainable anymore. Kuwait, Saudi Arabia, and the United Arab Emirates (UAE), of whom this study would be premised, share many characteristics.<sup>6</sup> The GCC is a sub-regional block that is comprised of state members of which are highly reliant on oil rents to distribute wealth and fund capital intensive projects, i.e. infrastructure.<sup>7</sup>

This study relies on the premise that while understanding the contextual nature of GCC institutions is key, and the regulatory intent of these state members in regularly preserving the welfare of their societies is rather noble, the envisioned transition into enabling the private sector in the countries' sustainable development through partnerships to implement large infrastructure projects entails this contextualism is disciplined. This extenuation is conceivable through the introduction of universal standards that Gulf government institutions adhere to. In other words, a universal contextualism approach is key in Gulf Public-Private-Partnerships (PPP) programs. This is especially true when considering the multinational nature of the private sector that is capable of carrying out many of the complex infrastructure development schemes in these states throughout the decades to come.

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<sup>4</sup> Valérie Marcel, an independent consultant, and other Saudi observers, spoke to the New York Times about a new Saudi leadership, which anticipates a stronger role for the private sector. And that one of the major problems facing the Saudi economy is an upcoming young generation having no jobs. A more inclusive process that is not solely government led seems to be the aim. Stanley Reed, *Saudi Aramco I.P.O. Prospect Reflects Kingdom Looking Beyond Oil*, N.Y. TIMES (Jan. 8, 2016), <http://www.nytimes.com/2016/01/09/business/dealbook/saudi-aramco-ipo-prospect-reflects-kingdom-looking-beyond-oil.html>.

<sup>5</sup> Clifford Cross, *Oil Prices: What's Behind the Drop? Simple Economics*, N.Y. TIMES (Mar. 8, 2016), [http://www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html?\\_r=0](http://www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html?_r=0). Moreover, oil prices are not clearly predicted with the rise of the shale industry and OPEC decisions to cut production and raise prices as pointed out in the World Bank October 2016 Commodity Markets Outlook. WORLD BANK, COMMODITY MARKETS OUTLOOK: OPEC IN HISTORICAL CONTEXT 7-9 (2016).

<sup>6</sup> This statement certainly does not denounce the similarities other GCC States have with Kuwait, Saudi Arabia, and the U.A.E. They were specifically mentioned for purposes related to the scope of this research.

<sup>7</sup> Karen E. Young, *Payment Delayed: The Economic Risk of Gulf Contracting Practices*, ARAB GULF STATES INST. WASH. (Feb. 9, 2018), <https://agsiw.org/payment-delayed-economic-risk-gulf-contracting-practices/>.

These States commonly live amongst a volatile region where the Arab Spring has emerged amongst many other existing conflicts. One of the main factors of this regional explosion was civic displeasure with the quality of core infrastructure projects and creeping “rent seeking” practices in the procurement of public goods and services.<sup>8</sup> In the context of satisfaction with public infrastructure or services, a survey conducted in Kuwait for instance revealed that a good 69% of citizens preferred introducing the private sector to provide public services that the government has been providing.<sup>9</sup>

Traditionally, states in this region would finance infrastructure projects and manage them.<sup>10</sup> This would necessitate both the existence of capital and institutional capabilities to manage the project with no or minimal time or cost overruns. Moreover, with government dominating different economic activities within the state, broad focus may come at the cost of forgone opportunities or opportunity costs where government could have instead relied on the

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<sup>8</sup> The importance of this study emerges from the volatile theme of the region itself. In an interesting policy research working paper by the World Bank Group entitled *Unhappy Development: Dissatisfaction with Life on the Eve of the Arab Spring*, the authors empirically attempted to reason the dissatisfaction in the Arab region in the outset of the Arab Spring. The leading reasons for such were corruption, in what was referred to as *wasta*, and betterment of the economic situation. Twenty-four thousand respondents from eleven developing Middle East and North Africa region states contributed, none of which were GCC state members. The purpose though, is to signal how pro-active approaches could benefit the Arab Gulf states governments when considering such results. Dissatisfaction in the quality of basic public services, such as health care and infrastructure, was deemed to have grown. Efstratia Arampatzi et al., *Unhappy Development: Dissatisfaction with Life on the Eve of the Arab Spring*, 64 REV. INCOME & WEALTH S80 (2018). See also Economic and Social Commission for Western Asia (ESCWA), Public-Private Partnerships for Infrastructure Development in the Arab Region, U.N. Doc. E/ESCWA/EDGD/2013/4, at 1 (2013). It must be pointed out though that the 2016 World Happiness Report ranked the U.A.E. at 28<sup>th</sup>, Saudi Arabia at 34<sup>th</sup>, and Kuwait at 41<sup>st</sup> for the period from 2013-2015. Simply put, this indicator measures “happiness” on an individual case basis by asking the question, “Please imagine a ladder, with steps numbered from 0 at the bottom to 10 at the top. The top of the ladder represents the best possible life for you and the bottom of the ladder represents the worst possible life for you. On which step of the ladder would you say you personally feel you stand at this time?” The Report attempts to capture the variables of GDP per capita, social support, healthy life expectancy at birth, freedom to make life choices, generosity, and perceptions of corruption. See WORLD HAPPINESS REPORT, UPDATE vol. 1 at 9, 16–17, 20 (John Helliwell et al. eds., 2016), <https://worldhappiness.report/ed/2016/>; Madawi Al-Rasheed, *Modernising Authoritarian Rule*, in A HISTORY OF SAUDI ARABIA 242–48 (2d ed. 2010).

<sup>9</sup> *Fasad Mahsoubiyah Wa Soo’ Idara Hokoomiyah [Corruption, Favoritism, and Government Mismanagement]*, AL QABAS NEWS (Mar. 13, 2019), <https://bit.ly/385eYgp>.

<sup>10</sup> Steffen Hertog, *State and the Private Sector in the GCC after the Arab Uprisings*, 3 J. ARABIAN STUD. 174, 174–79, 81 (2014).

private party to engage in some of such activity. This would have allowed the state to gear its focus towards other more pertinent public services like health and education. These are challenges that inform government strategies to understand the difference between confining its role to regulator of economic activity and not extend to operator of all services provided to the public. Opting for PPPs to implement infrastructure projects and provide services could be incentivized by intentions to gain more efficiency in public services from the expertise of private actors in many sectors, such as transportation, technology, and public health.<sup>11</sup> PPPs are the method in which the government would share risk and confer significant responsibilities to the private sector to help implement its infrastructure development plans.

The GCC States are embarking on ambitious transformational infrastructure plans valued at a big US \$1.1 Trillion worth of projects.<sup>12</sup> In the transportation sector for instance, the Gulf States have been undergoing large infrastructure projects to achieve sustainable outcomes.<sup>13</sup> Saudi Arabia has been constructing an 85-station metro in its capital Riyadh.<sup>14</sup> UAE's city Dubai has already completed building and operating a metro line in 2009 and is promising further

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<sup>11</sup> WORLD BANK, GOOD GOVERNANCE IN PUBLIC-PRIVATE PARTNERSHIPS: A RESOURCE GUIDE FOR PRACTITIONERS 12-13 (2009).

<sup>12</sup> Sam Bridge, *Gulf Countries Said to Have \$1.1 Trillion Active Infrastructure Projects*, ARABIAN BUS. (Mar. 21, 2019, 1:06 AM), <https://www.arabianbusiness.com/construction/414641-gcc-said-to-have-11trn-active-infrastructure-projects>.

<sup>13</sup> Colin Foreman, *GCC Construction Contract Awards Rebound in 2018*, MEED NEWS (July 4, 2018, 11:27 AM), <https://www.meed.com/gcc-construction-contract-awards-rebound-2018/>; Jack Ball, *Revealed: Top Sectors of Trillion-Dollar GCC Construction Pipeline*, CONSTRUCTION WEEK ONLINE (Nov. 24, 2018), <https://www.constructionweekonline.com/article-50758-revealed-top-sectors-of-trillion-dollar-gcc-construction-pipeline>; *Transport in the Middle East: Let's go Together*, ECONOMIST (Mar. 10, 2016), <http://www.economist.com/news/middle-east-and-africa/21694542-public-transport-all-rage-region-more-desperately-needed-lets-go>. See also *Kingdom has PPP Potential to Transform, Diversify Economy*, SAUDI GAZETTE (Mar. 8, 2016), <http://saudigazette.com.sa/business/kingdom-ppp-potential-transform-diversify-economy/>; Khalil Hanware & Fadia Jifrey, *JEF 2016: Saudi Economic Reforms Drive 'Impressive'*, ARAB NEWS (Mar. 3, 2016), <http://www.arabnews.com/featured/news/889556>; *PPP in the GCC*, IJ GLOBAL (Dec. 1, 2015, 6:38 PM), <https://ijglobal.com/articles/98595/ppp-in-the-gcc>.

<sup>14</sup> This project is expected to span 176 kilometers, in addition to being supplemented by a significant bus network. *Riyadh Metro Project 82% Complete*, RIYADH METRO (Apr. 25, 2019), <http://riyadhmetro.com/riyadh-metro-project-82-complete/>.

expansions.<sup>15</sup> Tenders on a 1,200-kilometer national railway that costs \$11 billion in the UAE have stopped because of difficulties of publicly financing such a project with plummeting oil prices. Kuwait is also undergoing two large transportation projects in the pre-tendering stage. Both, the Kuwait Metropolitan Rapid Transit System (KMRT) and the Kuwait National Rail Road (KNRR), are envisioned as PPPs with the Public Authority for Roads and Land Transport (PARLT) in collaboration with the Ministry of Public Works as the procuring authority.<sup>16</sup> What this indicates is, innovation in financing such large-scale projects is key.<sup>17</sup>

The three states of the GCC appear to have been pushing for introducing alternative more environmentally friendly renewable energy sources within a global shift away from traditional global fossil fuels in the outset of pivotal international instruments,<sup>18</sup> such as the Paris Convention on Climate Change in the wake of adverse climate change effects.<sup>19</sup> This seems like potential for PPP projects.<sup>20</sup>

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<sup>15</sup> Events like the Dubai Expo 2020 and Qatar World Cup 2022 seem promising in terms of private participation in infrastructure projects.

<sup>16</sup> The Ministry of Communication is listed as to have proposed the initiative. *Projects*, KUWAIT AUTHORITY FOR PARTNERSHIP PROJECTS (KAPP), <http://www.kapp.gov.kw/en/Projects> (last visited July 19, 2019).

<sup>17</sup> PUBLIC MANAGEMENT AND GOVERNANCE 70-71 (Tony Bovaird, A.G. Bovaird & Elke Löffler eds., 2003).

<sup>18</sup> Press Release, UN Environ. Program, Gulf Cooperation Council, UN Environment Partner on Environmental Action (Aug. 22, 2017), <https://www.unenvironment.org/news-and-stories/press-release/gulf-cooperation-council-un-environment-partner-environmental-action>; RABIA FERROUKHI ET AL., IRENA, RENEWABLE ENERGY MARKET ANALYSIS 2016: THE GCC REGION 11-17 (2016).

<sup>19</sup> FERROUKHI ET AL., *supra* note 18.

<sup>20</sup> Saudi Arabia has a list of renewable energy projects in line including: the Alfaisaliah Solar PV Plant (600MW), Dumat Al Jandal Wind Farm (400MW), Midyan Wind Farm (400MW), Sakaka PV Solar Plant (300MW), and Al Khafji Solar Desalination Plant. See John Whiteaker, *Update: First RFP out for Saudi Solar Stage 2*, IJ GLOBAL (July 19, 2019), <https://ijglobal.com/articles/141294/update-first-rfp-out-for-saudi-solar-stage-2>. Kuwait was also previously initiating a PPP planned project called the Abdaliya Integrated Solar Combined Cycle Project that “will develop the first solar thermal power plant in Kuwait.” The project has not further proceeded though and its future is undetermined thus far. *Al Abdaliyah Integrated Solar Combined Cycle (ISCC): Projects*, KUWAIT AUTHORITY PARTNERSHIP PROJECTS, [http://www.kapp.gov.kw/en/Al-Abdaliyah-Integrated-Solar-Combined-Cycle-\(ISCC\)](http://www.kapp.gov.kw/en/Al-Abdaliyah-Integrated-Solar-Combined-Cycle-(ISCC)) (last visited Dec. 4, 2019); Sohail Barkatali & Derek Kirton, *Kuwait: The BOT Market Reopens*, NORTON ROSE FULBRIGHT (Feb. 14, 2014), <https://www.projectfinance.law/publications/2014/February/kuwait-the-bot-market-reopens>; Jordan Bintliffe, *Kuwait PPP 10 Years On*, IJ GLOBAL (Feb. 21, 2018), <https://ijglobal.com/articles/132146/kuwait-ppp-10-years-on>.

The UN Sustainable Development Goals (SDGs) push for partnerships in Goal 17.<sup>21</sup> And in Goal 12 in target 12.6 on promoting sustainable consumption of energy and production mentions “Promote public procurement practices that are sustainable, in accordance with national policies and priorities.” In Goal 9’s Targets, one of the targets stresses, “Develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all.”<sup>22</sup> The SDGs take the antecedent MDGs’ approach premised on pushing for official development assistance (ODA) and partially shift it to focus on the role of the private (business) sector and mobilizing host country resources to barely fill the gap of global infrastructure needs.<sup>23</sup>

The three GCC States in this study have all explicitly undertaken initiatives that envision private sector lead in the countries’ 2030 or 2035 development plans.<sup>24</sup> The enablement of the private sector is portrayed as the necessary sustainable model for the Gulf States to implement their infrastructure needs and diversify their economies away from a single source of income, oil.

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<sup>21</sup> *Goal 9: Build Resilient Infrastructure, Promote Sustainable Industrialization and Foster Innovation*, SUSTAINABLE DEV. GOALS, <http://www.un.org/sustainabledevelopment/infrastructure-industrialization/> (last visited Mar. 6, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> George M. Ingram et al., *USAID’S Public-Private Partnerships: A Data Picture and Review of Business Engagement 1* (Global Econ. & Dev., Brookings Institute, Working Paper 94, 2016).

<sup>24</sup> See NEW KUWAIT, [newkuwait.gov.kw](http://newkuwait.gov.kw) (last visited Nov. 30, 2019) (addressing the different development targets of the State of Kuwait until the year 2035); SAUDI ARABIA’S VISION 2030, [vision2030.gov.sa](http://vision2030.gov.sa) (last visited Nov. 30, 2019) (embodying the different development programs leading to 2030 that include a National Transformation Program and Privatization Program, among others in the Kingdom of Saudi Arabia); DUBAI PLAN, [dubaiplan2021.ae](http://dubaiplan2021.ae) (last visited Nov. 30, 2019) (providing for a current 2021 Plan for Dubai targeting six key areas of focus: people, society, the experience, the place, the economy, and government, while emphasizing that it hosts the most business and investment friendly environment). Nonetheless, on the federal level of the U.A.E., there also exists a national development vision that provides similar aspirations and overlaps in certain manners of the Dubai 2021 Plan. See U.A.E. VISION 2021, [vision2021.ae](http://vision2021.ae) (last visited Nov. 30, 2019). In addition, an Abu Dhabi Vision 2030 exists that concerns the emirate of Abu Dhabi. See ABU DHABI ECONOMIC VISION 2030 (2008), <https://www.ecouncil.ae/Publications/economic-vision-2030-full-version.pdf>.

This proposition presses this study to undertake the challenge of furthering contextual scholarship of law and development studies (L&D) in a region where the legal and institutional culture is somewhat distinct. Policies of GCC state members are nonetheless very progressive, in the outset. One of the main predicaments of economic development policies that face the three states is empowering the private sector.<sup>25</sup> The key is making these policies “sustainable”.

The delivery of infrastructure projects has been largely strictly government dominated. The time is ripe to initiate the empowerment of the private sector through PPPs to execute these projects in order for it to fall within a sustainable development strategy, yet only after careful consideration of the nature of these contractual tools and the prerequisites for their success. The challenge that foreign competition may pose to local private actors, which may appear to stagnate their growth could nevertheless benefit consumers of the end project best quality at the most reasonable cost, i.e. value for money, which foreign investor may only offer. The “public interest” of the state could safeguard the project end users’ rights to become the ultimate judges of the present development policies. It is thus important to trace how legal tools were used in order to shape economic development, and how they are used to do so, notwithstanding deep insight into the social, political, and economic identities of these states. Regulatory tools would include domestic laws generally in addition to international instruments adhered to by the states.

One of the main challenges of adopting innovative infrastructure delivery policies is assessing the difficulties of adapting such rules to international standards. With principles such as national treatment prevailing in international investment and trade in development, what is to

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<sup>25</sup> One further very important implication to bear in mind is the issue of the impact on public sector employees in relation to these long-term PPP projects. The legal framework would have to address this precise issue. Pushing such employees towards private sector employment may certainly be desired to face any expected crises of unemployment in Kuwait, Saudi Arabia, and the U.A.E., to be precise.



ensure that a healthy local private sector would be able to develop in the face of foreign competition, a theme international trade for instance has addressed through schemes like special and differential treatment preserved for developing countries.<sup>26</sup> This is a category that remains vague with regards to the status of these GCC member states in terms of developing country status.

A focus on three of the six GCC member states may not capture the full spectrum of what the GCC bloc may approach in terms of infrastructure investment policies. And further focusing on Dubai, in the U.A.E., may undermine the central policy-making role of Abu Dhabi, the nation's capital. The Federal Emirati Government, and not each emirate, sets foreign policies. And thus, when approaching trade and investment agreements, the other emirate's PPP regulatory framework would not be captured when assessing the importance of international agreements. The federal nature of the UAE though makes choosing this city necessary. The PPP

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<sup>26</sup> Kuwait, for instance, adopts a policy that empowers the private sector and endorses its leading role in different infrastructure projects, but it marginally included small and medium enterprises (SMEs). SME growth and enablement is one crucial element of sustainable development, which is nurturing the role of SMEs in order to induce economic development in different states. SME activity could account to about 40% or 50% of the country's GDP within private sector activity, whereas in Kuwait, they strikingly only account for 3% of its GDP while comprising most of the state's retail and non-financial services. *See Building Kuwait's Future, One Small Enterprise at a Time, Feature Story*, WORLD BANK (Mar. 1, 2016), <http://www.worldbank.org/en/news/feature/2016/03/01/building-kuwait-future-one-small-enterprise-at-a-time>. The Sustainable Development Goals (SDGs) for instance emphasize in Goal 9 on building resilient infrastructure, promoting sustainable industrialization and fostering innovation that "Small and medium-sized enterprises that engage in industrial processing and manufacturing are the most critical for the early stages of industrialization and are typically the largest job creators. They make up over 90 per cent of business worldwide and account for between 50-60 per cent of employment." *See Goal 9, supra* note 21. When referring to this policy that cultivates its SMEs in order to lead tomorrow's infrastructure projects locally, regionally, and perhaps globally, certain provisions would be expected to be in place in order to ensure their growth. On whose account could this be? This is where more grey areas appear in terms of regulatory coherence in international trade and investment. Kuwait has already taken initiatives to stimulate the growth of local SMEs through access to finance and assist them in overcoming red-tape obstacles. The Government of Kuwait has established the National Fund for Small and Medium Enterprise Development in 2013. One of the Fund's main services offered to SMEs to ensure the facilitation of market linkage through "working closely with the Central Tendering Committee (CTC) to ensure integration of its SME portfolio into the government procurement process." *See Services*, NAT'L FUND FOR SMALL & MEDIUM ENTERPRISE DEV., <http://nationalfund.gov.kw/en/services-listing/> (last visited Mar. 8, 2016). Thresholds of PPP infrastructure projects are high compared to the capacity SMEs can bare, nevertheless their inclusion in supply chains in such contracts may be useful.

activity, progressive PPP framework, and unique diversification of the economy within this City and private sector presence in comparison with other Gulf peers, is what guides this study to focus on this precise city and enriches its comparison outcomes. The multinational corporate or international presence also reflects on the institutional schemes developed in the City of Dubai, which is useful insight when discussing development plans in the GCC and institutional arrangements to enable private sector participation in infrastructure.<sup>27</sup>

The study will also focus only on a limited number of government authorities in the three Gulf States. And as a result, the focus is on infrastructure projects. Infrastructure projects would be concentrated in sectors of energy, transportation, and telecommunication mainly. This means other sectors would not explicitly and elaborately be highlighted in this study. Nonetheless, the supervisory bodies of PPP units and central procurement monitoring authorities relevant to more than one sector would be incorporated.

Since the PPP approach in implementing infrastructure projects is relatively recent, not only to the three states, but globally as well, data would not be as generous. Nevertheless, public investment and procurement policies have already been in place in these states, with certain incongruities. The judiciary in these states has moreover engaged in ensuring that certain principles are met in procurement practices, including upholding the principle of non-discrimination. These judicial precedents however are necessarily influenced by specific legal interpretations based on civil law approaches to public contracts. This approach would emphasize the distinct powers a state government retains in its contractual relationships with

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<sup>27</sup> WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2017-2018, at 33 (Klaus Schwab ed., 2017) [hereinafter GLOBAL COMPETITIVENESS REPORT 2017-2018].

private parties. Dubai, nonetheless, slightly deviates from this civil law legal culture and opts for more hybrid approaches as the study will engage in displaying.

The major impediment in the Gulf when it comes to implementing infrastructure projects is the countries' government entities, institutions. This study attempts to assess institutional capacity in the context of pre-devised regulatory frameworks enabling private participation in infrastructure projects. Collaboration between institutions and clear agency mandates are key in PPP programs. And when foreign investors are a chief driver of the Gulf State's visions, certain assurances must be in place.

These safeguards are embodied in international investment standards that are applicable to foreign investments in a state's economic activity. Amongst the main goals these standards attempt to achieve is to ensure the legitimate expectations of investors are met. That is, when investors engage in business activity in the host country, implementing infrastructure projects, they should be able to plan according to predictable government institutional behavior.

At the same time though, countries must be allowed space for regulatory and institutional inputs, contextualism, to serve their societies. This is backed by global consensus stressing that economic growth should come hand in hand with focusing on the well-being of the people, which includes environmental sustainability and equitable wealth distribution.<sup>28</sup> In many instances, this space of government action does not align with the private sector's expectations. Introducing the private sector to lead the GCC's infrastructure projects must consider one point, the government will still be relevant. Private parties are not replacing the government. They are rather partnering and contributing to the country's goals. Gulf governments must consider how much private space is permissible in the governance of these States while embarking on

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<sup>28</sup> *Id.* at 1.

transforming the identity of the GCC to regulator governments instead of operator. While private sector space may be minimized in sectors like health and education to ensure the government's continued social development support of its community, other sectors like telecommunication, transportation, and energy, could be strengthened by an enhanced private sector role bringing with it advanced technologies and innovation.

The implications of private sector lead means welfare policies would shift.<sup>29</sup> In the name of efficiency for instance, private sector implementation of long-term infrastructure projects, such as building and operating solar power plants, could mean curbing the labor market. Where government employs a good five hundred government employees to operate a sector specific infrastructure, the private party may cut this number to half. For a growing GCC population anticipating employment opportunities, these repercussions must be well understood.<sup>30</sup>

Notwithstanding this fact, some of the GCC States, Kuwait, still insisted on brushing their touches to such private sector engagement by ensuring that citizens of the country retain a number of shares of project companies called special purpose vehicles (SPVs) that are specifically established to implement infrastructure projects.<sup>31</sup> While this approach is rather unique in private involvement in infrastructure, as the private sector is expected to mobilize finance for the project, the Kuwaiti welfare feature in this example is evident.<sup>32</sup> The public shareholding guarantee for citizens of Kuwait creates some sort of vested interest in these locals

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<sup>29</sup> FERNANDA RUIZ-NUÑEZ, CLIO DINTHILAC & ZICHAO WEI, THE ECONOMIC IMPACT OF PUBLIC-PRIVATE PARTNERSHIPS IN THE INFRASTRUCTURE SECTOR: LITERATURE REVIEW 7-11 (2016).

<sup>30</sup> Laura El-Katiri, *Saudi Arabia's Labor Market Challenge*, 6 HARV. BUS. REV. 1 (2016); WORLD ECONOMIC FORUM, RETHINKING ARAB EMPLOYMENT: A SYSTEMATIC APPROACH FOR RESOURCE-ENDOWED ECONOMIES 6–9, 12–13, 15 (2014).

<sup>31</sup> See, e.g., Law No. 116 of 2014, art. 13(3), Regarding Public Private Partnerships (Kuwait) [hereinafter Kuwait PPP Law] (providing that a public joint-stock company shall be established following the procurement of the project and selection of the Successful Investor, and shall distribute its shares with “[f]ifty percent (50%) . . . allocated for subscription through an initial public offering to living Kuwaitis”).

<sup>32</sup> Barkatali & Kirton, *supra* note 20.

backing the success of infrastructure projects. And consequently so, the dynamics between market v. welfare policies are tested in new Gulf visions.

In the context of this last point, it is critical to comprehend the nature of private involvement in infrastructure projects, mainly PPPs, in the first part of the study. While the underlying message of the Arab Gulf States' visions is to enable private sector engagement in such projects, the consequences of resorting to this means must be apprehended thoroughly in advance. This would guide in the level and nature of institutional capacity required to implement PPP policies.

The subsequent point would be understanding the role of law and development theories in allowing Gulf monarchies to shape PPP related institutions. The discussion elicits the interplay between universal and contextual rules and institutional practices. As L&D has evolved throughout moments or generational reforms, from Washington consensus market liberalization to emphasis on introducing a social element in civic participation to development policies. The progression within such studies may have nonetheless focused largely on regulations and their role in shaping development. This is certainly a significant component to shaping state policies, yet it is one face of the coin. L&D may also have acknowledged the important role of state public entities as state institutions as well, yet there still remains much more empirical evidence to be obtained and research to be conducted on their roles picking up from even solid regulatory frameworks.<sup>33</sup> This evolution allows for a more thorough approach in studying how GCC States may better pursue tailored methods for their PPP related institutional practice as per regulatory reforms to make policies properly enforceable.

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<sup>33</sup> KEVIN DAVIS & MICHAEL J. TREBILCOCK, WHAT ROLE DO LEGAL INSTITUTIONS PLAY IN DEVELOPMENT? 8-9 (1999), <https://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf>.

Gulf specificities are highlighted in this study when understanding the level of reform and adaptation needed in applying theories like path dependence to show the level of resistance to institutional changes. The private sector in the Gulf is rather unique.<sup>34</sup> There is an abundant grey area of private sector actors in the Gulf where the lines as to what a government entity is as opposed to private sector is often ambiguous. State-Owned Enterprises (SOEs) and consistent government appointed officials in private entities is one example of such rather distinct nature of the Gulf private sector.<sup>35</sup>

The government institutional structures in the GCC are no less complex. The study will attempt to address the institutional scheme of government entities entrusted with implementing PPP policies in their relationships with the private sector, a longtime partner in the decades to come. Lessons as to variances between the three Gulf States will be useful in instigating cross application of efficient institutional structures.

There is ultimately no extreme contextual model that the Gulf States may adopt at a time where they attempt to appeal to foreign investors. The foreseen foreign element in executing GCC development policies necessitates discoursing the applicable international investment law standards in this study as the concluding part. These universal principles tame the contextual Gulf institutional practice.

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<sup>34</sup> Mhamed Biygautane, Paula Gerber & Graeme Hodge, *The Evolution of Administrative Systems in Kuwait, Saudi Arabia, and Qatar: The Challenge of Implementing Market Based Reforms*, 26 DIG. MID. E. STUD. 97, 104-05 (2016).

<sup>35</sup> SOEs for instance may be exempt from the application of competition laws that ensure fair competition in the countries' business environment. *See, e.g.*, Council of Ministers Resolution No. 126, 4/9/1435H (2013), art. 3, issuing the Implementing Regulations to the Competition Law promulgated under Royal Decree No. M/25, 4/5/1425H and Royal Decree No. 24/M, 11/4/1435H (Saudi Arabia) [hereinafter Saudi Implementing Regulations to the Competition Law]; Law No. 10 of 2007, art. 6, Regarding the Protection of Competition (Kuwait) [hereinafter Kuwait Competition Law]; Federal Law No. 4 of 2012, art. 4, Regulation of Competition (U.A.E.) [hereinafter U.A.E. Competition Law]. *See also* Hertog, *supra* note 10, at 174, 179, 181-82, 84; Biygautane et al., *supra* note 34, at 107.

The study will reflect a discussion about principles like enforcing foreign judgments and arbitral awards in a restricted moderate version impacted by state public policies. Other standards would include protecting against state practice that may equate to expropriation, upholding the national treatment standard between local and foreign investors, fair and equitable treatment, and understanding government commitments to full protection and security of both investors and investments in circumstances like civil disturbances and uprisings, not all that foreign to this region. These are risks that need to be mitigated by host GCC governments, yet the private party shall inevitably be subject to a degree of business activity fundamentals, risk. Upholding internationally compliant institutional practice even when demanding certain private sector burdening of risk, can help lower project costs when risks are lower in the state. The interaction of these universal v. contextual institutional practices shall be reflected in the transaction costs burdening Gulf governments while implementing their development visions.

CHAPTER II  
THE PROVISION OF INFRASTRUCTURE AND PUBLIC SERVICES  
AND THE WORLD OF PPPS

The General Concept of Partnerships

Theories Behind the Idea of Partnerships

From Hobbe's Leviathan to Jean Jacque Rousseau and Adams Smith, a centralized authority and the cooperative nature it must adhere to in a society is discoursed.<sup>36</sup> The philosophical history behind partnerships of what would be referred to as public and private sectors is extensive. However, engaging in its deep analysis may serve more than what this study intends to cover.<sup>37</sup>

There are many public policy theories to explain the idea of government actions and correlated aims. And such policies surely affect a broad array of interests.<sup>38</sup> A necessary interdisciplinary approach to elaborate on the notion of partnerships, focusing precisely on partnerships between the government and the private sector, shall embrace public administration or policy theories and their evolution. This allows for later contextualizing such approaches to the Gulf region and elaborate on how legal instruments can utilize partnerships for certain aims. The idea of government in the Gulf may have implied exclusivity in its history. Accordingly,

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<sup>36</sup> A game theory perspective also approaches the idea of partnerships, using the prisoner's dilemma test, where the long-term contractual relationship of a PPP can achieve the optimum outcome. Ronald W. McQuaid, *The Theory of Partnership*, in PUBLIC-PRIVATE PARTNERSHIPS: THEORY AND PRACTICE IN INTERNATIONAL PERSPECTIVE 26, 27-29 (Stephen Osborne ed., 2000).

<sup>37</sup> The public sector would refer to governmental bodies such as ministries and state departments in addition to state-owned enterprises. The private sector covers the entities of the economy that are not under the direct control of the government, and are specifically for-profit businesses. For more information on this distinction, see George A. Boyne, *Public and Private Management: What's the Difference?*, 39 J. MGMT. STUD. 97, 98-99 (2002). See also JOHN J. FORRER ET AL., GOVERNING CROSS-SECTOR COLLABORATION 11-12 (2014).

<sup>38</sup> THOMAS A. BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING 8 (3rd ed. 2011).



fundamentally understanding the cooperative benefits of partnering with the private sector is an important gateway to assessing the prospects for empowering other actors to perform what have traditionally been state operations.

### Theories of Partnerships in Public Administration (Choice) Literature

The Greek philosopher Plotinus acknowledged some 2,000 years ago that the universe is a set of living being that resembles a sort of partnership, by saying, “all development is envelopment.”<sup>39</sup> Charles Darwin furthermore went on to say, “it is the long history of humankind (and animal kind, too) that those who learned to collaborate and improvise most effectively have prevailed.”<sup>40</sup>

Partnerships aim to address the aspects that action can be taken to encompass change where constituent parties cannot accomplish such solely.<sup>41</sup> The established partnership illustrates relationships with new viewpoints and capabilities that may not be available to each partner otherwise, thus assisting in the production of better results through reciprocal heterarchal interactions.<sup>42</sup> The problem with the term partnership however is that it is highly political when it comes to state institutions.<sup>43</sup> Politicians may use it as a tool to leverage their constituent support of which private individuals and entities are one of. And this would also mean opening the floodgate for a solid lobbying environment of private entities to politicians.<sup>44</sup> The meaning

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<sup>39</sup> SETH A. GROSSMAN & MARC HOLZER, PARTNERSHIP GOVERNANCE IN PUBLIC MANAGEMENT 12 (2016).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.*

<sup>43</sup> Tony Bovaird, A.G. Bovaird, Elke Loffler, *The Changing Context of Public Policy*, in PUBLIC MANAGEMENT AND GOVERNANCE 20 (Tony Bovaird, A.G. Bovaird & Elke Loffler eds., 1st ed. 2003).

<sup>44</sup> *Id.*

associated with the partnership idea as a result of political influence can be too broad even while embodying a positive undertone.

Public and private management are fundamentally different.<sup>45</sup> In public management, public administration literature traces the idea of the administrative state in the context of public administration to the Chinese civilization from the ideals of Confucius to the Roman empire in teachings of Cicero.<sup>46</sup> From these civilizations towards more modern insights, Jeremy Bentham introduced what he referred to as utilitarianism, where the government should pursue in its policies what maximizes the greatest benefit for its people, or welfare.<sup>47</sup> John Stuart Mill later carried out this work.<sup>48</sup> Often though, welfare policies do not correspond with private provision of public interest needs. This is where a more balanced version of utilitarianism might be necessary when private management is involved.

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<sup>45</sup> Max Weber described the modern office where he used the term bureaucracy and how the public is distinct from the private sphere as: “The totality of those working in the office with the respective material equipment and the files make up a ‘bureau.’ (In private enterprise, it is often called an ‘office.’) The modern civil service system separates in principle the bureau from the private domicile of the individual official. It is also a condition that official activity is separated from private sphere and that public money and materials kept distinct from the private possession of the official. This condition is a result of long development. Though now it is likely to be found in the private sector as well and even extends to the leading entrepreneurs. The principle is that the executive office is separated from household, business from private holdings, and business assets from private fortunes. The more consistently modern business has developed — these conditions go back to the middle ages — the more these separations have been the case. It is the peculiarity of modern entrepreneurs that they describe themselves just as the first rulers of bureaucratic modern states did — as ‘the first servant of the state.’ The picture of state bureau activities being different from private business matters is a European continental one, and would be quite contrary and foreign to an American view.” See MAX WEBER, *WIRTSCHAFT AND GESELLSCHAFT (ECONOMY AND SOCIETY)* 650–56 (1st ed., 1922), reprinted in *CLASSICS OF PUBLIC ADMINISTRATION* 63–64 (Jay M. Shafritz & Albert C. Hyde eds., 8th ed. 2017).

<sup>46</sup> Following the Chinese model, the Roman civilization was the first administrative empire that developed a tax collecting system and incorporated the writings of Cicero that went further into defining the role of citizens in public life. Jay M. Shafritz & Albert C. Hyde, *Part One: Early Voices and the First Quarter Century: Ancient Times to 1920s*, in *CLASSICS OF PUBLIC ADMINISTRATION* 3–4 (Jay M. Shafritz & Albert C. Hyde eds., 8th ed. 2017).

<sup>47</sup> *Id.* at 5.

<sup>48</sup> *Id.*

The divergence between public and private management can find its main conclusions drawn by observations of Graham T. Allison,<sup>49</sup> where:

- a) The demand for performance from government and efficiency in government is correct and real. The perception that government performance also lags behind business performance is also real. But the idea of directly transferring private management practices and skills to public management that significantly improves it is wrong.
- b) Substantial public management improved performance does not come from specifically borrowing private management skills and knowledge, rather, it comes from an articulation of general management functions and a self-consciousness about the general public management perspective. Private management can instruct public management through recognition of and consciousness about the public management function.
- c) The beneficial application of certain private management rules such as the 80-20 rule, where 80 percent of benefits of most production processes come from the first 20 percent of effort.
- d) Some accounting categories and rules may be transferable from private management to public management problems, however, more importantly, attention to specific management functions in business could create public management categories and rules.
- e) Experiences may be drawn and adopted by observance on an empirical basis.
- f) Developing public management as a field of knowledge should come from problems that public managers confront.<sup>50</sup>

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<sup>49</sup> Proceedings of the Public Management Research Conference at 27–38 (Nov. 19–20, 1979), in CLASSICS OF PUBLIC ADMINISTRATION, *supra* note 46, at 385.

<sup>50</sup> *Id.*

While certain deficiencies have been detected in public agencies, more innovative methods for delivering public needs also arise. The idea of “networks” in public administration literature<sup>51</sup> in this context emerges and entails governmental partnerships with non-governmental agencies in public service delivery. These networks embody many aspects of knowledge sharing and participatory policy setting, where traditional governance structures are challenged, although some stress that government administrators still take lead in such networks.<sup>52</sup> These ostensible public/private partnerships rather fall under interorganizational mixtures of relationships.<sup>53</sup> And these relationships tend to follow a horizontal structure based on trust and reciprocity, not a vertical hierarchy type one. And as such, it is of a cooperative nature with no particular direct control.<sup>54</sup>

And when talking about networks, they would differ from partnerships in the fact that they can include more actors as members, whether for-profit or non-profit sectors that the government involves in its programs under formal or informal structures.<sup>55</sup> This may appear to be of terminological divergence and could provide minimal practicality.

Ronald McQuaid focuses on elements in order to describe the relationship as a partnership that would include: a) what the partnership is seeking to do? -i.e. its purpose and whether it is strategic or project driven; b) who is involved -the key actors and their relationship in the partnership; c) when? -i.e. the timing or stage of development of the partnership process

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<sup>51</sup> See Elke Löffler, *Governance and Government: Networking with External Stakeholders*, in PUBLIC MANAGEMENT, *supra* note 17, at 170; Robert Agranoff, *Inside Collaborative Networks: Ten Lessons for Public Managers*, in CLASSICS OF PUBLIC ADMINISTRATION, *supra* note 46, at 584–94. See also FORRER ET AL., *supra* note 37, at 85.

<sup>52</sup> Agranoff, *supra* note 51, at 592.

<sup>53</sup> *Id.*

<sup>54</sup> Löffler, *supra* note 51, at 171; FORRER ET AL., *supra* note 37, at xix.

<sup>55</sup> FORRER ET AL., *supra* note 37, at 18–19.

and changing relationships and activities over time; d) where? –i.e. the spatial dimension; e) how the activities are carried out, the implementation mechanism.<sup>56</sup>

The rationale for what is referred to as cross-sector collaboration that encompasses the broad idea of public-private partnerships can be broken down into three categories: pragmatic, economic, and strategic rationales.<sup>57</sup> As for the pragmatic rationale, it would refer to the government's resort to such collaborations to face challenges related to lack of resources and staff or expertise in new fields.<sup>58</sup> The economic rationale for collaboration is the competitive advantage the private sector may have over the government in which the private sector is incentivized by gains and thus thrives to achieve efficient outcomes that would ultimately enhance a competitive environment.<sup>59</sup> And the strategic reasoning is based on the idea that collaboration would aim to achieve greater objectives of multiple actors and more importantly enhance the organizational structure of relevant agencies, such as increasing private firm competitiveness through alliances with government entities to deliver certain public services, just like what happens when two private firms form alliances.<sup>60</sup> And the public sector strategically gains from its collaboration with the private sector when it aims to achieve the public interest through practices like corporate social responsibility.<sup>61</sup>

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<sup>56</sup> McQuaid, *supra* note 36, at 13.

<sup>57</sup> FORRER ET AL., *supra* note 37, at 31.

<sup>58</sup> *Id.* at 32. GROSSMAN & HOLZER, *supra* note 39, at 31.

<sup>59</sup> FORRER ET AL., *supra* note 37, at 35–39.

<sup>60</sup> *Id.* at 40–41. Jeffrey Delmon adds to the justifications that drive the public sector to resort to PPPs: (1) Underperformance of public sector utilities, often linked with opaque funding structures and inefficient or corrupt procurement methods; (2) Inadequate technical and management resources in the public sector; (3) Investment demands exceeding public resources, in particular given the large upfront capital costs associated with major infrastructure investments and the 'lumpy' cost implications of periodic major maintenance; quite simply, the government may not have the resources. He further cites certain elements that PPPs would add, which are efficiency, whole asset life solution, transparency and anti-corruption, technology, innovation, and know-how, and sources of financing. JEFFREY DELMON, PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: PROJECT FINANCE, PPP PROJECTS AND PPP FRAMEWORKS 12-14 (3rd ed. 2016).

<sup>61</sup> FORRER ET AL., *supra* note 37, at 43–44.

## Incentives for Partnerships on the International Level

With regards to incentives that drive governments towards more collaboration and partnerships with other actors such as the private sector, there are many recent challenges that prove that sole government efforts may not address such problems. Climate change for instance is an issue where rising temperatures can lead to widespread pandemics and food shortages because of the effect on certain crops where public agencies will have to reach out to all relevant sectors.<sup>62</sup> The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects displays incentives to resort to private finance for infrastructure projects by explaining:

The current reverse trend towards private sector participation and competition in infrastructure sectors started in the early 1980s and has been driven by general as well as country-specific factors. Among the general factors are significant technological innovations; high indebtedness and stringent budget constraints limiting the public sector's ability to meet increasing infrastructure needs; the expansion of international and local capital markets, with a consequent improvement in access to private funding; and an increasing number of successful international experiences with private participation and competition in infrastructure. In many countries, new legislation was adopted, not only to govern such transactions, but also to modify the market structure and the rules of competition governing the sectors in which they were taking place.<sup>63</sup>

Moreover, resources required for instance to finance not billions but trillions necessary to achieve the new Sustainable Development Goals (SDGs) unquestionably incorporate the private sector's resources and expertise.<sup>64</sup> On September 25, 2015, leaders from all over the world met in New York and adopted United Nations General Assembly Resolution 70/1, which included 17 goals and 169 targets from 2015 until 2030.<sup>65</sup> The Resolution included sustainability and, in

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<sup>62</sup> *Id.* at 5–6.

<sup>63</sup> U.N. COMM'N INT'L TRADE LAW (UNCITRAL), LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS, at 1, U.N. Doc. A/CN.9/SER.B/4, U.N. Sales No. E.01.V.4 (2001) [hereinafter UNCITRAL PFIP].

<sup>64</sup> David Uszoki, *De-risking Sustainable Infrastructure: Special Report*, FINANCIER WORLD MAGAZINE, Apr. 2019.

<sup>65</sup> G.A. Res. 70/1, ¶ 18 (Oct. 21, 2015) (adopting the outcome document of the UN Summit for the post-2015 development agenda, Transforming Our World: The 2030 Agenda for Sustainable Development).

terms of development, clean water and sanitation; affordable and clean energy; decent work and economic growth; industry innovation and infrastructure; sustainable cities and communities; responsible consumption and production; life below water life on land; and peace, justice, and strong institutions.<sup>66</sup> Discussing the content of all the different targets goes beyond the scope of this study and demands more elaborate and in-depth discussion. Nevertheless, what accompanies this broad consensus is a high cost.<sup>67</sup> It is estimated that implementing such an agenda would be valued at US \$5 to 7 Trillion.<sup>68</sup>

The SDGs are part of a global structure, yet the role local communities play in the implementation of the SDGs is critical. What these SDGs sum up, as was the case with their predecessors, the Millennium Development Goals,<sup>69</sup> is that they are soft in their establishment through Resolution 70/1, but defer to state domestic constituents to further contextualize them.<sup>70</sup> Even in the language of the Resolution, with all the commitments the state members took upon themselves, it is intended to guide the participating governments in implementing a national

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<sup>66</sup> SUSTAINABLE DEVELOPMENT GOALS, <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited Oct. 27, 2015).

<sup>67</sup> SAMANTHA CUSTER ET AL., LISTENING TO LEADERS: WHICH DEVELOPMENT PARTNERS DO THEY PREFER AND WHY? 83 (2015), <https://www.aiddata.org/publications/listening-to-leaders-which-development-partners-do-they-prefer-and-why>. In a joint effort, the World Bank's Development Committee described the process of financing the SDGs as, "[t]o meet the investment needs of the Sustainable Development Goals, the global community needs to move the discussion from 'Billions' in ODA to 'Trillions' in investments of all kind: public and private, national and global, in both capital and capacity." WORLD BANK ET AL., FROM BILLIONS TO TRILLIONS: TRANSFORMING DEVELOPMENT FINANCE, POST-2015 FINANCING FOR DEVELOPMENT: MULTILATERAL DEVELOPMENT FINANCE, 1 (2015), <https://issuu.com/copcutbrasil/docs/55a513bf6b19a>.

<sup>68</sup> CUSTER ET AL., *supra* note 67, at 83; FROM BILLIONS TO TRILLIONS, *supra* note 67, at 1. *See also* Uszoki, *supra* note 64.

<sup>69</sup> The MDG agenda included eight goals to be attained by 2015: (1) eradicate extreme hunger and poverty, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/Aids, malaria and other diseases, (7) ensure environmental sustainability, and (8) develop global partnerships, with eighteen related specific targets, and forty-four quantifiable indicators. *Background*, MILLENNIUM DEV. GOALS, <http://www.un.org/millenniumgoals/bkgd.shtml> (last visited Oct. 27, 2015).

<sup>70</sup> The nature of U.N. General Assembly resolutions is discussed in art. 10 of the U.N. Charter, where the Assembly "may make recommendations to the members of the United Nations or to the Security Council or to both on any such matters of questions." U.N. Charter art 10, ¶ 1.

framework within the context of a generalized versus contextualized development goals debate.<sup>71</sup> Nevertheless, a broad and flexible tone is evident throughout the Resolution and in the Goals themselves, which implies that governments have some flexibility in implementing the SDGs.

#### PPPs as a Means of Private Participation in Infrastructure to serve the Public Interest

PPPs in their precise definition as shall be discussed in this study have been grounded and approached from multiple theoretical frameworks when it particularly comes to participating in infrastructure provision and public services. Some break this down into five meta-theories to justify PPPs.<sup>72</sup> These theories are: government regulation of business, regional and urban dynamics, new public management (NPM), critique of Private Finance Initiative (PFI) from a public sector accounting perspective, strategic management approach, public governance, and postmodernist theories.<sup>73</sup>

The idea behind the government regulation of business theory emerges from welfare economics in the early twentieth century and implies the need for state intervention in market activity and is particular to utilities governance in the US and UK economies.<sup>74</sup> It was also found in France in public service provision like the government granting concessions to private firms regulated by law and Germany with state partnerships in key industries like Volkswagen and Lufthansa.<sup>75</sup>

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<sup>71</sup> DEEPAK NAYYAR, *THE MDGS AFTER 2015: SOME REFLECTIONS ON THE POSSIBILITIES* 11 (2012).

<sup>72</sup> Tony Bovaird, *A Brief Intellectual History of the Public-Private Partnership Movement*, in *INTERNATIONAL HANDBOOK ON PUBLIC-PRIVATE PARTNERSHIPS* 43, 46–63 (Graeme A. Hodge et al. eds., 2010).

<sup>73</sup> *Id.* at 45–46.

<sup>74</sup> *Id.* at 46–48.

<sup>75</sup> *Id.*



Post 1950s, the regional and urban dynamics theory grounded the use of PPPs on regional and urban restoration. While governments were seen to invest in such urban developments, private sector interests dominated the structures of PPPs.<sup>76</sup> US cities resorted to PPPs for the provision of necessary infrastructure with soft loans or a proportion of the profits from the project and thus the city was perceived as “co-investor”.<sup>77</sup> This is what led some to believe that the term may have technically originated in the US.<sup>78</sup>

The new public management (NPM) movement in the 1980s influenced by public choice theory was seen to introduce a competitive environment to the public sector in the provision of services and goods.<sup>79</sup> This movement represented a blend between public management and private business management strategies and considers citizens customers.<sup>80</sup> This meant incorporating market principles that control costs and quality in the rationale of what was known as the private finance initiative (PFI), which was developed and extensively used by the UK government.<sup>81</sup> This initiative was largely influenced by then UK Government led by Margret Thatcher’s belief that a supersized public sector must be curbed in favor of a more efficient private sector that may deliver the same public services.<sup>82</sup> The movement pressed for more private sector participation in the delivery of infrastructure and of generally public services and goods. Similar perceptions existed in the United States that government is inefficient, oversized,

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<sup>76</sup> *Id.* at 49.

<sup>77</sup> Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 595–96 (2000); Bovaird, *supra* note 72, at 50.

<sup>78</sup> E.R. YESCOMBE, *PUBLIC-PRIVATE PARTNERSHIPS: PRINCIPLES OF POLICY AND FINANCE 2* (2007).

<sup>79</sup> Bovaird, *supra* note 72, at 54–55.

<sup>80</sup> James L. Chan, *Changing Roles of Public Financial Management*, in *PUBLIC MANAGEMENT*, *supra* note 17, at 103.

<sup>81</sup> Bovaird, *supra* note 72, at 55–56.

<sup>82</sup> Andrew Erridge, *Contracting for Public Services: Competition and Partnership*, in *PUBLIC MANAGEMENT*, *supra* note 17, at 90–92.

and unresponsive, i.e. the “hollow state”.<sup>83</sup> Others nonetheless disputed the adequacy of introducing private management ideals to offer public services.<sup>84</sup>

The PFI model and the NPM were not immune from criticism. The public accounting perspective from the 1990s criticized the PFI model in terms of the efficiency of the market discipline approach.<sup>85</sup> What is overlooked is the fact that while PFI brings private capital into essential infrastructure, it also imposes debt that future generations would confront, in addition to the higher costs PFIs entail in bringing private finance that public financing would not face, such as risk.<sup>86</sup> These consequences have in fact led the UK government to recently rather set this PFI approach aside in its upcoming infrastructure projects.<sup>87</sup> This is a significant move from the pioneer of the model and should set expectations of other countries that aspire to adopt the approach accordingly. The UK Government approach though has its unique fiscal structures that would not apply to other countries.

The strategic management approach to PPPs lays on the theory of “collaborative advantage” instead of “comparative advantage”.<sup>88</sup> This collaboration would improve firm performance. US transportation departments for instance would adopt policies that entailed

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<sup>83</sup> FORRER ET AL., *supra* note 37, at xv-xvii. *See also* MARK GOLDSTEIN, AMERICA’S HOLLOW GOVERNMENT: HOW WASHINGTON HAS FAILED THE PEOPLE (1992), (using the term “hollow government” to refer to the lack of resources to implement the government’s functions).

<sup>84</sup> Boyne, *supra* note 37, at 118; Erridge, *supra* note 82, at 90–92.

<sup>85</sup> Bovaird, *supra* note 72, at 56.

<sup>86</sup> *Id.*

<sup>87</sup> *Public-Private Partnerships*, U.K. GOV. (May 30, 2019), <https://www.gov.uk/government/collections/public-private-partnerships>.

<sup>88</sup> On a state level, the collaborative advantage element implies specialization afforded to economies, especially economies of scale, in which further cross-fertilization between economies would be mutually possible through trade. Bovaird, *supra* note 72, at 59; *see also* PAUL JOYCE, STRATEGIC MANAGEMENT IN THE PUBLIC SECTOR 9-11 (2015).

public outreach through surveys and even social media to other stakeholders such as customers, business partners, and state legislatures.<sup>89</sup>

Public governance theories in public administration, unlike the NPM, focused more on multiple stakeholders thriving to achieve multiple goals under an umbrella of a negotiated framework.<sup>90</sup> This meant PPPs were a way where decentralized decision-making would take place for the provision of services through multiple stakeholders.<sup>91</sup>

Finally, the postmodern theories were an amalgam of perspectives that attempted to shift the paradigm towards broadening engagement with PPPs.<sup>92</sup> The discourse ties governance arrangements to public service performance and makes public involvement key to success.<sup>93</sup> The impact PPP projects have on the public is to be identified and anticipated, and representative political presence should incorporate more individuals, organizations, and communities at large in the processes of PPPs,<sup>94</sup> which was referred to as culture governance.<sup>95</sup>

The evolution of the ideas of private participation in public services have in fact ranged in terms of the extent of this involvement but must not be understood to imply the absence of government. Government must remain an effective player regardless, especially with its enabling powers and hard enforcement mechanisms.<sup>96</sup> Public agencies thus retain the leadership role in the provision of public infrastructure and services whatever method is pursued.<sup>97</sup> The models

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<sup>89</sup> Theodore H. Poister, *The Future of Strategic Planning in the Public Sector: Linking Strategic Management and Performance*, 70 PUB. ADMIN. REV. 246, 249–50 (2010).

<sup>90</sup> Bovaird, *supra* note 72, at 60.

<sup>91</sup> *Id.* at 62.

<sup>92</sup> H. GEORGE FREDERICKSON ET AL., *THE PUBLIC ADMINISTRATION THEORY PRIMER* 160–61 (3d ed. 2016).

<sup>93</sup> Bovaird, *supra* note 72, at 63.

<sup>94</sup> FREDERICKSON ET. AL., *supra* note 92, at 160–61.

<sup>95</sup> Bovaird, *supra* note 72, at 63.

<sup>96</sup> Freeman, *supra* note 77, at 671–72.

<sup>97</sup> Mike Broussine, *Public Leadership*, in *PUBLIC MANAGEMENT*, *supra* note 17, at 175–85.

introduced above are predominantly western models in countries upholding more market liberated economies and this is important when understanding applicability to Gulf States.

Consequently though, in order to better evaluate the undertaking of this study and elicit the grounds for GCC private sector involvement –or what is also referred to as private sector development (PSD)- through PPPs, it is critical to understand what the recent precise technical reference to PPPs entails and differentiate this undertone from other means of public or private sector infrastructure project funding.

### What Are PPPs Specifically?

The idea of PPPs is not completely a new phenomenon as discussed previously. They have been a public policy method for centuries.<sup>98</sup> While PPPs may embody the participation of different stakeholders in collaboration with the government, such as non-profit organizations, this study rather focuses on the private for-profit parties in their relationship with the government. It is through the profit dynamic that this study would ultimately attempt to apprehend increased private sector involvement in infrastructure through PPPs as a major consequence.

There is no precise exhaustive definition for PPPs in their narrow sense.<sup>99</sup> Nonetheless, PPPs have been defined as “any contractual or legal relationship between public and private

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<sup>98</sup> Graeme A. Hodge et al., *Introduction: the PPP Phenomenon and its Evaluation*, in INTERNATIONAL HANDBOOK ON PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 72, at 3–4.

<sup>99</sup> Peter Carroll & Peter Steane, *Public-Private Partnerships: Sectoral Perspectives*, in PUBLIC-PRIVATE PARTNERSHIPS: THEORY AND PRACTICE IN INTERNATIONAL PERSPECTIVE 37 (Stephen Osborne ed., 2000). For more on how PPPs have actually been contested in terms of their meaning and what they refer to, see Erik-Hans Klijn, *Public-Private Partnerships: Deciphering Meaning, Message and Phenomenon*, in INTERNATIONAL HANDBOOK ON PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 72, at 68–69.

entities aimed at improving and/or expanding infrastructure services.”<sup>100</sup> Others set key elements of PPPs when defining them, include:

- A long-term contract (a ‘PPP contract’) between a public and private sector party.
- For the design, construction, financing, and operation of public infrastructure (the ‘facility’ that also includes all its equipment and even plants) by the private sector party.<sup>101</sup>
- With payments over the life of a PPP contract to the private sector party for the use of the infrastructure, made either by the public sector party or the general public as users of the facility; and
- With the infrastructure remaining in public sector ownership or reverting back to public sector ownership at the end of the PPP contract.<sup>102</sup>

The World Bank’s PPPs Reference Guide Version 3.0 views PPPs as, “A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.”<sup>103</sup>

In light of the meanings above, PPPs could be conducted in many different sectors that include transportation, energy, health, and even education. There needs to be a public interest

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<sup>100</sup> DELMON, *supra* note 60, at 3.

<sup>101</sup> The term infrastructure will be used throughout the study to refer to this elaborate meaning, which is also referred to as public asset. WORLD BANK GROUP, THE APMG PUBLIC-PRIVATE PARTNERSHIP (PPP) CERTIFICATION GUIDE 20 (2016) [hereinafter PPP CERTIFICATION GUIDE], <https://ppp-certification.com/sites/default/files/documents/Chapter-1-PPP-Introduction-and-Overview.pdf>.

<sup>102</sup> YESCOMBE, *supra* note 78, at 3. *See also* PPP CERTIFICATION GUIDE, *supra* note 101, at 20.

<sup>103</sup> WORLD BANK, PUBLIC-PRIVATE PARTNERSHIPS REFERENCE GUIDE VERSION 3.0 at 5 (2017) [hereinafter PPP REFERENCE GUIDE].

element for such infrastructure whether it is of an economic or social nature.<sup>104</sup> Public infrastructure has been defined as “facilities, which are necessary for the functioning of the economy or the society.”<sup>105</sup> Some also refer to what can be identified as hard infrastructure, like roads as physical facilities, or soft infrastructure as provision of services, such as telecommunication services.<sup>106</sup>

The key here is the public component of this arrangement. PPPs are not established to serve commercial goals that private entities may aspire to. The government through PPPs rather achieves a public need that serves its society like healthcare and transportation necessities linking rural areas to urban cities. And the ultimate judge of whether the infrastructure is public or of a private nature in terms of ownership is the public policy of the state.<sup>107</sup> The same applies to the public *vis a vis* private services distinction. This contrast will prove to be problematic to Gulf institutions, especially the judiciary, as the consequences of this classification are dire in terms of the applicable rules and institutional competencies in the public-private relationships. Some of the standards that make PPPs distinct include the type of asset involved, what functions the private sector is engaged in, and the way the private party is remunerated.<sup>108</sup>

While assets would refer to building or initiating new infrastructure, greenfield projects, or updating and administering such infrastructure, brownfield projects, the functions of the

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<sup>104</sup> *Id.* at 12–13.

<sup>105</sup> YESCOMBE, *supra* note 78, at 1. The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects refers to public infrastructure as: “Physical facilities that provide services essential to the general public. Examples of public infrastructure in this sense may be found in various sectors and include various types of facility, equipment or system: power generation plants and power distribution networks (electricity sector); systems for local and long-distance telephone communications and data transmission networks (telecommunications sector); desalination plants, waste water treatment plants, water distribution facilities (water sector); facilities and equipment for waste collection and disposal (sanitation sector); and physical installations and systems used for public transportation, such as urban and inter-urban railways, underground trains, bus lines, roads, bridges, tunnels, ports, airlines and airports (transportation sector).” See UNCITRAL PFIP, *supra* note 63, at 4.

<sup>106</sup> YESCOMBE, *supra* note 78, at 1.

<sup>107</sup> UNCITRAL PFIP, *supra* note 63, at 4.

<sup>108</sup> PPP REFERENCE GUIDE, *supra* note 103, at 8–12.

private partner can vary. However, one of the main features of PPPs is that they generally bundle multiple aspects or functions all in one project.<sup>109</sup> Amongst these main functions are the design, building or rehabilitating, financing, maintaining, and operating the projects.<sup>110</sup>

The private sector thus is in reality is operationally providing the public interest to the state's society through the infrastructure project in all its aspects for an extensive amount of time. This feature almost implies that this sector is substituting for the state in its relationship with the public, which is not to be undermined as a significant role in state functions to serve the society. Bundling projects will ultimately highly rely on each project and the government's value for money assessments.<sup>111</sup>

#### PPPs and the Term's Alternatives

While the term PPP may seem to have been gaining widespread acceptance, it is not necessarily the sole term that embodies PPPs. PPPs' classification would generally be dependent on the private sector's participation in a project, whether in terms of the project facility ownership or nature of the service or risk transfer.<sup>112</sup>

This would include management or operation and maintenance (O&M) contracts, affermage, build-operate-transfer (BOT), build-own-operate (BOO) and the like contracts, leases, concessions, divestitures, franchise, and private finance initiative (PFI) as shall be

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<sup>109</sup> Katja Funke, Tim Irwin & Isabel Rial, *Budgeting and Reporting for Public-Private Partnerships* 72 (Int'l Transport F., Discussion Paper No. 2013/07, 2013), <https://www.itf-oecd.org/sites/default/files/docs/dp201307.pdf>; PPP REFERENCE GUIDE, *supra* note 103, at 6; Darrin Grimsey & Mervyn Lewis, *Public Private Partnerships and Public Procurement*, 14 J. POL'Y ANALYSIS & REFORM 171, 171 (2007).

<sup>110</sup> PPP REFERENCE GUIDE, *supra* note 103, at 6.

<sup>111</sup> Oliver Hart, *Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships*, 113 ECON. J. 69, 74 (2003).

<sup>112</sup> YESCOMBE, *supra* note 78, at 13.

detailed later on when discussing types of PPPs.<sup>113</sup> Certain civil law legal systems may also refer to such contractual relationships as public works concessions or public service concessions when meeting certain criteria.<sup>114</sup>

### What PPPs Are Not: Traditional Public Investment

While PPPs are significant contractual relationships, other practices may overlap with the substance of these contracts nonetheless fall short of being PPPs.<sup>115</sup> Management contacts for instance embody short-term relationships between the public and private sector but do not include significant private capital.<sup>116</sup> Similarly, design-build or what is known as “turnkey” contracts do not establish long-term performance incentives on the private sector as such.<sup>117</sup> As for financial lease contracts, although they are long-term contracts for providing public assets, they transfer much less risk to the private sector than PPPs do.<sup>118</sup>

And so, while the private sector may traditionally be engaged in infrastructure projects, the fact that a private party is part of the contractual agreement does not turn the relationship into a PPP in the narrow sense previously displayed. The private sector has regularly been engaged in designing, building, or managing public assets.<sup>119</sup> What a PPP essentially adds here is a more

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<sup>113</sup> DELMON, *supra* note 60, at 9–10. *See also* PPP REFERENCE GUIDE, *supra* note 103, at 6–10. Some alternative terms to PPPs include, private participation in infrastructure (PPI), private sector participation (PSP), P3, and privately financed projects (PFP). YESCOMBE, *supra* note 78, at 4.

<sup>114</sup> UNCITRAL PFIP, *supra* note 63, at 4.

<sup>115</sup> PPP REFERENCE GUIDE, *supra* note 103, at 10.

<sup>116</sup> *Id.* at 10–11.

<sup>117</sup> *Id.* at 11.

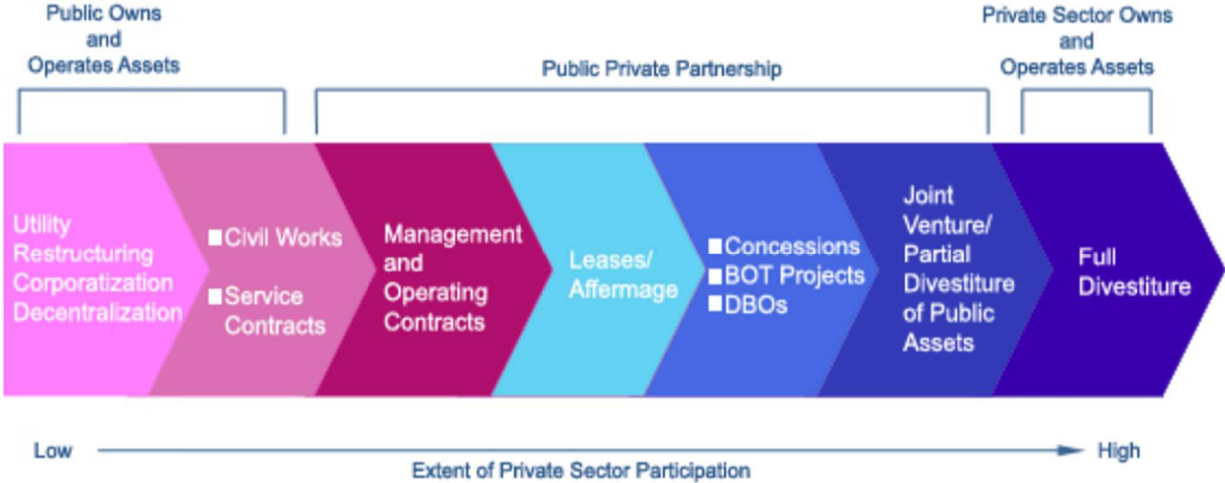
<sup>118</sup> *Id.* For purposes of this study as well, certain contractual arrangements would not fall under the scope of PPPs that this study addresses. This would include, information-sharing mechanisms, voluntary private sector contributions such as in the state’s education system, private funding of projects on a philanthropic basis, joint-projects for research and innovation, governmental interventions to support private sector development where the private sector does not fully provide public services. *Id.* at 10–11.

<sup>119</sup> Grimsey & Lewis, *supra* note 109, at 171.



significant role for the private sector in bearing actual risk of providing quality infrastructure that lasts several decades (See Figure 1).

Figure 1: Spectrum of Private Participation in Infrastructure



Source: Public-Private Partnerships Legal Resource Center, World Bank Group, <https://ppp.worldbank.org/public-private-partnership/agreements>.

Therefore, it must be clear that state governments may certainly resort to what is referred to as traditional public investment or traditional procurement approaches to provide infrastructure to the public juxtaposed against PPPs. In the case where the government resorts to the traditional arrangement though, it would significantly and continuously be engaged in different aspects of the infrastructure contract in addition to its regular state functions to its society and externally. The government would be burdened with both extensive responsibilities and accountability for many of the infrastructure project’s details.<sup>120</sup> This could make it much more complex for the government to expand its project activities in different sectors without having all the necessary human resources with the right technical capabilities. This is in addition to funding and financing the project itself.

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<sup>120</sup> Grimsey & Lewis, *supra* note 109, at 172–73.

When the private sector steps in through PPPs to provide the necessary infrastructure, it instead assumes the details of providing the agreed upon public asset or service to the society. It would be responsible for contracting with all subcontractors to provide necessary materials or services, regularly collecting fees from the public to use the service that is offered, and other relevant tasks. The private party would seemingly be more driven to be more effective in executing these tasks because this party throughout the duration of the contract with the government anticipates achieving a return on their investment by ensuring public acceptance of the quality of infrastructure. The fact remains that the level of competency of government agencies in the country will certainly be a major factor contributing to value for money that may be provided by traditional public investment routes when such government competencies are high in comparison with PPPs. This is why this study engages in understanding GCC government competencies and emphasizing the importance of these Gulf governments' acknowledgment of their capabilities.

### Types of PPPs

When it comes to PPPs, they can take many shapes and forms to accommodate the needs and contexts of a given society, which may inevitably differ, as there is no particular universal method to contract.<sup>121</sup> Nonetheless some scholars such as Jeffrey Delmon classified or categorized delivery segments comprising PPP arrangements into:

- a) New or existing businesses
- b) The nature of project company construction obligations
- c) The need for the project company to mobilize significant private funding ab initio.

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<sup>121</sup> DELMON, *supra* note 60, at 10.

- d) The nature of the project company's service delivery obligations
- e) The source of the project revenue stream.<sup>122</sup>

When discussing particular forms of PPPs, it is critical to point out once again that there is certainly no exclusive reference to a kind of PPP, rather a reflection on the most common types that are available. Terminology would necessarily vary across different jurisdictions around the world. PPPs in terms of privately financed projects would commonly include the following forms:

- a) *Build-operate-transfer projects (BOT)*: In this project, the public entity resorts to a private partner – a concessionaire- to construct an infrastructure facility and administer it, in exchange for revenue, in which ultimately the facility in its final condition would be transferred back to the public entity as the owner.<sup>123</sup>
- b) *Build-transfer-operate (BTO)*: This project evidently refers to the immediate ownership to the public partner of the infrastructure facility once its construction stage is completed, in which the private partner would then operate the facility for a given time.<sup>124</sup>
- c) *Build-rent-operate-transfer (BROT) or Build-lease-operate-transfer (BLOT)*: This combines the components of BOT or BTO projects in addition to the private partner leasing some of the assets of the facility throughout the time of the project.<sup>125</sup>

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<sup>122</sup> *Id.* at 10–11.

<sup>123</sup> UNCITRAL PFIP, *supra* note 63, at 5. *See also* DELMON, *supra* note 60, at 54.

<sup>124</sup> UNCITRAL PFIP, *supra* note 63, at 5.

<sup>125</sup> *Id.*

- d) *Build-own-operate-transfer (BOOT)*: This project gives the private partners a more extensive bond with the infrastructure facility in which construction, ownership, and maintenance authorities are preserved for the private partner who would in exchange retain the right to collect fees and other charges from its users.<sup>126</sup>
- e) *Build-own-operate (BOO)*: This is where the private partner owns the infrastructure facility permanently and is under no commitment to return it to the public partner.<sup>127</sup> This would more accurately apply to what would be known as power purchase agreements (PPAs) in energy projects like wind farms. The private providers in such energy projects would sell the energy to customers and no real transfer back to the government is applicable other the option of buying out the private investor by the government.<sup>128</sup> This is perhaps the closest of models to privatization in terms of the highest level of private engagement and may appear to be confused with it as the lines are significantly thin.<sup>129</sup>

Other arrangements for what PPPs may reflect exist where ownership is not particular to the project. These types of PPPs would include refurbish-operate-transfer (ROT) or modernize-operate-transfer (MOT), or “refurbish-own-operate” (ROO) or “modernize-own-operate” (MOO). The expression “design-build-finance-operate” (DBFO) would also highlight the private

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<sup>126</sup> *Id.* at 6.

<sup>127</sup> EDWARD FARQUHARSON ET AL., HOW TO ENGAGE THE PRIVATE SECTOR IN PUBLIC-PRIVATE PARTNERSHIPS IN EMERGING MARKETS 24 (2011); UNCITRAL PFIP, *supra* note 63, at 6.

<sup>128</sup> ASIAN DEV. BANK, DEVELOPING BEST PRACTICES FOR PROMOTING PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: POWER 58–59, 72, 75–76 (2000).

<sup>129</sup> TOOLKIT FOR PUBLIC-PRIVATE PARTNERSHIPS IN ROADS & HIGHWAYS 64 (2009).

partner's further responsibility for designing the facility and financing its construction.<sup>130</sup> PPPs remain particular contractual agreements that need to be understood in the context of their different forms in contrast with publicly financed infrastructure projects.

### A PPP's Distinct World

Public works and services for infrastructure projects are traditionally funded and financed by the government from the state's public budget.<sup>131</sup> The value for money (VfM) assessment is a means of comparison between traditional public provision of infrastructure and services and privately financed projects, i.e. PPPs. Both methods will always need to be options on the table that the government studies for qualifying projects of significant size. The Canadian agency Infrastructure Ontario provides in its *Assessing Value for Money: An Updated Guide to Infrastructure Ontario's Methodology Guide* of March 2015:

There is a growing body of empirical data that supports the notion that traditionally delivered projects have a tendency to run over budget at a rate that is higher than an AFP delivery model. IO has considered this relevant external data, where available, to assess the quantification of risks using a 'top down' approach. We have noted that the vast majority of information available indicates that P3 projects globally have achieved strong performance in terms of on-time and on-budget delivery.

Findings from the Conference Board of Canada published in their 2010 report titled "Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments" show that out of 55 P3 projects examined in Canada, none exceeded budget and of the 19 that had achieved substantial completion, 17 of these were completed either on-time or ahead of schedule.<sup>132</sup>

Value for money would in this context help guide decision making as to whether PPPs are the most suitable choice to procure infrastructure projects amongst other sensitivity tests and

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<sup>130</sup> UNCITRAL PFIP, *supra* note 63, at 6.

<sup>131</sup> PPP CERTIFICATION GUIDE, *supra* note 101, at 25.

<sup>132</sup> ASSESSING VALUE FOR MONEY: AN UPDATED GUIDE TO INFRASTRUCTURE ONTARIO'S METHODOLOGY 9 (2015).

studies like cost-benefit analyses (CBA) and qualitative assessments. And the quality and capacity of governments like those that will be assessed in the GCC are one major factor in deciding whether to opt for PPPs to achieve more effectiveness in infrastructure project implementation even while quantitatively, projects appear to cost more.

To further delineate PPPs and distinguish them from what may be referred to as publicly or governmentally financed infrastructure projects, or where the projects are financed by institutions like international donors such as the World Bank or Asian Development Bank in some cases, there are certain elements that need to be traced and further clarified. The distinction of PPPs compared with traditional public delivery of infrastructure will be displayed in terms of the legal scope, the financing aspect, risk allocation, and duration of the contract as main elements that characterize PPPs.

### Legal Scope

The regulatory framework that governs the contractual relationship or transaction in a PPP contract is a key aspect that allows for configuration to the precise type of arrangement. Regulations have been identified as government controls on business activity.<sup>133</sup> These controls would entail the laws and policies of the state in a flexible broad understanding. The main aim of governments would be to establish rules that create a stable environment for PPPs, where risk and ambiguity around the project's outcome would mitigate the level of concern private partners may have, and the government as well would eventually create a competitive setting it gains

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<sup>133</sup> ASHLEY C. BROWN ET AL., HANDBOOK FOR EVALUATING INFRASTRUCTURE REGULATORY SYSTEMS 16 (2006).

from that leads to more lending and minimizes costs through lower priced and better-quality bids accordingly.<sup>134</sup>

In order to meet the legitimate expectation of the parties to the PPP contract, it can be debated whether precise tailored rules to govern PPPs should be in place.<sup>135</sup> When discussing ad hoc rules that regulate PPPs, it is also important to consider the legal system in place in the given state. There could be many variables in different jurisdictions that shape the legislative approach to these contractual arrangements.<sup>136</sup> Civil law states may approach PPPs in a way that differs from states that adopt a common law legal system.

In that regard, the European Union (EU) and UK have considered PPPs as one procurement model that fits within a broader public contracts' regime, i.e. a legally similar but alternative option to traditional public contracts. This means the governing legal framework would be either the EU Public Procurement or Concessions Directives and their implementing laws.<sup>137</sup> In order for these procurement rules to be adequate, they have to embody flexible rules that could adapt to the specific nature of PPPs. PPPs in these rules are consequently not strictly defined and allow for more flexible interpretations.<sup>138</sup>

Notwithstanding the contrast between detailed provisions as opposed to more broad legal texts, PPP regulatory frameworks should be clear to the concerned parties to a given PPP arrangement on how the PPP process takes place.<sup>139</sup> Jeffrey Delmon identifies the importance that such a framework would embody:

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<sup>134</sup> DELMON, *supra* note 60, at 155.

<sup>135</sup> YESCOMBE, *supra* note 78, at 33.

<sup>136</sup> *Id.* at 31–33.

<sup>137</sup> The national laws of the state members of the EU derive their legal basis from the EC Treaty and Procurement Directives. Christina D. Tvarno, *Law and Regulatory Aspects of Public-Private Partnerships: Contract Law and Public Procurement Law*, in INTERNATIONAL HANDBOOK ON PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 72, at 217.

<sup>138</sup> *Id.* at 218.

<sup>139</sup> YESCOMBE, *supra* note 78, 31–33; DELMON, *supra* note 60, at 155.

- a) The aim of the PPP regulatory framework, including justifications for resorting to PPPs instead of public finance.
- b) A definition of PPPs in their different components, i.e. the partners, duration of the contract, and other relevant elements.
- c) The governmental agencies concerned with overseeing the PPP process.
- d) The allocation of responsibilities between the PPP stakeholders, such as provisions on permits and approvals.
- e) Provisions on the necessary assessments to be undertaken that would contain value for money and feasibility evaluations.
- f) Provisions on dispute resolution mechanisms.
- g) The procurement process for PPPs and status of unsolicited proposals.
- h) Provisions on funding for PPP projects planning.<sup>140</sup>

Eventually, frameworks regulating PPPs could broadly be found within different legal or authoritative tools, whether they were legislations issued by the parliament, decrees by the head of state or designated executive, or even executive resolutions or orders and other similar instruments that hold some binding effect on their constituents. The regulatory framework governing PPPs should be identified as flexibly as possible to further incorporate what would appear to be soft law allowing for more malleable standard-setting schemes.<sup>141</sup> These standards could be developed and refined alongside the progression of different projects and lessons learned.<sup>142</sup> Kerry Rittich in this context informally describes formal legal rules as not in and of

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<sup>140</sup> DELMON, *supra* note 60, at 155–56.

<sup>141</sup> FARQUHARSON ET AL., *supra* note 127, at 30–32.

<sup>142</sup> *Id.* at 31–32.



themselves generative of predictable results, but rather of variant outcomes.<sup>143</sup> This is why she suggested that a comprehensive approach to regulation is one that incorporates both formal hard rules and other soft instruments.<sup>144</sup> The PPP frameworks as a result would in addition to laws and executive orders and ministerial resolutions, also embody manuals and policy documents that are binding on public officials entrusted with enforcing their rules and judicial precedents. These tools equally guide the private partner to better construct their proposal as well.

In this context, emphasis should be put on diligent structuring of a PPP contract to embody detailed rules governing the contractual relationship as a binding tool between its parties. This is only logical when considering the contract's likely outcome of outliving laws themselves. If the PPP project agreement lasts a good thirty years, i.e. full contract life cycle, this could be equivalent to seven or more consecutive elected or appointed governments in a country. These contracts can embody hundreds of pages as an outcome of extensive negotiations. And so, we are left with what appears to be participation of public and private legislators in the PPP agreements as the project will impact public users. Nonetheless, laws could set out general principles so as to standardize some certain provisions of a contract but allow some elasticity for the contract to be used as a tool that adapts to future emerging circumstances.

In this context though, it is worth noting that the regulatory method to govern PPPs entails certain implications. Parliamentary legislation may be a laborious process and even hold certain political incentives within the state, where executive decrees may adapt to more flexible circumstances, as has been the case in Indonesia with a presidential decree issued to regulate

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<sup>143</sup> Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 243 (David M. Trubek & Alvaro Santos eds., 2006).

<sup>144</sup> *Id.* at 243–44.

PPPs.<sup>145</sup> Yet this certainly is not a generalized statement and would have to consider the authoritative hierarchy of the legal instruments within the country, i.e. statutes, decrees, and other instruments.<sup>146</sup>

The provisions governing PPPs are by no means single-sourced. Applicable rules can be found in specific PPPs laws, concessions laws, or even laws regulating direct investment in the state and other sectoral laws governing certain utility services and select infrastructure. The underlying aim is private sector engagement in what are public projects, which means PPP regulatory frameworks must acknowledge the associated review of all pertinent different laws in the country to create a more harmonized enabling framework.<sup>147</sup>

### *The International Legal Framework Regulating PPPs*

On the international level, there are mechanisms that may aim to influence national legislations and even oblige states to comply with certain treaty provisions. The current international rules regulating government procurement have found major support in the WTO Agreement on Government Procurement (GPA). International appetite to regulate government procurement may increase when large regional trade agreements, such as the Trans-Pacific Partnership (TPP), explicitly start to address details of government procurement by withholding principles such as non-discrimination, national treatment, and transparency, which has in fact taken place.<sup>148</sup>

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<sup>145</sup> DELMON, *supra* note 60, at 157.

<sup>146</sup> *Id.* at 157.

<sup>147</sup> FARQUHARSON ET AL., *supra* note 127, at 31.

<sup>148</sup> Trans-Pacific Partnership Agreement arts 2.1–2.32 [hereinafter TPP], <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

In terms of international agreements on government procurement, the GPA has been demarcated as the bold multilateral level instrument. Authors Henrick Anderson, Fuguo Cao, Christina D. Tvarno, and Ping Wang discuss the international analysis of PPPs and characterize their congruence with GPA regulated procurement rules that don't specifically address PPPs.<sup>149</sup> A *lex specialis* approach towards more precise rules may be useful because of the specificities of PPPs.<sup>150</sup> WTO member states such as Brazil and India incorporate PPPs when executing infrastructure projects.<sup>151</sup> The authors highlight the impact of globalization on today's PPP activity. The private entity may want to enter a partnership agreement with a foreign state government in order to perform certain economic activity, while the host government may want to attract foreign investments by engaging a foreign private investor in its economic development strategies.<sup>152</sup> The substance of the GPA is useful but by no means elaborately addresses the public-private contractual relationship in implementing infrastructure projects.

As for case law on economic development and infrastructure projects potentially implemented through PPPs using international investment principles on government-foreign private relationships, in the *Salini* test, the International Center for the Settlement of Investment Disputes (ICSID) Tribunal concluded that an investment infers, "contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. The Convention's Preamble (of the ICSID Convention) may add the contribution to the economic development of the host state of the investment as an additional condition."<sup>153</sup> In this case, the

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<sup>149</sup> Henrick Anderson, *PPP & WTO Procurement Law*, in PUBLIC-PRIVATE PARTNERSHIPS: AN INTERNATIONAL ANALYSIS – FROM A LEGAL AND ECONOMIC PERSPECTIVE 46, 55 (Christina Tvarno ed., 2010).

<sup>150</sup> SEUNGWOO SON, LEGAL ANALYSIS ON PUBLIC-PRIVATE PARTNERSHIPS REGARDING MODEL PPP RULES 4–5 (2012); Anderson, *supra* note 149, at 46, 55.

<sup>151</sup> Anderson, *supra* note 149, at 17.

<sup>152</sup> *Id.* at 46.

<sup>153</sup> *Salini et al. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 31, 2001), 42 I.L.M. 609 (2003).

ICSID Tribunal considered infrastructure construction in Morocco, and the technical expertise, referred to as “know-how,” which the Italian company offered to the host state Morocco, as constitutive of the economic development element of the investment, i.e. public interest of the state.<sup>154</sup>

On up-to-date government procurement rules, the TPP Agreement defines the “build-operate-transfer contract and public works concession contract,” distinct PPP models, as

a contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plants, buildings, facilities or other government-owned works and under which, as consideration for a supplier’s execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of those works for the duration of the contract.<sup>155</sup>

And government procurement conducted as a build-operate-transfer contract and public works concession contract falls precisely under the scope of the Government Procurement Chapter 15 of the TPP.<sup>156</sup> This is a significant leap forward in comparison with the 2011 WTO GPA that makes no explicit mention to such types of contracts.<sup>157</sup> The TPP even further permits preferential treatment to SMEs of states in government procurement, when certain criteria are met.<sup>158</sup>

International best practices drive PPP frameworks with regards to the domestic PPP regulatory frameworks. The United Nations Commission on International Trade Law

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<sup>154</sup> *Id.* ¶ 57.

<sup>155</sup> TPP, *supra* note 148, art. 15.1.

<sup>156</sup> *Id.* art. 15.2.1(b).

<sup>157</sup> *See generally* Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 1915 U.N.T.S. 103 [hereinafter WTO GPA] (making no clear reference to BOT type government procurement yet defining construction service as “a service that has as its objective the realization by whatever means of civil or building works, based on Division 51 of the United Nations Provisional Central Product Classification (CPC)” in Article 1(c) of the GPA).

<sup>158</sup> TPP, *supra* note 148, art. 15.21.

(UNCITRAL) established the Legislative Guide on Privately Financed Projects (PFIP) (2001),<sup>159</sup> and even UNCITRAL’s Model Law on Public Procurement (UNCITRAL Procurement Model) as amended,<sup>160</sup> which bundled best practices on PPP structured projects.<sup>161</sup> A continuum of best practices may softly be put in play when economies of the world are assessed against benchmarks, universal ones to be precise. The World Bank Procuring Infrastructure Public-Private Partnerships project undertakes this task of assessing the different PPP regulatory frameworks on PPP projects, not only in connection with their procurement, but also the implementation of these projects.<sup>162</sup> By doing so, a report is ultimately issued in which the different economies are scored based on their performance on “certain standards,” precisely following its other World Bank Group compatriots, such as the Doing Business report.<sup>163</sup>

One of the most interesting aspects of such benchmarks in connection with domestic institutional capacity is assessing whether procuring authorities or other ad hoc government

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<sup>159</sup> UNCITRAL PFIP, *supra* note 63.

<sup>160</sup> U.N. COMM’N INT’L TRADE LAW (UNCITRAL), MODEL LAW ON PUBLIC PROCUREMENT (2011), U.N. Sales No. E.14.V.1. This Model Law replaced the previous UNCITRAL Model Law on Procurement of Goods, Construction and Services.

<sup>161</sup> The UNCITRAL PFIP explicitly identifies the unique nature of privately financed projects in comparison to traditional government procurement and provides, under Chapter III on the Selection of Concessionaires, “A number of adaptations have been introduced to take into account the particular needs of privately financed infrastructure projects, such as a clearly defined pre-selection phase. Where appropriate, this chapter refers the reader to provisions of the UNCITRAL Model Procurement Law, which may, *mutatis mutandis*, supplement the selection procedure described herein.”

<sup>162</sup> WORLD BANK, PROCURING INFRASTRUCTURE PPPS (2018) [hereinafter PROCURING INFRASTRUCTURE PPPS], [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Procuring%20Infrastructure%20Public-Private%20Partnerships%20\\_2018\\_EN2\\_0.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Procuring%20Infrastructure%20Public-Private%20Partnerships%20_2018_EN2_0.pdf). This is to declare that by no means do the views expressed here represent those of any of the World Bank Benchmarking Public-Private Partnership Procurement project team members.

<sup>163</sup> Some scholars interpret the role of the Doing Business Report in this regard as ultimately pushing governments to establish domestic formal rules to help advance a predictable environment for SMEs rather than informal rules, thus perceived to have been stimulated by the approaches of economist Hernando de Soto on the informal market and formalizing property rights through registration and including entrepreneurs who don’t account for the country’s GDP because of lack of registration in its formal economy. Kevin Davis et al., *Indicators as a Technology for Global Governance*, 36 L. & SOC’Y REV. 71, 89–92 (2012). See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2003) (explaining the critical role of formalizing property rights through registration systems, which also applies to other economic activity and ultimately misleads GDP figures because of the informal market).

entities obtain permits, licenses, or make available land or right of way for the private partner amongst other metrics.<sup>164</sup> What seems to be induced from such standards is that domestic legal systems are expected to establish institutions with such capacities when public authorities enter into contractual agreements with their private partners.

It is clear that while no international treaties have particularly addressed PPPs, there are other instruments in place including the GPA, which embodies provisions that may accommodate PPP contracts. This instrument nonetheless lacks the certainty in its rules that may be needed to conduct PPPs in specific. And while international regulatory guidance may be sought, contextual local rules governing PPPs are the paramount regulating tool to fit the specific infrastructure needs and state particular policy goals as the case will be in the GCC.

### Financing

A major element and incentive for resorting to PPPs is its financing scheme. In this financing method, the private sector generally approaches the infrastructure project and finances it throughout its duration, hence it relieves to some extent the public budget from its direct fiscal budgetary commitments amongst other benefits.

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<sup>164</sup> Section 28 of UNCITRAL's PFIP for instance, provides: "Thus, it is advisable to conduct an early assessment of licences and permits needed for a particular project in order to avoid delay in the implementation phase. A possible measure to enhance the coordination in the issuance of licences and permits might be to entrust one organ with the authority to receive the applications for licences and permits, to transmit them to the appropriate agencies and to monitor the issuance of all licences and permits listed in the request for proposals and other licences that might be introduced by subsequent regulations." Section 29 follows with: "However, it should be noted that the distribution of administrative authority among various levels of government (for example, local, regional and central) often reflects fundamental principles of a country's political organization. Therefore, there are instances where the central Government would not be in a position to assume responsibility for the issuance of all licences and permits or to entrust one single body with such a coordinating function. In those cases, it is important to introduce measures to counter the possibility of delay that might result from such distribution of administrative authority, such as, for instance, agreements between the contracting authority and the other public authorities concerned to facilitate the procedures for a given project or other measures intended to ensure an adequate level of coordination among the various public authorities involved and to make the process of obtaining licences more transparent and efficient."

The intention of this segment of the study is not to elaborate on project finance principles, which are one of the most common and efficient ways to finance PPP projects,<sup>165</sup> rather it is to demonstrate how financing infrastructure projects within the context of PPPs is a unique feature to reimburse the private partner. This scheme though must nevertheless be well understood in terms of government commitments when choosing this arrangement.

There are generally two main methods in which governments commit to PPP projects and the private partner is reimbursed, user fees and availability payments. The first method would be referred to as user-pays PPPs and the latter could basically be labeled government-pays PPPs. The means of payment can also be a blend of the two and even allow for further complex payment arrangements.<sup>166</sup> The two mechanisms both have their historical roots in different jurisdictions and financial and economic justifications.

In user-pays PPPs, user fees would refer to the ability of the private partner to collect certain payments from the end users of the infrastructure that has been built, maintained, or renovated. The government would therefore grant the private partner the ability to charge the users for these fees. A prime example of these payments would be tolls that are collected for the use of highways. Additionally, the government could supplement these user payments by subsidizing certain payments on a performance-base or output-base.<sup>167</sup> Subsidies could help make services more affordable to the public in using toll roads for instance. This scheme is also known as concessions in some legal cultures such as in France.<sup>168</sup>

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<sup>165</sup> Project finance is also known as “limited recourse” or “non-recourse” financing, where a special purpose vehicle receives lending in order to oversee the construction and operation of a PPP project. DELMON, *supra* note 60 at 17.

<sup>166</sup> PPP REFERENCE GUIDE, *supra* note 103, at 151–53.

<sup>167</sup> Funke, Irwin & Rial, *supra* note 109, at 72; PPP REFERENCE GUIDE, *supra* note 103, at 151–52.

<sup>168</sup> Eshien Chong et al., *Public-Private Partnerships and Prices: Evidence from Water Distribution in France*, 29 REV. INDUS. ORG. 149, 151, 155–56 (2006); Pierre Sadran, *Public-Private Partnerships in France: A Polymorphous and Unacknowledged Category of Public Policy*, 70 INT’L REV. ADMIN. SCI. 233, 241 (2004).

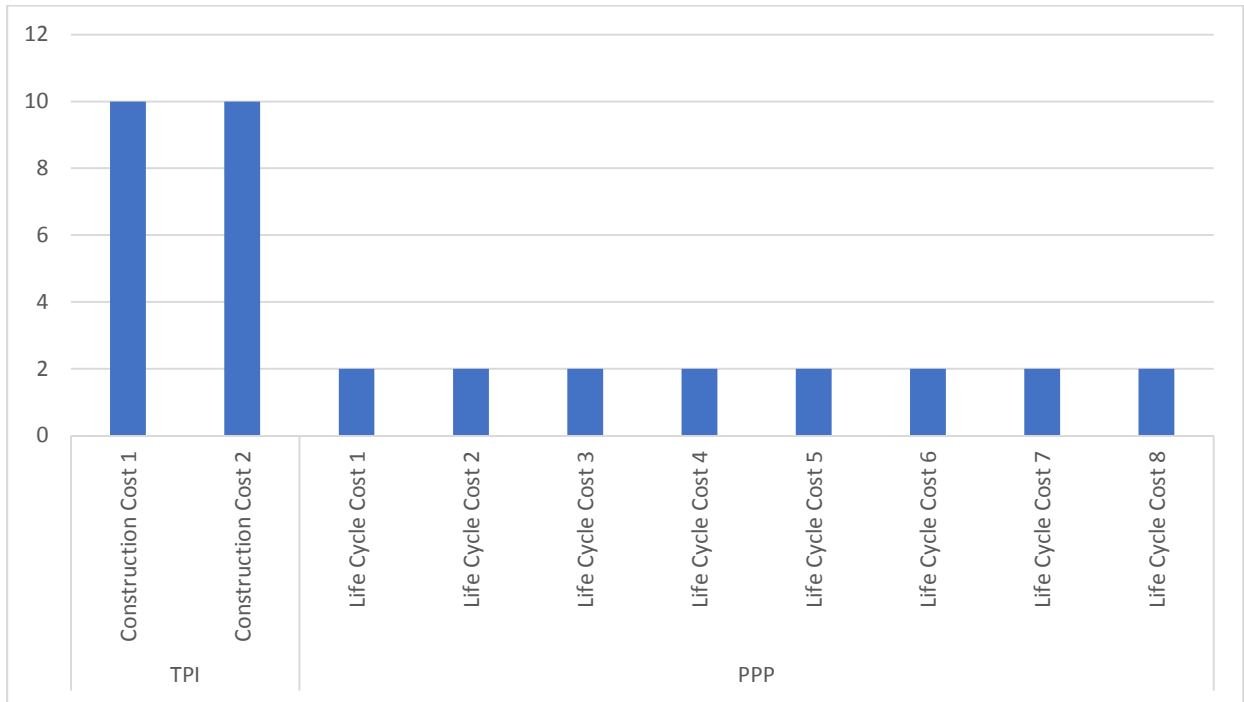
As for government-pays PPPs, government payments, more often adopting availability payment mechanisms that are contractually defined, where the private partner receives payments from the government in exchange for implementing their part of the contractual components of the project. The availability element thus refers to the eventual availability of and completion of the assets or components thereof, i.e. the final construction of a hospital building for example. The general principle that identifies the uniqueness of many PPP models is that government payments are commensurate with the completion of construction and the operation of the infrastructure. The rule is: no asset no payment. So generally, while in traditionally procured infrastructure projects there are large upfront costs for the government to construct the asset, in PPPs, the payments are rather distributed throughout the life of the contract, i.e. thirty years. This would mean smaller payments are paid throughout, of an equal or greater total amount only commencing after construction completion, whereas the private partner pays the upfront construction costs (*See Figure 2*). The government may also pay the private partner what could have been tolls the partner was to collect, in order to make the service in certain highways free for the public users or more feasible.<sup>169</sup> This is more of a government role in comparison with subsidizing user fees charged in toll roads in the previous example. This latter scheme is perhaps when Gulf governments wish to maintain welfare distribution strategies amongst their populations.

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<sup>169</sup> PPP REFERENCE GUIDE, *supra* note 103, at 152–53.



Figure 2: TPI v. PPP Payments



\* TPI= Traditional Public Investment/Traditionally Procured Infrastructure

This feature of PPPs that is associated with financing projects helps in understanding the traditional method of delivering infrastructure projects that governments may resort to, as have GCC governments regularly done. In the traditional manner, the government rather raises funds to implement projects by resorting to borrowing or tax-payer money.<sup>170</sup> The second element is perhaps rather unique in the Gulf context, where governments of these States instead rely on oil rents to fund projects, to a lesser degree in Dubai though unless federal funds are utilized. The UK PFI model that was previously displayed was one of the early and pioneer models of government-pays PPPs.

Notwithstanding the chosen payment scheme for the project, a special purpose vehicle (SPV), a corporate entity, would be established to generate finances for the PPP project, in

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<sup>170</sup> Funke, Irwin & Rial, *supra* note 109, at 73.

addition to administering the project and paying any loans.<sup>171</sup> The project debt as a result would be placed on the balance sheet of the SPV and questionably the off-balance sheet of the government.<sup>172</sup>

### *Are PPPs Free Government Solutions Then?*

If the private sector is called upon to lead and implement future infrastructure projects in the Gulf in light of fiscal restraints, one would wonder whether PPPs are a piecemeal solution to implement free infrastructure projects that serve the public. In other words, could it be more than a dream that the private sector is prepared to provide the countries' infrastructure at no cost.

Unfortunately, the idea that PPPs will not cost state budgets a thing is far from being true. In fact, because of the nature of risk endured by the private sector for a longer period of time, the projects that are implemented as PPPs can be costlier to governments. Politically speaking, PPPs can be the best campaign slogan when the general public, and even other state agencies for this sake, have minimal knowledge as to what PPPs entail.

By offsetting the costs of PPP projects to ensuing fiscal years, governments may appear to be cutting capital expenditures only to later realize that subsequent governments are haunted by a supersized budget with debt that needs to be paid instantly. This is because payments in PPPs are rather allocated throughout the project period, about 30 years or more, when the project components are completed, not based on periodic invoices submitted by contractors for the

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<sup>171</sup> Frederic Marty, *The Evolution of Financing Conditions for PPP Contracts: Still a Private Financing Model?*, in *THE ECONOMICS OF PUBLIC-PRIVATE PARTNERSHIPS: THEORETICAL AND EMPIRICAL DEVELOPMENTS* 80-81 (Stephanie Saussier & Julie de Brux eds., 2018).

<sup>172</sup> DELMON, *supra* note 60, at 16. The off-balance sheet would allow the “project debt [to be] held in a sufficiently minority subsidiary [and] is not consolidated onto the balance sheet of the respective shareholders [or government agency].” *Id.* at 16.

completion of each segment of a project.<sup>173</sup> The latter case refers to the traditional public investment method following contracts like engineering, procurement, and construction (EPC), also known as turnkey contracts.<sup>174</sup> This fiscal scheme is perhaps doomed to failure and is not more than manipulating state budgets for populous support or to slip the budget under the eyes of parliamentary oversight.<sup>175</sup> The IMF in one of its reports calls this budgetary scheme an “illusion”.<sup>176</sup>

Then why resort to PPPs? When properly assessed in comparison with traditional public investment schemes, PPPs may achieve more value for money for the government. The success entirely evolves around the thorough selection of worthy projects that necessitate long term private sector expertise and efficiency. This is especially true when identifying the lack of efficiency of GCC governments, which varies, in managing infrastructure projects themselves instead of contracting this task to private entities. And so, when governments adhere to cheaper costs by traditionally funding projects and maintaining such projects, they could eventually pay double the amounts in the near future and end up at square one. Hence, the project would become more expensive on the long run in comparison with the same private sector bundling the different components of a PPP project that include building the infrastructure in addition to operating and maintaining it, i.e. whole of life cycle.

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<sup>173</sup> Funke, Irwin & Rial, *supra* note 109, at 73.

<sup>174</sup> This contract, especially when using the term “turnkey,” refers to the type of contract where the contractor would construct the project, procure the necessary material and services, and engineer it, to eventually deliver a project where the user only needs to turn a key to operate the project. CONDITIONS OF CONTRACT FOR CONSTRUCTION: FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER 2 (1st ed. 1999); JONATHAN HOSIE, TURNKEY CONTRACTING UNDER THE FIDIC SILVER BOOK: WHAT DO OWNERS WANT? WHAT DO THEY GET? 2 (2007).

<sup>175</sup> EDUARDO ENGEL, RONALD D. FISCHER & ALEXANDER GALETOVIC, THE ECONOMICS OF PUBLIC-PRIVATE PARTNERSHIPS: A BASIC GUIDE 110–12 (2014).

<sup>176</sup> Funke, Irwin & Rial, *supra* note 109, at 71.

And when tailored adequately, PPPs may relieve government budgets from burdensome timely payments in exchange for allowing the private partner to instead achieve the desired rate of return for the investment it has made. This could be done by for instance charging the general public beneficiaries user fees and ensuring that the quality of service that is offered is worthy of public usage. Notwithstanding the previously mentioned advantages, the utility of PPPs must not be exaggerated and rather carefully considered in each potential project. This is a clear message to GCC governments.

### Mobilizing Islamic Finance

One key point remains in the context of financing PPP projects in relation to the Gulf Arab States. Islamic finance could be a major factor when it comes to financing these projects.<sup>177</sup> This system of financing attempts to ensure that business transactions ultimately serve Muslim communities' religious beliefs.<sup>178</sup> The Islamic rules for financing, or that are *sharia* compliant, would include the following fundamentals:

- a) *Riba* is prohibited in transactions.<sup>179</sup> *Riba* would refer to the taking of interest, or premiums charged in the conventional banking term according to *Qura'anic* versus, and thus an alternative means of compensating the bank would be established.<sup>180</sup> The criteria for which interest within the meaning of *riba* would not be acceptable includes: 1) the interest is positive and fixed *ex ante* instead of the rate of return being

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<sup>177</sup> MOBILIZING ISLAMIC FINANCE FOR INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS 13-20 (2017).

<sup>178</sup> M. Kabir Hassan & Mervyn K. Lewis, *Islamic Banking: An Introduction and Overview*, in HANDBOOK OF ISLAMIC FINANCING 1, 22 (M. Kabir Hassan & Mervyn K. Lewis eds., 2007).

<sup>179</sup> *Riba* could be categorized under *riba alquroodh* and *riba albuyuu*. The first would refer to interests on loans, and the latter to usury including trade. Latifa M. Algaoud & Mervyn K. Lewis, *Islamic Critique of Conventional Financing*, in HANDBOOK OF ISLAMIC FINANCING, *supra* note 178, at 38, 43.

<sup>180</sup> ZAMIR IQBAL & ABBAS MIRAKHOUR, AN INTRODUCTION TO ISLAMIC FINANCE: THEORY AND PRACTICE 57–60 (2d ed. 2011).

- determined based on a profit-sharing scheme making it uncertain in the forefront; 2) it is associated with the duration and amount of the loan; 3) payment of the fixed amount interest is compulsory regardless of circumstances pertaining to the principal amount.<sup>181</sup> In application though, this concept of *riba* could prove more difficult depending on differing conditions at stake.
- b) The business transactions have to be based on *halal* investments, which mean they are legitimate and legal. This would create a sort of ethical investment where transactions in alcoholic beverages or pork meat would be considered *haram*, a violation to Islamic beliefs, or simply not considered *halal*, permitted.<sup>182</sup>
- c) *Maysir* (gambling) is forbidden and the source of business transactions should be free from it, of which some believe this notion expands to any unjust enrichment out of sheer chance.<sup>183</sup>
- d) *Gharar*: is equally prohibited in trade. *Gharar* would refer to transactions that involve speculations, where there is extreme uncertainty and risk as to the pillars of the contract such as selling a product to the buyer that the seller cannot hand over.<sup>184</sup> This may evidently prove challenging and the term may need to evolve to keep up with digitalized transactions in this current day. It is a fertile ground to apply fundamental principles to present day transactions like bitcoin.

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<sup>181</sup> *Id.* at 59; Beng Soon Chong & Ming-Hua Liu, *Islamic Banking: Interest-Free or Interest-Based?*, PAC. BASIN FIN. J. 125, 128 (2009).

<sup>182</sup> Algaoud & Lewis, *supra* note 179, at 38–39; Chong & Liu, *supra* note 181, at 128.

<sup>183</sup> Mervyn K. Lewis, *Islam and Accounting*, 25 ACCT. F. 103, 119 (2001).

<sup>184</sup> Algaoud & Lewis, *supra* note 179, at 38–39.

e) *Zakat* must be paid, because property has a social function in Islam and is used for the benefit of all society. Thus, Islamic banks collect what is equivalent to 2.5% of the assets assessed and that were held for a whole year, as a sort of tax.<sup>185</sup>

f) To ensure compliance with Islamic rules, a board would supervise the business transactions. This board is under great responsibility in adapting sharia principles to concurrent business transactions that are of a global nature.<sup>186</sup>

In other terms, the Islamic finance aspect about financing PPPs would fundamentally entail the sharing of profits and losses. The provider of capital would have the authority to reimburse, but this compensation would be commensurate with the intricate risk and effort within the return on which the capital-receiving project generates, instead of a predetermined loan and its interests irrespective of the outcome of the borrower's endeavor.<sup>187</sup>

In summary, Islamic finance is, on the books, the Islamic way of doing business as opposed to the more westernized model. Then, the inquiry is how is this means of financing appealing to a globalized world in order to finance the GCC and broader Arab region infrastructure projects. Reality is, Islamic finance has in fact attracted western businesses. For example, Saudi Arabia has recently issued a gigantic US \$9 Billion Islamic bond, sharia compliant *sak*, on the Irish stock exchange and attracted a good US \$33 Billion in orders of interested investors.<sup>188</sup>

In the Gulf, not all banks are confined to sharia compliant transactions, however, there are perhaps as many Islamic banks, seemingly applying sharia principles on banking

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<sup>185</sup> *Id.* at 38–40.

<sup>186</sup> IQBAL & MIRAKHOUR, *supra* note 180, at 384–86; Chong & Liu, *supra* note 181, at 131.

<sup>187</sup> Algaoud & Lewis, *supra* note 179, at 46.

<sup>188</sup> John McKenna, *What is Islamic Finance?*, WORLD ECON. F. (May 16, 2017), <https://www.weforum.org/agenda/2017/05/what-is-islamic-finance>.

transactions, as there are western style conventional commercial banks. In small country Kuwait, for instance, five out of the eleven local commercial banks functioning in the country are actually Islamic banks.<sup>189</sup> Similarly, the Saudi Islamic finance market is pretty established in the country and represents two-thirds of bank financing.<sup>190</sup> While four of the twelve local commercial banks in the Kingdom are fully sharia compliant, the rest of the banks are a sort of hybrid offering both sharia compliant and conventional banking services.<sup>191</sup> And in the UAE, it appears that the appeal of Islamic banks is only growing in comparison with conventional banks.<sup>192</sup> Currently, about half of all local commercial banks are sharia compliant.<sup>193</sup>

All these Islamic banks are potential financiers of the ongoing and future infrastructure pipeline of projects in the Gulf. And so, the contextual Islamic finance element in prospective PPP projects must be well understood by private partners when generating or crowdfunding resources to finance infrastructure projects. This is a glimpse into the world of Islamic finance and its importance to the Gulf, as there are lots of details that go beyond the need this study would engage in.<sup>194</sup>

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<sup>189</sup> These Islamic banks are: Al Ahli United Bank, Boubyan Bank, Kuwait International Bank, Kuwait Finance House, Warba Bank, in addition to Al Rajhi Bank, which is a Saudi Islamic bank with a subsidiary operating in Kuwait. *Kuwaiti Banks*, CENTRAL BANK OF KUWAIT, <http://www.cbk.gov.kw/en/supervision/financial-units/kuwaiti-banks.jsp> (last visited Jan. 23, 2019); *List of Islamic Banks in Kuwait*, GLOBAL BANKING AND FIN., <https://www.globalbankingandfinance.com/list-of-islamic-banks-in-kuwait/> (last visited Jan. 23, 2019).

<sup>190</sup> *Fitch: Islamic Banking is Dominant in Saudi Arabia*, REUTERS (Feb. 2, 2016, 4:17 AM), <https://www.reuters.com/article/idUSFit947384>.

<sup>191</sup> *Id.*; see also *Saudi Banks*, SAUDI ARABIAN MONETARY AUTHORITY, <https://sama.gov.sa> (last visited Jan. 23, 2019).

<sup>192</sup> Sam Bridge, *Islamic Banking Grows in Popularity in the UAE- Survey*, ARABIAN BUS. (Nov. 17, 2018, 11:47 AM), <https://www.arabianbusiness.com/banking-finance/407471-islamic-banking-grows-in-popularity-in-the-uae-survey>; Waheed Abbas, *Why UAE Residents are Opting for Personal Finance from Islamic Banks*, KHALEEJ TIMES NEWS (Oct. 30, 2018), <https://www.khaleejtimes.com/Why-UAE-residents-are-opting-for-loans-from-Islamic-banks>.

<sup>193</sup> *List of National Banks & Distribution of their Branches in the UAE*, CENTRAL BANK OF THE UAE (Oct. 31, 2014), [https://www.centralbank.ae/sites/default/files/2018-11/List-of-Local-Banks-Branches-En\\_30102014.pdf](https://www.centralbank.ae/sites/default/files/2018-11/List-of-Local-Banks-Branches-En_30102014.pdf); *List of Islamic Banks in the UAE*, GLOBAL BANKING & FIN., <https://www.globalbankingandfinance.com/list-of-islamic-banks-in-the-uae/> (last visited Jan. 23, 2019).

<sup>194</sup> Islamic finance could be adapted to project finance methods necessary for PPP infrastructure projects. These would include a multiplicity of instruments known to Islamic finance. Issuing bonds, *sukuk*, in different manners and

## Risk Allocation

The third feature that makes PPPs distinct is the allocation of risks between the PPP partners, the public entity and private partner. In PPP models of implementing public infrastructure projects, the private sector must bear a significant amount of risk.<sup>195</sup> Risk allocation hence remains a critical negotiation platform where each party to the PPP agreement aims to guarantee a degree of shared responsibility to best implement the project.<sup>196</sup> Accordingly, while traditional public provision of infrastructure and services generally burdens the government with its risk, PPPs enable sharing risks between the parties.

Amongst the key stakeholders in any given PPP project are its lenders. The lenders are basically the financial institutions providing the necessary financing to the private partner. And while lenders to the project can attempt to calculate how much risk they would be exposed to and evaluate the risk premium or fee for the loan accordingly, the actual private designer, constructor, or operator would have a broader array of unpredictable risks to apprehend.<sup>197</sup>

Risk is very contextual.<sup>198</sup> What a private sector anticipates in fragile or conflict affected zones is certainly different than other countries. As a result, risk assessments are an essential component of a well-constructed PPP agreement. These assessments are amongst the project

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the means of the disposition of assets that include methods like: *ijarah* (leasing), or offering usufruct rights on assets; *murabaha*, in which it entails a manner in which interest is prevented by the purchase and resale of an asset by the customer without having to obtain a conventional loan; *istisnaa*, the pre-agreed purchase of an asset to be provided later; *musharaka*, i.e., partnership in the share of risks and benefits between partners; *mudharaba*, where investments by one party offering technical expertise is providing to another capital providing party; and *takaful*, which is the Islamic version of insurance but with a social element to it where it entails reciprocal insurance between different parties against risks. MOBILIZING ISLAMIC FINANCE, *supra* note 177, at 29–38; Lewis, *supra* note 183, at 111–12, 119, 122; IQBAL & MIRAKHOUR, *supra* note 180, at 75–94.

<sup>195</sup> PUBLIC-PRIVATE PARTNERSHIPS: IN PURSUIT OF RISK SHARING AND VALUE FOR MONEY 47 (2008) [hereinafter PPPS & VALUE FOR MONEY].

<sup>196</sup> ENGEL, FISCHER & GALETOVIC, *supra* note 175, at 77; DELMON, *supra* note 60, at 105.

<sup>197</sup> DELMON, *supra* note 60, at 106.

<sup>198</sup> TIMOTHY C. IRWIN, GOVERNMENT GUARANTEES: ALLOCATING AND VALUING RISKS IN PRIVATELY FINANCED INFRASTRUCTURE PROJECTS 51 (2007).



finance schemes and could include the private partner's evaluation of different factors that may impede the project's smooth success. Consequently, significant knowledge and familiarity of the host state environment is key in assessing risks.<sup>199</sup> Risk matrixes are a tool that could be used to chart the different anticipated risks and assess and allocate them accordingly.<sup>200</sup>

Broadly, sources of risk may be categorized into multiple groups, yet it is unrealistic to fully confine risks to such categories. E. R. Yescombe divides risks facing PPPs and the matrix into the following classifications:

- a) General political or economic risks
- b) Site-related risks
- c) Construction risks
- d) Completion risks
- e) Operation-phase risks<sup>201</sup>

Others like Jeffrey Delmon categorize these risks under risks related to:

- a) The development stage
- b) The completion stage
- c) The operation stage
- d) Cost increase
- e) Performance
- f) The Market

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<sup>199</sup> DELMON, *supra* note 60, at 107-08; Rui Sousa Monteiro, *Risk Management*, in INTERNATIONAL HANDBOOK ON PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 72, at 262.

<sup>200</sup> DELMON, *supra* note 60, at 111.

<sup>201</sup> YESCOMBE, *supra* note 78, at 242. Yescombe refers to the distribution of risks between the parties to PPPs as "risk transfer" rather than sharing or allocation. Where he asserts the private partner is burdened with risks of implementing the PPP project components, but it is transferred to the public entity in order for this latter entity to ensure that the private partner is properly incentivized to execute its obligations and successfully complete the PPP project components. *Id.* at 243.

- g) Political
- h) Environmental
- i) Credit<sup>202</sup>

These classifications do appear to follow a sequential or thematic approach to grouping risks. Eduardo Engel, Ronald D. Fischer, and Alexander Galetovic integrate a similar taxonomy of risks.<sup>203</sup> However, in addition, they stress the existence of two general classifications of risks in this context, endogenous and exogenous, in terms of whether risk can be controlled.<sup>204</sup>

Endogenous risks are those that may be anticipated and controlled whereas exogenous risks are out of the control of the contractual parties.<sup>205</sup> Amongst the sub-categories of risks that fall under the previous groupings and that are of economic nature are, cost increases of construction and operation than what were in the financial model, currency exchange rate changes, interest rate and refinancing risks, inflation, and increased taxes.<sup>206</sup> Stringently classifying risks is not a task that is in and of itself particularly required. Some risks may reluctantly be confined to one category like a decrease in demand on the use of a road that can be due to an emergence of another more efficient road or even a state policy imposing higher taxes on private partners which lead to the imposition of higher user fees on public users of the road. Such risk thus would range from market or revenue risk to political risk. It is rather the eventual outcome of elaborately capturing all different potential risks to a project that is important to a properly procured PPP.

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<sup>202</sup> DELMON, *supra* note 60, at 109–39.

<sup>203</sup> ENGEL, FISCHER & GALETOVIC, *supra* note 175, at 76.

<sup>204</sup> PPPS & VALUE FOR MONEY, *supra* note 195, at 52.

<sup>205</sup> *Id.* at 52.

<sup>206</sup> DELMON, *supra* note 60, at 117–20; YESCOMBE, *supra* note 78, at 257–59.

Risks related to permits and licensing or requisite project approvals are critical and significantly a reflection of institutional government capacities, the major theme of this study in the GCC.<sup>207</sup> Delays for obtaining such authorizations to undertake certain tasks related to the implementation of the PPP contract are to be acknowledged and may affect the smooth completion of the PPP agreement.<sup>208</sup> This would also refer to land acquisition or right of way that are necessary for the PPP project.<sup>209</sup> The time and amount of effort necessary to acquire all these necessary approvals would add to the transaction costs of entering infrastructure markets in given countries. These may come at an additional overall project cost.

Likewise, environmental risks could impede the PPP project, which is why certain environmental impact or damage assessments of the project are to be conducted upfront. These assessments could comprise meeting with surrounding local communities and resorting to experts in the field.<sup>210</sup> This would ultimately leverage both the local legitimacy of the project and its sustainability, both of which are critical for the private sector to function in the country on the long run.

Moreover, one of the most important risks that PPP projects may endure are political risks. When it comes to contextualizing the circumstances of PPPs to host states, this risk certainly stands out in certain states more than others. Laws are issued to regulate certain behaviors, yet they certainly do not guarantee eternal existence in a single form. And when PPPs are implemented within an extended period of time, a change of law is certainly a possible

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<sup>207</sup> Monteiro, *supra* note 199, at 281.

<sup>208</sup> *Id.*

<sup>209</sup> YESCOMBE, *supra* note 78, at 251.

<sup>210</sup> *Id.* at 250–51. *See also* DELMON, *supra* note 60, at 135–37.

scenario. This change may affect the outcomes of the given PPP project at stake and commercial feasibility of the project to the private partner.<sup>211</sup>

A major exogenous risk facing any PPP project is force majeure. In this circumstance, conditions arise that are beyond the reach and control of any of the parties to the agreement, like natural disasters.<sup>212</sup> These are general risks that any type of contract may confront, hence they are not specific to PPPs. Similarly, civil disturbances in the host state may occur during the period of the PPP contract and affect its implementation.<sup>213</sup> Identification of project risks may be guided by tools like the International Organization for Standardization (ISO) 31000 Risk Management Standard.<sup>214</sup>

PPPs as contractual agreements allow for a proper allocation of risks between both governments and their private sector counterparts in the implementation of projects. In traditional schemes of implementing infrastructure projects, this risk would rather largely be held by governments, or rather accurately by taxpayers, as the government would regularly manage and maintain the built infrastructure and ultimately the users would hopefully benefit from the completed project.<sup>215</sup>

The principle rule for risk distribution in PPPs is allocating the specific category of risk to the party that can best bear and manage it.<sup>216</sup> And this is where bundling different components of the infrastructure project, as is done in PPPs, may be useful. This would incentivize the

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<sup>211</sup> YESCOMBE, *supra* note 78, at 275–76. *See also* DELMON, *supra* note 60, at 131.

<sup>212</sup> YESCOMBE, *supra* note 78, at 272.

<sup>213</sup> *Id.*

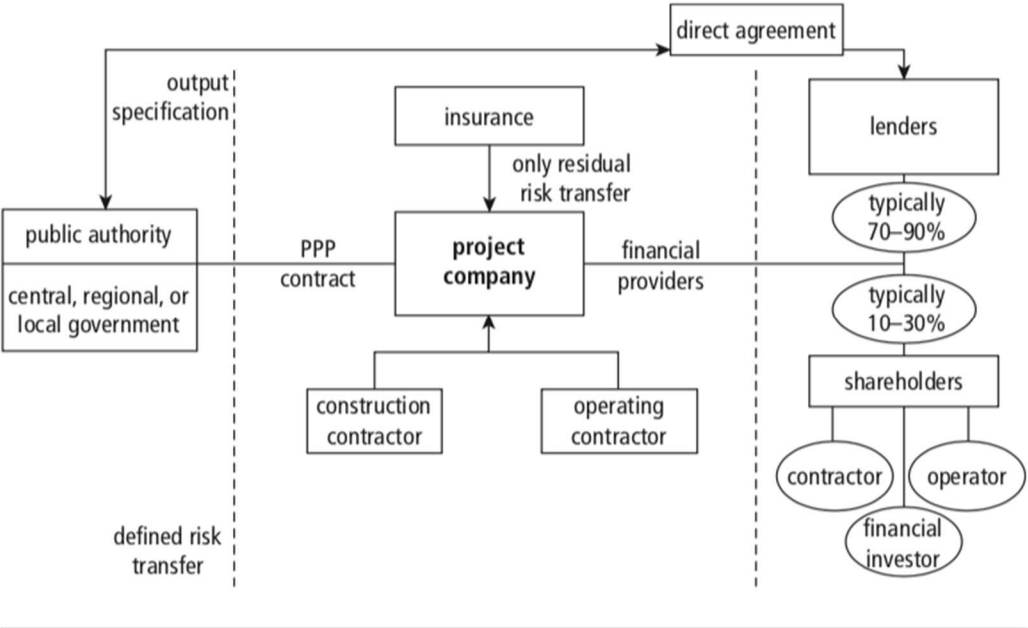
<sup>214</sup> *See generally* INT'L ORG. FOR STANDARDIZATION (ISO), RISK MANAGEMENT GUIDELINES 31000 (2018), <https://www.iso.org/obp/ui/#iso:std:iso:31000:ed-2:v1:en> (identifying and assessing the most important risk events that may face an organization and schemes to manage such risks).

<sup>215</sup> ENGEL, FISCHER & GALETOVIC, *supra* note 175, at 77.

<sup>216</sup> IRWIN, *supra* note 198, at 56–61; ENGEL, FISCHER & GALETOVIC, *supra* note 175, at 77; David Baxter, *2018 Dubai MENA PPP Forum: Key Takeaways*, WORLD BANK BLOG (Oct. 11, 2018), <https://blogs.worldbank.org/ppps/2018-dubai-mena-ppp-forum-key-takeaways>; DELMON, *supra* note 60, at 105–09.

private party to ensure that the infrastructure quality that was built and designed is easier to maintain and would be less costly.<sup>217</sup> The private party in overseeing bundled tasks would in their role pass certain risks like construction risks to the sub-contractors it engages with. The private partner in this case will be responsible to the government for the risk of the contractors completing the works in the agreed upon time. In this regard, the private partner may be more efficient at meeting timelines as they have more at stake. Yet, governments must understand that depending on the certain tasks retained by the private partner, this retention may come at a cost in terms of the price of a project on the state budget. Figure 3 provides an illustration of the parties involved in a PPP contractual agreement and how risks may be allocated amongst them.

Figure 3: Contractual Relations Emerging from a PPP



Source: EDWARD FARQUHARSON ET AL., HOW TO ENGAGE THE PRIVATE SECTOR IN PUBLIC-PRIVATE PARTNERSHIPS IN EMERGING MARKETS 59 (2011).

<sup>217</sup> ENGEL, FISCHER & GALETOVIC, *supra* note 175, at 77.

In practice as well, other factors like bargaining power may prevail in terms of who bears specific risks while designing contracts.<sup>218</sup> The implication of such risk distribution is high and costly, which is why this task must be carefully considered in each procured project. GCC Governments must understand that when private parties may be large enough to have expert teams capable of negotiating the best outcomes with regards to risk distribution for their corporations, similar resources must be vested in relevant state public entities. Proper risk allocation in PPP contracts would help alleviate the likelihood of ensuing costly disputes.

### Duration

Needless to say, the precise duration of a PPP agreement would depend on the particular substance of the project and necessary amount of time needed for the implementation and tasks required, i.e. design, build, operate, and maintain. This would also in part be dependent on a financial model that is designed to capture the necessary time to complete the project.<sup>219</sup>

Nonetheless, even with contextually driven decisions for the duration of the contract, the natural course of PPPs, which differentiates them from traditional public provision of infrastructure, is that it generally bundles multiple tasks in one long-term contract.<sup>220</sup> Moreover, this is supplemented by the need in the context of project finance for raising long-term debt financing for large infrastructure projects.<sup>221</sup> The reasoning behind this is to grant the private party enough time to repay the debt and receive a reasonable margin of profit, and for lenders to

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<sup>218</sup> DELMON, *supra* note 60, at 105–09.

<sup>219</sup> *Id.* at 97. *See also* YESCOMBE, *supra* note 78, at 143–44.

<sup>220</sup> Eduardo Engel et al., *The Basic Public Finance of Public-Private Partnerships*, 11 J. EUR. ECON. ASS'N 83, 84 (2013).

<sup>221</sup> YESCOMBE, *supra* note 78, at 113.

achieve the desired interest.<sup>222</sup> These contracts would last several decades, in many instances twenty, thirty, or more years.<sup>223</sup> There are many states that even identify a minimum threshold of duration in which the contract must meet in order to qualify as a PPP contract.<sup>224</sup>

The level of government engagement in a contract this extensive is consequently much more demanding than a traditional scheme of public works contract, i.e. an EPC contract, that may last only a couple of years in order to implement a very precise task. Government entities must be vigilant as to institutionally retaining the necessary long breadth required to work with the private partner over the course of three or more decades. Government capacities and responsibilities in the GCC do not stop during the PPP contract duration. It is a key reiteration that the ultimate owners of the public asset in which the private partner has built and managed are state governments. The government must then eventually prepare qualified institutions competent with retaining the necessary skills to manage the assets and services after the term of the contract.

Furthermore, there are certain reasons for the termination of the PPP contract. These could be natural terminations such as the end of the pre-negotiated duration of the contract or other circumstances like the aforementioned force majeure, or the default of a party to the contract in upholding their contractual obligations within the PPP agreement as well.

### *Can PPPs Address the Issue of Infrastructure Project Delays and Cost Overruns in the Gulf?*

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<sup>222</sup> UNCITRAL PFIP, *supra* note 63, at 151–52.

<sup>223</sup> DARRIN GRIMSEY & MERVYN K. LEWIS, PUBLIC PRIVATE PARTNERSHIPS: THE WORLDWIDE REVOLUTION IN INFRASTRUCTURE PROVISION AND PROJECT FINANCE 1, 6 (2004); YESCOMBE, *supra* note 78, at 113.

<sup>224</sup> UNCITRAL PFIP, *supra* note 63, at 152.

The importance of increasing private sector engagement in infrastructure delivery makes sense when there is an underlying problem in the existing status quo. Studies have concluded that infrastructure projects in the Gulf notwithstanding their boom, have also regularly been witnessing project time delays and budgets have been exceeded than the amounts initially agreed upon.<sup>225</sup> These observations have also included consistent delays in payments to contractors in publicly financed infrastructure projects.<sup>226</sup> This is probably not an exclusive aspect of Gulf infrastructure projects,<sup>227</sup> but in the context of this study, they are a problem that needs to be addressed. The previous statement about the whole GCC is rather broad, albeit, there have been different shared characteristics identified leading to delays and cost overruns. Many of the studies were premised on construction projects.

In one study conducted about the Dubai construction market, different categories of delays were identified. These categories were attributed to the project client (government entity), the consultant, and the contractor.<sup>228</sup> And the causes for delays varied from unrealistic project

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<sup>225</sup> See, e.g., Ruqaya Al-Sabah, Carol C. Menassa & Awad Hanna, *Evaluating Impact of Construction Risks in the Arabian Gulf Region from Perspective of Multinational Architecture, Engineering and Construction Firms*, 32 CONSTRUCTION MGMT. & ECON. 382, 395–400 (2014); Reshma Mary Johnson & Robin Itty Ipe Babu, *Time and Cost Overruns in the UAE Construction Sector: A Critical Analysis*, INT’L J. CONSTRUCTION MGMT. 1, 1–2 (2018); DELOITTE GCC POWERS OF CONSTRUCTION 2017: IF IT’S FUNDABLE IT’S FEASIBLE 12, 50, 63, 66 (2017); *Ilbalady: Moawiqat Taaatil 11 MashrooanTanmawiyani* [Municipality Council: Constraints Delaying 11 Development Projects], ALQABAS NEWS. (July 14, 2018), <https://bit.ly/2PfhZ57>; *Alashghal Almutaham Ala’awal fee Taateel Atanmiya.. Wa Fasadha La Tahmiloho Albaareen* [The Public Works is the First Accused for the Development Delay.. And its Corruption cannot even be Carried by Camels], ALSHAHED NEWS. (May 24, 2017), <https://bit.ly/2YhPmbK>; Ehab Soliman, *Recommendations to Mitigate Delay Causes in Kuwait Construction Projects*, 5 AM. J. CIVIL ENGINEERING & ARCHITECTURE 253, 254–61 (2017); Mhamed Biygautane, *Infrastructure Public-Private Partnerships in Kuwait, Saudi Arabia, and Qatar: Meanings, Rationales, Projects, and the Path Forward*, 22 PUB. WORKS MGMT. & POL’Y 85, 105 (2017); *Jaber Hospital Project Records Highest Fine for Delay-KD 71M Debt Detected after Inventory*, ARAB TIMES (Aug. 28, 2017), <https://www.arabtimesonline.com/news/jaber-hospital-project-records-highest-fine-delay-kd-71m-debt-detected-inventory/>.

<sup>226</sup> Young, *supra* note 7.

<sup>227</sup> Biygautane, *supra* note 225, at 90–92.

<sup>228</sup> Z. Ren, M. Atout & J. Jones, *Root Causes of Construction Delays in Dubai*, in PROCS 24TH ANNUAL ARCOM CONFERENCE 749, 753–56 (A. Dainty ed., 2008).



timelines, culturally challenging communication factors, the choice of subcontractors and suppliers, obtaining necessary approvals and permits, and irregular payments to contractors.<sup>229</sup>

A similar study detected comparable reasons pertaining to government construction project delays in Kuwait. The general categorical impediments included: Challenges associated with government procedures, problems linked with the local construction industry, site and project management obstacles, financial difficulties, and planning and monitoring of projects and skills deficiencies.<sup>230</sup> Many of these highlighted difficulties relate to the quality of government institutional management of infrastructure projects. In fact, the Audit Report of the State Audit Bureau of Kuwait highlighted that the eventual cost of building a new campus for a public university in Kuwait by Kuwait University, following the traditional public procurement path, grew six folds than that of the initial projections.<sup>231</sup> And while some of the reasons were attributed to the contractor, most of the problem according to the Report concerned insufficient planning, coordination, and preparation on the part of the government entity.<sup>232</sup> Similarly, this Bureau in another report identified the continued delay in the Shegaya Solar Power project, a public procurement project, that diversifies the country's reliance from non-renewable to renewable energy to generate electricity.<sup>233</sup> This project has witnessed delays in its first phase

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<sup>229</sup> The study concluded that most of the construction projects assessed have followed the traditional procurement model. *Id.* at 749–50, 753–56.

<sup>230</sup> Government procedural challenges for instance include delays and difficulties in providing the necessary permits and approvals to start project implementation and subsequent changes to existing contracts, in addition to slow decision-making. Soliman, *supra* note 225, at 256–58.

<sup>231</sup> STATE AUDIT BUREAU OF KUWAIT, ANNUAL REPORT OF PERFORMANCE MONITORING 50–51 (2017). Although Kuwait University disputed the cost overrun estimates and claimed the cost grew 5% than what was initially allocated from the budget. *Aljamiaa: Alawamir Atagheeriya Fee Madinat Sabah Alsalem Aljamiaaiya Lam Tatajawaz 5% Min Almezaniya Alaama Lilmashrooaa [Kuwait University: Change Orders of Sabah Alsalem University City did not Exceed 5% of the Public Budget for the Project]*, ALANBA NEWS (Aug. 13, 2018), <https://bit.ly/2DNkWEC>.

<sup>232</sup> PERFORMANCE MONITORING 2017, *supra* note 231, at 50–51.

<sup>233</sup> STATE AUDIT BUREAU OF KUWAIT, RENEWABLE ENERGY IN KUWAIT: ASSESSMENT OF POLICIES AND CURRENT AND FUTURE PROJECTS 39 (2018).

that pushed any prospects for tendering its latter stages as PPPs far away due to what the project referred to as lengthy red-tape procedures and inefficient inter-agency communication.<sup>234</sup>

One study conducted by Adel Al-Kharashi and Martin Skitmore about the Saudi Arabian construction market for public infrastructure projects identified that the key factors that are attributed to the Kingdom's delays in implementing public infrastructure projects included: lack of capable human resources on the part of the government from the outset of the projects to their completion or replacement of key personnel, inadequate communication on the part of the government entity to relevant parties engaged in executing such projects, and a sluggish decision-making process on the part of the government in relation to implementing the concerned public project.<sup>235</sup>

Similarly, in another study by Ibrahim Mahamid on delays in public construction projects, EPC contracts, in the northern provinces of Saudi Arabia, but this time from the perspective of government entities, the same reasons for project delays to such projects topped the list.<sup>236</sup> These reasons included lack of clear communication and coordination to implement projects, awarding bids to the lowest price with no due regard to quality, i.e. poor government selection, poor site management, which in traditional procurement models may heavily rely on government capacity if not contracted out, and delays in payments to contractors.<sup>237</sup>

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<sup>234</sup> *Id.*

<sup>235</sup> Adel Al-Kharashi & Martin Skitmore, *Causes of Delays in Saudi Arabian Public Sector Construction Projects*, 27 CONSTRUCTION MGMT. & ECON. 3, 9, 18–21 (2009).

<sup>236</sup> Ibrahim Mahamid, *Contributors to Schedule Delays in Public Construction Projects in Saudi Arabia: Owners' Perspective*, 3 J. CONSTRUCTION PROJECT MGMT. & INNOVATION 608, 612–15 (2013).

<sup>237</sup> *Id.* See also Ibrahim Mahamid, *Factors Contributing to Poor Performance in Construction Projects: Studies of Saudi Arabia*, 12 AUSTL. J. MULTI-DISCIPLINARY ENGINEERING 27, 31–36 (2016); Naser Obaid Alotaibi, Monty Sustrisna & Heap-Yih Chong, *Guidelines of Using Project Management Tools and Techniques to Mitigate Factors Causing Delays in Public Construction Projects in Kingdom of Saudi Arabia*, 6 J. ENGINEERING, PROJECT & PRODUCTION MGMT. 90, 93 (2016).

By reiterating the main features of a PPP project, this model may overcome some of the previously identified challenges.<sup>238</sup> The private sector would contractually be entrusted with implementing all bundled functions including submitting the necessary designs, designating the right subcontractors, and more realistically living up to project timelines in order to receive payments and move on to the next phases of the project. Yet, this is all dependent on whether executing the given project would achieve value for money, which might not be the case in all instances, considering the high transaction costs associated with PPPs. Nevertheless, the gains from the effectiveness of private implementation of infrastructure projects in the Gulf although not always financially feasible, i.e. costlier, in the short-term, may be more prosperous on the long run in addressing project delays and cost overruns in the Gulf.<sup>239</sup> Where governments may implement infrastructure projects they directly finance, but end up later paying double the amounts to maintain the average quality end-product, the purpose of being more efficient is rather defeated.<sup>240</sup> And so, private actors would be introduced to help fill a project management gap in the GCC as opposed to other countries where PPPs may primarily target the lack of concurrent government financial resources to fund these projects. This rather refers to the present contextual advantages PPPs may serve GCC governments in implementing their infrastructure projects.

In a report submitted to Infrastructure Partnerships Australia, the main PPP agency in Australia, the performance between implementing infrastructure projects following the PPP route as opposed to traditional procurement has been contrasted. The most striking part of the report is the consistent success of PPP projects in overcoming problems of both project delays and cost

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<sup>238</sup> Marty, *supra* note 171, at 79.

<sup>239</sup> Young, *supra* note 7.

<sup>240</sup> Biygautane, *supra* note 225, at 107.

overruns. In other words, the private sector has been more capable of delivering projects on time and within the agreed upon budget.<sup>241</sup> This being said in the context of what would be supposedly capable government entities in Australia that may manage such projects, yet nevertheless saw the outperformance by private actors, which is also likely due to proper government monitoring.

Even with studies conducted about the efficiency or effectiveness of PPPs to address infrastructure project mismanagement, no particular concrete conclusions may be drawn as to consistently drive towards always resorting to PPPs in infrastructure projects. The model seemed to have largely worked in Australia, as highlighted above. Albeit, governmental institutional capacities in Australia as pointed out in relation to enabling the private sector through PPP contractual relationships is different than the same capacities that are anticipated in the Gulf. Even in PPPs, government entities shall remain relevant, and can still obstruct the smooth implementation of infrastructure projects.

### *The Underlying Nuisance of Contract Changes and Renegotiations*

In the context of delays and cost overruns, one aspect that must not be overlooked in infrastructure projects is the issue of renegotiation. When an infrastructure project is perceived to have saved the public budget some bucks by nailing the lowest priced bid to implement a state planned infrastructure project to later confront adjustments to the initial contract that exceed projected amounts, the deal is no longer great.

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<sup>241</sup> ALLEN CONSULTING GROUP, PERFORMANCE OF PPPs AND TRADITIONAL PROCUREMENT IN AUSTRALIA: FINAL REPORT 6–7, 26–31 (2007).

Renegotiation of infrastructure contracts cannot be left unchartered. Yes, these contracts are never perfect, and their circumstances change within time. Explicit empirical evidence as to whether less renegotiations of contracts occur in traditional procurement contracts in comparison with PPPs are not concrete, but a number of such renegotiations exist in both. Jose Luis Gausch et. al document the rising number of renegotiations of PPP contracts in the transport sector in the Latin American region during the past three decades.<sup>242</sup> In fact, they represented 75% of the contracts that the study covered in this sector.<sup>243</sup> Whereas in another study conducted by Eduardo Engel, Ronald Fischer, and Alexander Galetovic on similar US PPP contracts, eight out of twenty projects in the study, have eventually resulted in contract renegotiations.<sup>244</sup> Frequency of renegotiations have even been detected in Spanish toll road concessions in one study.<sup>245</sup> This stresses the point that the issue is rather that of governance on the part of state government agencies in most instances to monitor the renegotiation of its infrastructure contracts whether the traditional track or PPP model is chosen.

Renegotiations are no stranger to GCC infrastructure procurement contracts. The Ministry of Public Works in Kuwait for instance pointed out that approximately during the period from 2013-2018, fifteen projects it oversees have been subjected to renegotiations in the value of KD 700 Million (US \$2.3 Billion).<sup>246</sup> These projects included Jaber Al Ahmed public hospital, a new public building for the Ministry of Education, and five roads projects, inter

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<sup>242</sup> Jose Luis Gausch et al., *The Renegotiation of PPP Contracts: An Overview of its Recent Evolution in Latin America* 6 (Discussion Paper No. 2014-8, 2014).

<sup>243</sup> *Id.* at 6.

<sup>244</sup> Eduardo Engel, Ronald Fischer & Alexander Galetovic, *Public-Private Partnerships to Revamp U.S. Infrastructure* 11 (The Hamilton Project, Discussion Paper 2011-02, 2011).

<sup>245</sup> María de los Ángeles Baeza & José Manuel Vassallo, *Private Concession Contracts for Toll Roads in Spain: Analysis and Recommendations*, 30 PUB. MONEY & MGMT. 299, 302–03 (2010).

<sup>246</sup> Faraj Naser, *700 Malyon Awamir Tagheeriya Li 15 Mashrooaaan Khilal 5 Sanawat [700 Million Change Orders for 15 Projects throughout 5 Years]*, ALANBA NEWS. (June 19, 2018), <https://bit.ly/2Yqqpeb>.

alia.<sup>247</sup> And whereas some technical difficulties have been identified that necessitated contract modifications, there were many reasons that were associated with the lack of interagency government coordination and red-tape procedures.<sup>248</sup>

In a study conducted about large-scale construction projects in the Eastern province of Saudi Arabia that predominantly followed the turnkey traditional model, the study revealed that 50% of respondents provided that change orders existed and led to an increase in the cost of projects by 6-10%, whereas 26% of respondents said that the changes led to a 11-15% increase.<sup>249</sup> Similarly, and with regards to project delays, over 55% of respondents said that initial timeframes increased by 10%, 35% of the respondents said the delays were between 10-20%, and less than 1% said the increase was more than 20%.<sup>250</sup> As for the top reasons that were associated with these delays according to the study, this included the change of plans and schedule by the government as the owner of the project, in addition to unclear objectives and designs of the project. These reasons all share one thing in common, government capacity is (ris)key.<sup>251</sup>

In the UAE, the reasons for renegotiating infrastructure contracts were relatively similar to Kuwait and Saudi Arabia.<sup>252</sup> Change orders were identified in one study as a major challenge in construction projects, although the conclusions were drawn from a nationwide analysis of the UAE.<sup>253</sup> Yet, in another study, other reasons have also been identified that ignited the appetite for contract modifications. A chief factor that caused a large degree of instability to such

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Abdulghafoor Habib Al-Dubaisi, *Change Orders in Construction Projects in Saudi Arabia* 14 (Construction Engineering & Management Working Paper CEM-520, 2007).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 16.

<sup>252</sup> Johnson & Babu, *supra* note 225, at 5.

<sup>253</sup> *Id.*

contracts according to this study was the rate of inflation.<sup>254</sup> The inflation in material costs throughout project implementation has been a major source of risk.

Gulf States must be extra cautious as to the fiscal implications and efficiency dispossessions that constant renegotiations of contractual agreements may lead to in terms of costs and delays. Time is money. An attentive government entity's grasp on contract management of infrastructure projects is paramount.

And while this study will later advocate for extra caution in adding layers of unnecessary bureaucracy and multiple overlapping government agencies, renegotiations may perhaps benefit from requiring the approval of a higher government entity other than the sectoral relevant body to give renegotiated contractual terms effect. So, if a select government agency, i.e. the ministry of transport, exclusively adopts the approach of consistently allowing for its contracts with a private party to be modified, bilaterally, leading to additional costs and time and perhaps sometimes circumventing the whole competitive process of tendering the project to the best bidder, the lack of capacity or ill intent of such agency must be detected from a monitory authority in the state and consequently decide whether to proactively approve such modifications or not. The Central Tenders Agency in Kuwait assumes such approval functions for renegotiations of public contracts, and for PPPs specifically, it would be the Higher Committee for Partnership Projects.<sup>255</sup> Dubai regulations allow for renegotiations in the limit of 30% of the public contract price and with the approval of the relevant Government Committee.<sup>256</sup> Saudi Arabian regulations do not clearly require explicit external approvals of renegotiations yet set

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<sup>254</sup> Al-Sabah, Menassa & Hanna, *supra* note 225, at 396.

<sup>255</sup> See Law No. 49 of 2016, art. 4(1), Regarding the Public Tenders Law (Kuwait) [hereinafter Kuwait Public Tenders Law]; Kuwait PPP Law, art. 35.

<sup>256</sup> See Law No. 6 of 1997, art. 48, Regarding Government Entities Contracts in the Emirate of Dubai (U.A.E.) [hereinafter Dubai Government Contracts Law].

general guidelines that must be met when government entities resort to such changes.<sup>257</sup> This Saudi approach may not be as ideal. It is problematic when regulatory ambiguity must be fulfilled by discretion, which is not particularly predictable across different infrastructure projects the private sector engages in and different government entities are left with no standardized check.

Contracts like PPPs do need flexibility to prevent further losses in some cases and adapt to the especially long-term contract needs. Contractual changes can be justified by different instances such as the occurrence of sudden changes during the life of a project and the public interest.<sup>258</sup> However, regular renegotiations of such contracts would alert to lack of proper project preparation or even collusion and possible corruption through bilateral negotiations and can distort previous competitive tendering processes.<sup>259</sup> The consistency may signal to the drawback on the part of the government agency not understanding what it expects and wants from the project from the initial project design stage.<sup>260</sup> And the further implication as well is when private parties factor renegotiation costs in their bids in the forefront by knowing government behavior in the country, which may lead to suspiciously low bids.<sup>261</sup> Negative outcomes of renegotiations eventually impact the users of the public infrastructure or tax payers, such as in a case like toll roads.<sup>262</sup>

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<sup>257</sup> Art. 58 of the Implementing Procurement Regulation provides that amendments to works of the contract or increasing or reducing the contractor's obligations are within the "competency of the government authority" with certain safeguards that must be ensured when exercising such powers, including, the preservation of the economic balance and nature of the contract, the additional works necessarily fall within the scope of the contract, and that such modifications eventually serve the public interest. Minister of Finance Implementing Resolution No. 362 of 2/20/1428H (2007) to the Government Tenders and Procurement Law (Saudi Arabia) issued according to Article 80 of the Government Procurement Law.

<sup>258</sup> Baeza & Vassallo, *supra* note 245, at 300.

<sup>259</sup> Gausch et al., *supra* note 242, at 6; J. Luis Gausch & Stephane Straub, *Renegotiation of Infrastructure Concessions: An Overview*, 77 ANNALS PUB. & COOPERATIVE ECON. 479, 480–81 (2006).

<sup>260</sup> Juan-Jose Ganuza, *Competition and Cost Overruns in Procurement*, 55 J. INDUS. ECON. 633, 634, 650–51 (2007).

<sup>261</sup> Baeza & Vassallo, *supra* note 245, at 300.

<sup>262</sup> *Id.* at 303.



The renegotiation problem may also be mitigated by setting caps on the percentages to change the price of an ongoing contract to prevent bilateral negotiations between contractors and government entities that primarily rely on bargaining powers. Rather, when such threshold is exceeded, a new competitive tender must be conducted to invite other bidders to submit their proposals and achieve the optimal value. Kuwait, for instance, for a very good reason, requires the approval of the Central Tenders Agency for any modifications that either increase or decrease the total contract value by 5%.<sup>263</sup> No prohibition is imposed on renegotiations, but approvals must be obtained for such procedure. This is a very valid approach from the Kuwaiti legislature to ensure delivery of public infrastructure is fair and competitive throughout even the implementation stage of the project. This addresses the unfair advantage a private party may have by contemplating making up for a low bid they have previously presented and won the project based on.

Another method that could contribute to more efficiency in implementing infrastructure projects is that instead of focusing on fixed-term contracts, adopt what Engel and Galatovic refer to as the Present Value of Revenue (PVR) approach.<sup>264</sup> Fixed-term contracts may push government entities to be occupied with time-frames so much as to even renegotiate them to meet deadlines yet incurring an excess of project budgets. A PVR contract relies on the idea that governments execute the contract until the project generates the necessary revenue instead of reaching a certain time limit.<sup>265</sup> The model has been largely adopted and has seen success in Chile.<sup>266</sup> This approach can work for both PPPs and traditionally procured infrastructure

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<sup>263</sup> Kuwait Public Tenders Law, art. 74.

<sup>264</sup> Engel, Fischer & Galetovic, *supra* note 244, at 18–20.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

contracts that are typically of a longer duration. The problem with this model though is that GCC taxpayers, or more accurately users, are burdened with delayed services until project revenues are recovered.

The PVR model thus highly depends on government entities closely observing project results. This approach could be useful when obsolescent circumstances appear in the future and make the technology or services in the implemented project less valuable. An example of this would be if GCC governments were to implement passenger trains or even traditionally designed highways for trains and cars to use, but in a decade's time, the use of automated or aerial vehicles, which is actually planned for in Dubai by 2030,<sup>267</sup> becomes more frequent and cuts commute times. Dubai, for example, is also preparing to launch a phase of its hyperloop transportation technology from Dubai to Abu Dhabi during the 2020 EXPO,<sup>268</sup> with a recently emerging but less concrete roadmap at the moment by its neighbor Saudi Arabia,<sup>269</sup> while Kuwait has been trailing behind and still engaged with implementing and procuring more

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<sup>267</sup> This includes the Autonomous Transportation Strategy. *Dubai Aims to Improve Public Transport with the help of AI*, INTELLIGENT TRANSPORT NEWS (Apr. 29, 2019), <https://www.intelligenttransport.com/transport-news/79089/dubai-public-transit-ai/>; *Dubai's Autonomous Transportation Strategy*, DUBAI FUTURE, <https://www.dubaifuture.gov.ae/our-initiatives/dubais-autonomous-transportation-strategy/> (last visited May 21, 2019). See also Phoebe Whetson, *World's First Commercial Hyperloop System Could Hurtle Passengers Around Abu Dhabi at up to 760mph by 2020*, DAILY MAIL (Apr. 19, 2018, 4:56 PM), <https://www.dailymail.co.uk/sciencetech/article-5635363/Worlds-commercial-Hyperloop-hurtle-passengers-Abu-Dhabi-2020.html>.

<sup>268</sup> Jack Ball, *The World's First Hyperloop System Could Cost \$40m per Kilometre*, CONSTRUCTION WEEK ONLINE, Jan. 17, 2019; Arjun Kharpal, *Hyperloop is Coming to Abu Dhabi by 2020*, CNBC NEWS (May 28, 2018, 9:00 AM), <https://www.cnbc.com/2018/04/18/hyperloop-coming-to-abu-dhabi-by-2020.html>.

<sup>269</sup> There are announced plans to extend such hyperloop route to Riyadh, Saudi Arabia, but no official plans of such negotiations have been announced on the Saudi side as of yet. Some of the additional routes that have been promised to be linked are Saudi future mega cities like NEOM and Red Sea projects. Oscar Rousseau, *Virgin Hyperloop One to Reveal Vision 2030 Plans at the Big 5 Saudi*, CONSTRUCTION WEEK ONLINE, Mar. 3, 2019; Whetson, *supra* note 267; Nick Webster, *UAE transport: Virgin Hyperloop One takes a Realistic 'Not Reckless' view as it looks to Mid-2020s Launch*, NAT'L NEWS (Nov. 28, 2018), <https://www.thenational.ae/uae/transport/uae-transport-virgin-hyperloop-one-takes-a-realistic-not-reckless-view-as-it-looks-to-mid-2020s-launch-1.796666>. Virgin Hyperloop One founder, Josh Giegel, has previously opined about the company's anticipated partnership with the Saudi Government to implement hyperloop technology across Saudi Arabia. Josh Giegel, *KSA and the Hyperloop Century*, ASHARQ AL-AWSAT NEWS (Oct. 9, 2018), <https://aawsat.com/english/home/article/1421036/josh-giegel/ksa-and-hyperloop-century>.

traditional rail and underground metro schemes. This is exactly what some experts have been teasing with regards to the promised GCC railway that would connect the Gulf States by land, where the hyperloop idea would instead cut time travel significantly and suggests that even costs can be 30% or 40% cheaper than building the rail system.<sup>270</sup> This technology is a passenger or even possibly cargo vehicle that runs in fast speeds cutting travel time between the two Emirati cities, Abu Dhabi and Dubai, from about two hours to just twelve minutes.<sup>271</sup> The level of flexibility governments should have in cases like this with their contractual private partners must be identified in advance in contractual clauses that allow for adjustments in exchange for just compensations or with the option of the government buying back the project instead of incurring more losses by delaying the decision-making process to figure out what should be done in cases like this. The transformative phase not only Gulf Governments are going through, but also the rate of technological advances as well, necessitates that these governments introduce levels of flexibility in their contractual partnerships for situations like this with the private sector to ensure the actual multi-decade societal needs to come are met. Both the Emiratis and Saudis appear to be considering such changes in the example above about hyperloop technologies. The Kuwaiti government must ensure its development plans coincide with the quality of infrastructure partnerships it strikes with the private sector in the years to come.

The moral is that Gulf governments ought to understand that introducing PPPs or private participation in infrastructure can generally introduce efficiency gains, but these governments

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<sup>270</sup> Webster, *supra* note 269; Shafaat Shahbandari, *40 KM Hyperloop Link to Serve Expo 2020*, GULF NEWS (Dec. 11, 2016), <https://gulfnnews.com/uae/transport/40km-hyperloop-link-to-serve-expo-2020-1.1943404>; *Work on Abu Dhabi-Dubai Hyperloop to Start in 2019*, TIMEOUT ABU DHABI (Nov. 4, 2018), <https://www.timeoutabudhabi.com/news/387908-work-on-abu-dhabi-dubai-hyperloop-to-start-in-2019>; Niall Patrick Walsh, *The World's First Commercial Hyperloop is Coming to Abu Dhabi in 2020*, ARCH DAILY (Apr. 20, 2018), <https://www.archdaily.com/893006/the-worlds-first-commercial-hyperloop-is-coming-to-abu-dhabi-in-2020>.

<sup>271</sup> Whetson, *supra* note 267.

cannot sit back and watch. The residual role for these governments in monitoring infrastructure projects remains absolutely critical.

### Do PPPs Create Jobs?

The problem that arises with not only the long-term nature of this PPP contract, but more broadly with the underlying message that the private sector is more efficient in implementing infrastructure projects, is the welfare aspect of this feature. With growing populations in the Gulf, and the need for more jobs to be created for the incoming labor force,<sup>272</sup> do PPPs really create jobs?

This question is one of the single-most controversial arguments when discussing the outcomes of resorting to PPPs to implement infrastructure projects.<sup>273</sup> The answer is consequently not concrete. The logic behind efficiency is that the private sector would execute the job with the least resources necessary to cut costs and maximize returns. So how does this PPP strategy serve the public in the upcoming human capital growth then? The simple logical business approach to the matter may be ad hoc when not considered in the broader micro and macro level contexts.

PPPs in still an efficient manner may lead to creating or more accurately shifting employment towards more emphasis on other certain sectors resulting in direct and indirect job opportunities.<sup>274</sup> When information technology (IT) and renewable energy sectors may have minimally been in the Gulf's instant development visions in the past, this adjustment leads to a more labor-force demanding sector and hence where jobs may be curbed in some sectors, like

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<sup>272</sup> El-Katiri, *supra* note 30; RETHINKING ARAB EMPLOYMENT, *supra* note 30, at 6–9, 12–13, 15.

<sup>273</sup> RUIZ-NUÑEZ, DINTHILAC & WEI, *supra* note 29, at 3, 7–9.

<sup>274</sup> *Id.*

roads and health for instance, jobs are created in others like IT and renewable energy. Smart responsive governments as a result would invest in creating job skills that feed into these new or reinvigorated sectors through education.<sup>275</sup> The trickle-down effect is that primary schools and universities start empowering STEM education (science, technology, engineering, and mathematics) and analytics for example instead of other previously established skillsets and this equipped labor force feeds into newly empowered sector. The job skill preparation must consider that where private entities may have been more gender responsive by employing females, as great an incentive this is, it does not necessarily mean creating jobs. It is rather an indication about the failure of GCC governments to ensure a more gender balanced labor force in their public entities, which consequently may have not been accounted for in the labor market.<sup>276</sup>

The ultimate inevitable fact is that types of PPP contracts vary and impacts on the labor market may differ from management contracts to DBFOM contracts, which must also be considered when accounting for the impact of PPPs on the local labor market.<sup>277</sup> And perhaps the discussion at the end is more so about the prospects for creating better jobs with private sector participation in infrastructure instead of preserving low-productivity employment opportunities, a recurrent theme some GCC Governments have sadly nurtured.<sup>278</sup>

### Privatization and PPPs

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<sup>275</sup> WORLD BANK GROUP, THE JOBS AGENDA FOR THE GULF COOPERATION COUNCIL COUNTRIES 58–60 (2018).

<sup>276</sup> RETHINKING ARAB EMPLOYMENT, *supra* note 30, at 6, 15.

<sup>277</sup> DEV. BANK OF S. AFRICA (DBSA), PUBLIC-PRIVATE PARTNERSHIPS (PPPs) AND THEIR IMPLICATIONS FOR JOBS AND EMPLOYMENT 3 (n.d.).

<sup>278</sup> Klaus Tilmes, *Does Competition Create or Kill Jobs?*, WORLD BANK BLOG (Nov. 18, 2015), <http://blogs.worldbank.org/psd/does-competition-create-or-kill-jobs>.

The details are pretty extensive when it comes to what the different interpretations of what privatizations are, and this study does not particularly aim to generously engage in that.<sup>279</sup>

Privatization, nevertheless, was one major element linked with economic growth in the neoliberal global agenda that was known as the “Washington Consensus” in the late 1980s.<sup>280</sup>

The term privatization is philosophically broken down into empowering the role of the private sector to provide public needs and minimizing the government’s participation in such task. When the idea of privatization more narrowly follows the notion of a complete transfer of control to the private sector of an asset or service, PPPs evidently exit this consequence.<sup>281</sup>

Partial transfer though may pose more complexities in terms of the differences between PPPs and privatization.<sup>282</sup> PPPs assume a continued role for the public entity in the contract and over the asset or service as a partner.<sup>283</sup> Hence, in PPPs, the government is not quite ready to hand over the public asset completely or partially. And in many instances, privatization also implies the preexistence of the infrastructure that is being transferred.<sup>284</sup> Furthermore, the private sector would be held accountable in the context of privatization in front of the citizen end users whereas the government would be burdened with that responsibility in PPPs.<sup>285</sup> PPPs are about as gradual

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<sup>279</sup> For a detailed analysis of these interpretations and what privatization entails, see E.S. SAVAS, *PRIVATIZATION IN THE CITY: SUCCESSES, FAILURES, LESSONS* 14–35 (2005).

<sup>280</sup> MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, *ADVANCED INTRODUCTION TO LAW AND DEVELOPMENT* 164 (2014). Upholding the values of a free market economy where economic resources are more efficiently allocated in a society by establishing pricing signals represents the neoclassical or liberal element of this agenda, and state intervention in the economy was viewed as the problem rather than the solution. *Id.* at 19. The Washington Consensus mirrored these principles by introducing a set of policies in connection with macro-economic stability, liberalization, privatization, foreign direct investment incentive policies, and policies to foster the role of private entrepreneurship. *Id.*

<sup>281</sup> Dep’t Econ. & Soc. Aff., Div. Pub. Econ. & Pub. Admin., *Privatization and Regulation in Developing Countries and Economies in Transition*, at 9, UN Doc. ST/ESA/PAD/SER.E/19 (1999); FARQUHARSON ET AL., *supra* note 127, at 9.

<sup>282</sup> FARQUHARSON ET AL., *supra* note 127, at 9.

<sup>283</sup> *Privatization and Regulation*, *supra* note 281, at 9; FARQUHARSON ET AL., *supra* note 127, at 9–10.

<sup>284</sup> FARQUHARSON ET AL., *supra* note 127, at 10.

<sup>285</sup> *Id.*

as GCC governments can get when allowing the private sector to provide public services to the countries' constituents through infrastructure development in comparison with privatizing public assets and services. And thus, the Gulf governments must well understand what resorting to privatization would entail in terms of their control over assets in comparison with PPPs. The welfare role would significantly shrink with the idea of privatization. GCC governments must regulate and address privatization and PPPs differently, which proves to be more confusing amongst the different Gulf States as this study will show.<sup>286</sup> Saudi regulations to be specific bundle both schemes under one definition thus far.

Needless to say, as well, privatization is a very complex process and is not guaranteed smooth success. A whole sector is pretty much on the verge of being handed over to a very different actor in privatization, the private party. One major concern to many of the states' citizens as a result, would be the belief that they will risk job security and tenure when a state adopts a widespread privatization policy and as a consequence ask for more guarantees from the government to cover private incurred debts by enterprises, an issue that can get out of hand when multiple enterprises request such bailout and assistance.<sup>287</sup> This was one of the obstacles Eastern Europe had to face where widespread layoffs have been witnessed in Hungary and Poland when privatization schemes were pursued.<sup>288</sup> This is also one reason when where privatization is chosen instead of PPPs, corporate governance and enabling actual ownership by the private entity in privatization is crucial for the privatization's success, otherwise the solution is half-adopted and could lead to confusion.<sup>289</sup>

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<sup>286</sup> Baxter, *supra* note 216.

<sup>287</sup> Privatization and Regulation, *supra* note 281, at 17; David Lipton & Jeffrey Sachs, *Privatization in Eastern Europe: The Case of Poland*, 2 BROOKINGS PAPERS ECON. ACTIVITY, 1990, at 293, 299.

<sup>288</sup> Lipton & Sachs, *supra* note 287, at 299.

<sup>289</sup> *Id.* at 299, 303.

When the communist party was in power in Poland, governance of enterprises was largely influenced by what was known as the “nomenklatura system” and later switched to the “Workers’ Council” and appointments of directors in these enterprises on this basis took place.<sup>290</sup> And while privatizations give the lead to the private sector to govern its institutions, whether a free market economy is adapted or not, there seems to be acknowledgment of the role state intervention can play in the economy and precisely with certain local industries in a more collaborative manner as in with PPPs.<sup>291</sup> This latter conclusion could lead to grey areas with PPPs and privatization as to their end goal.

There can be as many positive experiences from privatizations as much as there are negative ones. Nonetheless, what remains is that there are core elements for its success. Michel Trebilcock and Mariana Prado believe that privatizations could achieve sustainable economic and social development by meeting four criteria: 1) a healthy private sector; 2) an effective regulatory framework; 3) macro-economic stability; 4) the absence of corruption.<sup>292</sup> These main foundations remain country and industry specific though.<sup>293</sup> As a result, in certain states, if a non-competitive environment persists even with privatization of certain state-owned enterprises (SOEs), this may further negatively affect the role of the local private sector because of monopolized pricing.<sup>294</sup> And while the private sector through privatization solely operates a whole sector or part of it, there would be a government regulator, a state entity overseeing the governance of the sector(s), to ensure antitrust violations do not take place.<sup>295</sup> In other words, the

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<sup>290</sup> *Id.* at 305.

<sup>291</sup> TREBILCOCK & PRADO, *supra* note 280, at 179–80.

<sup>292</sup> *Id.* at 171.

<sup>293</sup> *Id.*

<sup>294</sup> Privatization and Regulation, *supra* note 281, at 19; TREBILCOCK & PRADO, *supra* note 280, at 171.

<sup>295</sup> *Id.* at 9, 19–20, 67–68, 141–45.



government's institutional role is still indispensable in this scheme, to ensure a healthy sectoral market.

From the abovementioned displayed PPP specificities in terms of the different elements that shape such projects, one fact is evident, PPPs are in essence a contract or agreement. This conclusion means that this contractual agreement may be tailored in any form its public and private counterparts agree to. The Gulf countries of Kuwait, the UAE, and Saudi Arabia all have the opportunity to contextualize PPP agreements to their specific public interest needs.

Different types of PPP contracts, BOT, BTO, or DBFO, are all potential candidates depending on the given sectoral initiative. And where Gulf governments may want to ensure better maintenance and operation of roads for instance while guaranteeing the regular flow of users of these certain roads, they may introduce the private party to further operate such roads and collect tolls. This will allow the government to grant the private party a steady revenue stream and return on investment through user pay fees and offset payments on its budget and preserve more efficient management of the roads sector. This scheme though must be assessed well in light of these governments' roles to provide the welfare of GCC residents in free access to roads. The first populous reaction may be to the rise of costs in tolls, which governments may help subsidize.

This is a glimpse of how the private sector may be offered a range of opportunities in the provision of infrastructure projects that highly depend on the preferences agreed upon with the relevant government entity. PPPs are but a tool that GCC States may utilize to engage private sector actors in their economies while not losing complete control of public assets and services at the same time. However, these same governments must not oversee the fact that these contracts regularly entail high transaction costs in their preparation, procurement, and even management,

i.e. complex procedures. These contractual tools then, as a result, depend largely on these governments' diligence in selecting the optimal scheme in each infrastructure project that brings the most value for money. One actor that will remain in demand regardless of the selected governmental scheme to implement infrastructure projects will be the private sector.

## CHAPTER III

### SUSTAINABLE ECONOMIC DEVELOPMENT IN THE GULF: TIPTOEING BETWEEN UNIVERSALISM AND CONTEXTUALISM

#### Achieving a Gulf Arab Version of Sustainable Development

Sustainable Development or Economic Growth: Multiple Words, One Meaning?

#### Economic Development Where it Emerged: Economic Perspectives

There are economic approaches to analyze what would lead to economic development and was more so referred to as economic growth. There were different stages and perspectives where economic growth was seen to be more associated with certain factors more than others. This, in other words, is what empowered a field of study that later became known as development economics, which remains a broader field of study. Development economics takes a multidisciplinary approach and looks at the historical and contemporary experience of development in the specific region or country of study. Thus, cultural, economic, political, and institutional mechanisms, internally and externally, that affect economic growth in the state or region are considered.<sup>296</sup> The schools of thought that fall under this field would include: the Structuralist School, the Linear-Stages-of-Growth Model, the Neo-Marxist approach, and the Neo-Classical Revival.<sup>297</sup>

The Structuralist School emerging as a Latin American experience aimed at state internal empowerment of its industry rather than complete dependence on exports of its resources

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<sup>296</sup> Ricardo Contreras, *Competing Theories of Economic Development in E-Book on International Finance and Development: Part One Pursuing the Good Life The Meaning of Development as it Relates to the World Bank and the International Monetary Fund (IMF)*, 9 TRANSNAT'L L. & CONTEMP. PROBLEMS 93, 95 (1999).

<sup>297</sup> *Id.* at 95.

abroad.<sup>298</sup> At a later stage, the theory incorporated “comparative advantage” and the idea of exporting raw materials (natural resources).<sup>299</sup> Consequently, a “dual economic structure” was introduced, where a modern export structure would be in parallel with an underdeveloped internal one.<sup>300</sup> The theory claimed that only government intervention could bring about economic development in this respect, such as imposing tariffs, subsidies, and quotas, in what others would perceive as protectionist measures.<sup>301</sup> The theory also believed that state-owned enterprises (SOEs) could preserve a governmental induced sizable investment approach.<sup>302</sup> With that said, the main criticism this theory faced was that it empirically failed to prove the success of internal industrialization.<sup>303</sup>

The Linear-Stages-of-Growth Model is more connected to the Western European view.<sup>304</sup> This theory claimed that economic growth is internally induced and not based on external factors.<sup>305</sup> Societal and local institution attitudes, like saving, are factors to consider. Induced local investments or foreign investments in the state itself are one of this movement’s elements.<sup>306</sup> Walt W. Rostow was a champion of this analysis and he classified the stages of advances states witness into, the traditional society, the pre-conditions to take-off stage, the take-off stage, the drive to maturity, and the age of high-mass consumption.<sup>307</sup> The criticism this movement faced was that it is very difficult to adjust societal behaviors.

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<sup>298</sup> *Id.* at 96.

<sup>299</sup> Justin Yifu Lin, *New Structural Economics: A Framework for Rethinking Development* 9 (World Bank, Policy Research Working Paper No. 5197, 2010).

<sup>300</sup> Contreras, *supra* note 296, at 98.

<sup>301</sup> Lin, *supra* note 299, at 9.

<sup>302</sup> Contreras, *supra* note 296, at 98.

<sup>303</sup> Lin, *supra* note 299, at 99.

<sup>304</sup> Contreras, *supra* note 296, at 99 (1999).

<sup>305</sup> *Id.* at 99.

<sup>306</sup> *Id.*

<sup>307</sup> W.W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO 4-16 (1960).

The Neo-Marxist approach or dependency theory arises from the idea that capitalist states were viewed as exploiting other states and led to the revolt of the social workers. Whereas, the Neo-Classical Revival, that was briefly explained previously in this study,<sup>308</sup> saw non-governmental intervention in the economy as critical for economic development. These are notions of what economic development would refer to from a more economic view. Many updates into this term later came into the being.

### Development Qualified by Sustainability

When lawyers engage in litigation, they often challenge the meaning of legal terms within the context of certain provisions, such as those based on the interpretation principles in international law. These interpretation principles stem from the Vienna Convention on the Law of Treaties (“VCLT”).<sup>309</sup> Under the VCLT, lawyers are tasked with ascertaining the “ordinary meaning” of a term, in light of the “object and purpose” of the treaty.<sup>310</sup>

As such, the interpretation of certain terms may shape the future course of action of treaty provisions. This certainly applies to terms that may seem so ambiguous, perhaps even intentionally, that their ultimate application would be questioned, unless some sense of flexibility is left to respect differentiating treaty parties’ intentions. One such term is “sustainable development.” This term has evolved in such a dynamic way that attributing an actual meaning to it may not be possible, such as is the case with terms like “justice,” “right,” and “freedom.”

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<sup>308</sup> See Privatization and PPPs in Chapter II.

<sup>309</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

<sup>310</sup> *Id.* art. 31.

## Evolution of the Term Sustainable Development

The term “development” can be approached from multiple angles. It could be broadly viewed in terms of human freedoms it sets to prosper as Amartya Sen put it,<sup>311</sup> or even as a right to survival.<sup>312</sup> On the other hand, a narrow view of development refers to the rise of personal incomes as a result of an increase in the gross national product (“GNP”), in addition to technical and industrial advancements.<sup>313</sup> While there could be some added value in looking into the origins and evolution of this self-standing term, the aims of this study go beyond that. What is important, however, is how the term has been qualified by the term “sustainability.”<sup>314</sup>

The international community has played a significant role in ascertaining shared aims as to what the term sustainable development may be perceived as. The evolution of the term can be broken down into two stages: (1) the period preceding the transition into the MDGs, and (2) the phase representing today’s SDGs.

## Developing the Way to The MDGs

In the early stages of fostering the term “sustainable development,” the World Commission on Environment and Development (“Brundtland Commission”), published a report titled *Our Common Future* in 1987, which defined the term as, “development that meets the needs of the present generation without compromising the ability of future generations to meet

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<sup>311</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1st ed. 1999).

<sup>312</sup> Upendra Acharya, *The Future of Human Development: The Right to Survive as a Fundamental Element of the Right to Development*, 42 DENV. J. INT’L L. & POL’Y 345, 360–65 (2014).

<sup>313</sup> *Id.* at 350.

<sup>314</sup> See generally Timothy W. Luke, *Neither Sustainable Nor Development: Reconsidering Sustainability in Development*, 13 SUSTAINABLE DEV., no. 4, 2005, at 228, 228–38. Luke attempts to critically analyze the evolution and rhetoric of “sustainable” development, in which he deems would neither lead to sustainability nor development. *Id.*

their own needs.”<sup>315</sup> Perhaps, adding an “altruistic” value to development would encourage present generations to act in a way that ensures future generations will not be burdened by past decisions that interfere with the capacity of the future generations to continue the development of the environment, health, and economy.<sup>316</sup>

But who exactly is more worried about sustainable development, developing or developed countries? As is the case with other human rights generally, people are the main subjects of this agenda.<sup>317</sup> From a rights-based approach, no certain category of people or country monopolizes this term. People living in developed countries, as much as constituents of developing countries, are considered to fall under this term. However, it is not who is most in need of utilizing this term, rather, the aim is to highlight the global consensus that the agenda’s duty-bearers, which are predominantly states, are burdened with commitments that best serve the sustainable development goals of the people.<sup>318</sup>

As emphasized in earlier initiatives, to qualify development with sustainability, efforts persisted to underscore this qualification in other forums. The United Nations Conference on Environment and Development (“UNCED”) in Rio de Janeiro in 1992, reached agreement amongst 176 states that sustainable development is a major aim for the international community.<sup>319</sup>

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<sup>315</sup> Rep. of the World Commission on Env. & Dev., *Our Common Future*, annex, U.N. Doc. A/42/427 (1987).

<sup>316</sup> Nico Schrijver, *Introduction*, in *THE EVOLUTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: INCEPTION, MEANING AND STATUS* 23, 23–24 (2008).

<sup>317</sup> See G.A. Res. 41/128, annex, Declaration of the Right to Development, at Preamble & art. 1 (Dec. 4, 1986). U.N.G.A.’s Declaration of the Right to Development reiterates Article 1 several times in its preamble and defining provision, as peoples being the central subjects of this right on the premises of it being an “inalienable human right.”

<sup>318</sup> See Jeremy Waldron, *Duty Bearers for Positive Rights* (New York Sch. of Law Pub. Law & Legal Theory Research Paper Series Working Paper No. 14-58, 2014) (further elaborating on how duty-bearers of social and economic rights could change with the change of particular interests that are protected, and even become multiple duty-bearers).

<sup>319</sup> Schrijver, *supra* note 316, at 23, 24.

The European Union, and the United Nations General Assembly and Security Council Resolutions also followed this consensus.<sup>320</sup>

During the Millennium Summit, held in September 2000, in New York, the attendees, 149 heads of states and high-ranking officials from 40 countries, adopted the Millennium Declaration.<sup>321</sup> The result was a systematic move towards soft guidelines, as opposed to strict treaty obligations, but nevertheless, widespread, international consensus to elaborate on these sustainable development goals.<sup>322</sup> It is some sort of aspirational mission to link many different topics under one umbrella. Some attendees described these goals as being “all-encompassing concepts, if not a mantra.”<sup>323</sup> The MDG agenda included eight goals to be attained by 2015: (1) eradicate extreme hunger and poverty, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/Aids, malaria and other diseases, (7) ensure environmental sustainability, and (8) develop global partnerships, with 18 related specific targets, and 44 quantifiable indicators.<sup>324</sup> With this ambitious attitude, there had been a significant amount of fear about implementing these development goals on a domestic level, which continues into the new stage.

### Today's SDGs

After the MDGs, the term sustainable development continued to find new venues to address; but this time, the horizon was vast. On September 25, 2015, leaders from all over the

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<sup>320</sup> *Id.* (citing UN Doc. S/RES/1483 (2003), May 22, 2003, ¶ 8(e), related to the economic reconstruction of Iraq and the conditions for sustainable development).

<sup>321</sup> *Millennium Summit (6-8 September 2000)*, UNITED NATIONS, [http://www.un.org/en/events/pastevents/millennium\\_summit.shtml](http://www.un.org/en/events/pastevents/millennium_summit.shtml) (last visited Nov. 9, 2015).

<sup>322</sup> See NAYYAR, *supra* note 71, at 5–6, 11.

<sup>323</sup> Schrijver, *supra* note 316, at 23, 24.

<sup>324</sup> *Background*, *supra* note 69.



world met in New York and adopted United Nations General Assembly Resolution 70/1, which included 17 goals and 169 targets to be implemented from the period from 2015 until 2030.<sup>325</sup> The Resolution included sustainability and, in terms of development, clean water and sanitation; affordable and clean energy; decent work and economic growth; industry innovation and infrastructure; sustainable cities and communities; responsible consumption and production; life below water life on land; and peace, justice, and strong institutions.<sup>326</sup> Without engaging deeply about the details of these goals and targets, what is nevertheless noticeable with this agenda is that what accompanies this broad consensus is a high cost.<sup>327</sup> It is estimated that implementing such an agenda would be valued at \$5 to 7 trillion.<sup>328</sup>

The SDGs are part of a global structure, yet the role local communities play in the implementation of the SDGs is critical. What these SDGs sum up, as was the case with their predecessors, is that they are soft in their establishment through Resolution 70/1, but defer to state domestic constituents to further contextualize them.<sup>329</sup> Even in the language of the Resolution, with all the commitments the state members took upon themselves, it is intended to guide the participating governments in implementing a national framework within the context of a generalized versus contextualized development goals debate.<sup>330</sup> Nevertheless, a broad and flexible tone is evident throughout the Resolution and in the Goals themselves, which implies that governments have some flexibility in implementing the SDGs.

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<sup>325</sup> G.A. Res. 70/1, *supra* note 65, ¶ 18.

<sup>326</sup> SUSTAINABLE DEV. GOALS, *supra* note 66.

<sup>327</sup> CUSTER ET AL., *supra* note 67, at 83; FROM BILLIONS TO TRILLIONS, *supra* note 67, at 1.

<sup>328</sup> CUSTER ET AL., *supra* note 67, at 83.

<sup>329</sup> The nature of U.N. General Assembly resolutions is discussed in art. 10 of the U.N. Charter, where the Assembly “may make recommendations to the members of the United Nations or to the Security Council or to both on any such matters of questions.” U.N. Charter, art. 10, ¶ 1.

<sup>330</sup> NAYYAR, *supra* note 71, at 5–6, 11.

With regards to this agenda's future, it is only clear how unclear its future is. But what these states have done through the General Assembly is set the bar high for other forums, i.e. international organizations or non-governmental organizations ("NGOs"). If there is something that stands out from all 17 goals, it is that almost any forum on the international level could be a stakeholder. An international body omitting the acknowledgement of this new agenda would counter a new era of flexible general consensus.

Even in terms of other international regimes, the 1994 World Trade Organization (WTO) Marrakesh Agreement Preamble also outlines main elements of sustainable development and link it to the trade agenda, where the Preamble reads:

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.<sup>331</sup>

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<sup>331</sup> Marrakesh Agreement Establishing the World Trade Organization, Preamble, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. The General Agreement on Tariffs and Trade ("GATT") preceded the WTO as an agreement where parties collaborated their efforts to facilitate the liberalization of trade. Padideh Ala'i, *Trade and Sustainable Development*, 4 SUNGKYUNKWAN J. SCI. & TECH. L. 63, 65 (2010). The main objective of free trade ideology of the parties relied on mainly two dimensions: (1) market access, which implied eliminating trade barriers that included tariffs, quotas, and subsidies; and (2) non-discrimination between the parties of GATT, which attracted a global consensus. *Id.* These two features have persisted in the WTO. *See* General Agreement on Tariffs and Trade, preamble, ¶ 3, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT]. The same language of the Marrakesh Agreement Preamble of raising standards of living, full employment, economic growth, and full use of resources remained. What preceded was a push by developing countries to address more development needs, which were raised during the four-year Kennedy Round from 1963–1967, with minimal results. The Kennedy Round was named after President John F. Kennedy upon his death in 1963 as one of the strong proponents of this Round. Marie-Claire Cordonier Segger & Markus W. Gehring, *Introduction*, in *SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW* 1, 7 (2005). The structure of GATT remained, but a GATT Committee on Trade and Development was established. Institutionally, the United Nations Conference on Trade and Development ("UNCTAD") was also created in Geneva in 1964 to address the North-South divide between what is perceived as the wealthy developed states and the developing poor states. The Kennedy Round was named after President John F. Kennedy upon his death in 1963 as one of the strong proponents of this Round. *Id.* at 7–8.

And so, the international regime expands the development undertone, which means an even greater task for states to address public needs. Private support in achieving these needs as a result becomes sensible, especially considering the high costs correlated with the agenda. And a major component of economic growth and raising the living standards of the state's citizens, i.e. sustainable development, is infrastructure development.<sup>332</sup> As for the tools that can help induce development, the role of regulations may be questioned in terms of a reflection on state policy.

### Can Law Achieve Development?

The reasoning behind this chapter is to understand whether certain contextual sustainable development results may be achieved through legal instruments. In particular, whether legal tools on PPPs in the Gulf could enhance the role of the private sector to fulfill public needs in an effective manner as a major target of itself instead of using PPP policies for exclusive fiscal justifications. And in order to do so, it is necessary to first draw on what is referred to as law and development (L&D) theories and global examples in this context.

#### Evolution of Law and Development

In the field of L&D studies, scholars have tried to trace its evolution and have used terms such as the “first moment,” the “second moment,” and the third moment of L&D.<sup>333</sup> While the first moment referred to the historical stage where the state government led development policies of the state.<sup>334</sup> Whereas the second moment exemplified the period challenging the role of state

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<sup>332</sup> TREBILCOCK & PRADO, *supra* note 280, at 163.

<sup>333</sup> David M. Trubek & Alvaro Santos, *An Introduction: the Third Moment, in Law and Development Theory and the Emergence of a New Critical Practice, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 143, at 5-10.

<sup>334</sup> *Id.* at 5.

governments and rather empowering private actors in what became known as the Washington Consensus.<sup>335</sup> In this moment, the international community pushed for trade liberalization by eliminating, or at least limiting, trade barriers, such as tariffs.<sup>336</sup> Certain international institutions eventually played a key role in pushing for such agendas like the World Bank (International Bank for Reconstruction and Development), International Monetary Fund, and the World Trade Organization in a way that even some termed “global regulatory governance” “or “global administrative law”.<sup>337</sup> In the third moment, a sort of enlightenment as to the negative and positive consequences resulting from previous moments was acknowledged by adapting to a more social and human rights friendly policy.<sup>338</sup>

The importance of tracking the evolution to the ideas of linking law to development is that the sequential phases in the moments mentioned above rather also embody lateral elements like increased market liberalization that are more empowered to this day in certain communities even while others advocate for more civil society or social safety net programs within the state. Much of the confusion perhaps emerges from the difficulty of actual broad apprehension that development entails much more than notions of economic growth. And so, while waves of privatization may have been documented in periods of history, these private sector enablement tools still very strongly exist to this day yet vary geographically. The end goal in L&D studies is to acknowledge that law is but a means to an end, which demands a more consequentialist

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<sup>335</sup> *Id.* at 5–6.

<sup>336</sup> For a more detailed account of such trade policy dimensions, see JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* (6th ed. 2013).

<sup>337</sup> See Benedict Kingsbury, *Global Administrative Law in the Institutional Practice of Global Regulatory Governance*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE* 3–33 (Hassane Cisse, Daniel D. Bradlow & Benedict Kingsbury eds., 2011) (“attempting to display this structured role of intergovernmental institutions and their impacts on states.”).

<sup>338</sup> Trubek & Santos, *supra* note 333, at 7–9.

approach to linking law to development.<sup>339</sup> This study aims to stress that in light of previous discussions about sustainable development, legal or regulatory tools must meet a higher threshold in achieving broader public goals, social and economic. This is a larger and more ambitious undertaking and public v. private inclinations must be well understood in this context.

The two spheres of economic and social may appear to be contravening when shaping state policies. Legal ordering on the one side may have entailed issuing legal tools in order to target and achieve certain social or economic objectives. On the other end, regulations may have been established to rather ensure limited state intervention in the market and so ensure free competition amongst private actors within the state.<sup>340</sup> However, legal ordering is much more complex than being confined to either extremes within the state. This means that regulations must be designed to achieve certain public goals in certain sectors like health and education for instance yet ensure that private actors retain a leveled competitive field in other sectors, especially economic sectors, like sea ports or renewable energy generation. This would be pertinent to Gulf States where governments have generally led state activities across sectors.

In terms of highlighting the current state of L&D, Kevin Davis and Michael Trebilcock approached what they deemed “optimists v. skeptics” views in this connection.<sup>341</sup> They address the issue of the lack of consensus amongst L&D scholars.<sup>342</sup> Davis and Trebilcock seem to conclude their findings by suggesting a shift towards contextualism by saying:

We hence conclude (rather in the spirit of Pande and Udry) that the next research frontier is likely to entail a much more labour-intensive and context-sensitive

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<sup>339</sup> *Id.* at 10.

<sup>340</sup> David Kennedy, *The “Rule of Law,” Policital Choices, and Development Common Choice, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 143, at 102–05.

<sup>341</sup> Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists v. Skeptics*, 56 AM. J. COMP. L. 1, 7, 26 (2008).

<sup>342</sup> *Id.* at 60. Thomas Carothers is cited as one of the contributors to L&D, especially when he approaches the notion of the rule of law (Rule of Law) and “the problem of knowledge.” *Id.* at 61. *See generally* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006).

analysis of particular legal regimes and institutions (both formal and informal) in particular societies, and potential reforms thereto evaluated against some set of broad or more generalizable development goals. We believe that legal scholars can play a valuable role in this kind of research and because of its importance we encourage them to take up this challenge.<sup>343</sup>

The same authors highlight the important fact that developing countries need not develop a carbon copy of developed nations' institutions, rather exceeded benefits could be generated by resorting to more similarly situated developing countries in terms of history and culture having attempted akin legal reforms, such as cross-GCC comparisons.<sup>344</sup>

Other scholars have confirmed this, in which, "Institutional solutions that perform well in one setting may be inappropriate in other setting[s] [sic] without the supporting norms and complementary institutions."<sup>345</sup> And so scholars like Dani Rodrik adhere to the importance of universal tools that may help construct a country's development plans, but the key to succeeding with such policies comes with their genuine contextual application.<sup>346</sup> Even with that being said about the field of L&D, perhaps amongst the strongest skeptics of its success in correlating legal reforms to development are David Trubek and Marc Galanter.<sup>347</sup> They challenge the success of the idea of a "liberal legalist" model of L&D in what they termed the "Third World."<sup>348</sup>

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<sup>343</sup> Davis & Trebilcock, *supra* note 341, at 7, 30.

<sup>344</sup> *Id.*

<sup>345</sup> Sharun Mukand & Dani Rodick, *In Search of the Holy Grail: Policy Convergence, Experimentation, and Economic Performance*, 95 AM. ECON. REV. 374, 377 (2002). The authors further emphasize, "By endogenizing policy choice, we have shown that the informational externality generated by successful leaders benefit those countries that have a "close" degree of similarity to the leaders in their underlying circumstances, while it hurts countries that have an "intermediate" degree of similarity." *Id.* at 411. They also quote North who says: "[E]conomies that adopt the formal rules of another economy will have very different performance characteristics than the first economy because of different informal norms and enforcement." *Id.*

<sup>346</sup> DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS AND ECONOMIC GROWTH AT 184-90, 196 (2007); DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 25-35 (2011).

<sup>347</sup> David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062, 1088 (1974).

<sup>348</sup> They elaborate their suspicions on the legal induced social change by saying: "But experience has shown that law may have little effect on society. Substantial programs of legal reform have failed. Investments in legal education, designed to change the orientation and role of the lawyer, have yielded little change in either legal performance or social relations. These experiences have naturally given rise to calls for better programs, bigger investments, and a

The critical legal studies approach in L&D led by Duncan Kennedy has its own take on the L&D field of study,<sup>349</sup> where he highlights “classical legal thought” and institutionalism.<sup>350</sup> L&D may be perceived as representing a North point of view, while other approaches such as the Toronto School approach, might opt for more of a programmatic approach, adopting a more South lenient induced approach. This certainly is not a given, and ideals have evolved with time to bring both approaches closer together.

Others such as Mariana Prado discuss the fragmentation of L&D studies and claim that there must be middle level generalizations where shared developing countries’ successful policies would be elicited in a universalism v. relativism context.<sup>351</sup> Kennedy also shares this sort of view when discussing a *laizze affaire* v. welfare economics, and stresses mid-level generalizations, which contextualists and relativists have to acknowledge.<sup>352</sup> Kevin Davis additionally says that in oil rich developing states, it is not about establishing core economies,

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more scientific understanding of the techniques to improve legal effectiveness. But they have also led to doubts about the implicit assumption that legal change will lead to significant social change.” *Id.*

<sup>349</sup> For critique of the critical legal studies movement, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARVARD L. REV. 561, 561-675 (1983) (referring to this movement as a leftist movement and analyzing how it interprets formalism, objectivism, and other notions).

<sup>350</sup> Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 143, at 63–71.

<sup>351</sup> Mariana Mota Prado, *The Past and Future of Law and Development*, 66 U. TORONTO L.J. 297 (2016). Michael Trebilcock seems to join Mariana Prado on the idea of these middle-level generalizations as well. TREBILCOCK & PRADO, *supra* note 280, at 215–17.

<sup>352</sup> Past and Future of Law and Development Conference, *supra* note 351. Nonetheless some would argue for caution when implementing models of similar states within the Arab Gulf. For instance, “while the late-stage rentier state has development policies as well as overarching development goals or strategies, it does not have a single development model behind it. The criticisms already implied about the difficulties in transmitting the ‘Dubai model’ are worth elucidating here: at best, only some aspects of the ‘Dubai model’ are transferable to other Gulf states, as proponents of the term accept. Dubai has a business-government relationship that is not shared with all Gulf states, and, in fact, in terms of the deliberate internationalization and liberalization of the trading merchant class in the early twentieth century, is quite unique. Although Bahrain’s limited hydrocarbon reserves and production is similar to Dubai’s, it has a different trading and diplomatic history to Dubai. For Dubai, the lack of oil reserves has been both a blessing and a curse; it forced the city-state to look beyond simple mineral rents for economic development, which made it an early reformer and diversifier when it began its first moves towards opening to investment and globalization in the 1980s and early 1990s.” Matthew Gray, *A Theory of “Late Rentierism” in the Arab States of the Gulf* 29 (Occasional Paper No. 7, 2011).

and thus development may not be as universal, rather contextual.<sup>353</sup> Though he stresses that there are some universal nuances, like corruption, and there should be generalized methodologies, qualitative, like inter-institutional interdependence, and quantitative, such as measuring the rule of law.<sup>354</sup>

The focus for Davis and Trebilcock is not only on establishing formal legal tools, but also looking into public sector institutions and development. They say:

In this sense, the relationship between law and development is likely to elide, to a significant extent, with the relationship between public sector institutions and development more generally rather than being a discrete focus of reform. Perhaps this is one of the most important lessons that can be drawn from the failure of the earlier law and development movement and suggests a need for situating law reform in this broader agenda of public sector reform if the current interest in the relationship between law and development is not to suffer the same fate as the earlier law and development movement.<sup>355</sup>

Public administration reform through legal tools is certainly at the core of any reform policy a state would adopt in order to ensure that its policies would be properly enforced and further monitored through adjudicatory mechanisms. Many legal systems embody such reforms in their administrative laws to achieve transparency, impartiality, and due process that the institutions would adopt.<sup>356</sup> So to ensure the fair procurement of infrastructure projects and proper recourse to any judicial means when contract provisions are not abided by, institutions must be established and regulated in a way that ensures a monitory role, where the efficient allocation of qualified personnel are in place and policies against corruption deter public servants from corrupt practices.

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<sup>353</sup> Past and Future of Law and Development Conference, *supra* note 351.

<sup>354</sup> *Id.*

<sup>355</sup> DAVIS & TREBILCOCK, *supra* note 33, at 8–9.

<sup>356</sup> TREBILCOCK & PRADO, *supra* note 280, at 146.



Michael Trebilcock and Ronald Daniels point to three obstacles to institutional reform that include: 1) lack of financial, human, or technological resources; 2) social-cultural-historical factors; and 3) political economy-based impediments. This is a topic that will be discussed in more detail later in this study about the role of PPP-related institutions.<sup>357</sup>

When it comes to a set of standards to contextualizing L&D to a certain society, some even stress the political status within the state that can enhance or act as a detriment to the development process.<sup>358</sup> Democracy, in whatever method that may refer to as a very broad term, could be insinuated as a basis for success of any development plan and some empirical evidence has been provided in this respect, but the relationship between development and democracy remains very obscure.<sup>359</sup> The main problem is defining what model democracy replicates. South Korean growth, making it today the eleventh largest economy in the world, has certainly not initiated its growth with what many may view as their standard western model of democracy.<sup>360</sup> The Government politically subsidized certain firms more than others to help them grow and contribute to the economy.<sup>361</sup>

Ultimately, what can be concluded from the aforementioned is that L&D studies are more successful when they are done on a contextual level, i.e. based on the prevalent economic, social, or political conditions in a given state or region/sub-region. And after considering the legal framework on PPPs in chapter II of this study and sustainable economic development norms, it is

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<sup>357</sup> *Id.* at 142.

<sup>358</sup> TREBILCOCK & PRADO, *supra* note 280, at 87.

<sup>359</sup> *Id.* at 89–96.

<sup>360</sup> CURTIS J. MILHAUPT & KATHERINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 116–25 (2008).

<sup>361</sup> *Id.*

necessary to discuss what fits the context of the selected Gulf Arab States in terms of their sustainable development plans.

### A Possible GCC Version of Sustainable Development

The GCC is a distinct part of the world, and its member states have particular features that shape their course of development. It is necessary to introduce some information on these states and their shared structures in order to proceed with this study. The analysis of Kuwait, Saudi Arabia, and the UAE with regards to their PPP regulatory frameworks and sustainable development plans in connection with the role of the private sector would also be addressed.

#### Distinct GCC State Members: Getting to Know Today's Members

The Cooperation Council for the Arab States of the Gulf (GCC)<sup>362</sup> includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.<sup>363</sup> The GCC was established on May 25, 1981 when leaders of the state members convened in Abu Dhabi, U.A.E.<sup>364</sup> The end goal for forming this organization was to have a venue for coordination, integration, and interdependence between the state members in different fields.<sup>365</sup> The Supreme Council heads the Organization,<sup>366</sup> and a secretariat general acts as its executive body and prepares reports and implements the Supreme Council's decisions.<sup>367</sup> What seems to be distinct about this

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<sup>362</sup> Charter of the Co-operation Council for the Arab States of the Gulf art. 1, May 25, 1981, 1288 U.N.T.S. 21244 [hereinafter GCC Charter].

<sup>363</sup> *Id.* art. 1.

<sup>364</sup> *About GCC: Objectives*, GULF COOP. COUNCIL, <https://www.gcc-sg.org/en-us/AboutGCC/Pages/StartingPointsAndGoals.aspx> (last visited Feb. 8, 2017).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> ECONOMIC INTEGRATION IN THE GCC, WORLD BANK MIDDLE EAST AND NORTH AFRICA REGION REPORT 5-6 (2010).

organization is that it has more successfully established global networks in comparison with other Middle East and North Africa (MENA) region compacts like the League of Arab States. The GCC has a clear vision, which may possibly be due to the abundance of oil and gas in these states and the member states' economic status.<sup>368</sup> The member states furthermore share many characteristics and such shared norms are reflected in their established body, nonetheless Kuwait, Saudi Arabia, and the UAE are self-standing states, so to say, and briefly introducing each state would be necessary.

Figure 4: Map of the Gulf Arab States



Source: Saudi-US Relations Information Services

Kuwait

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<sup>368</sup> *Id.* at 1.

Kuwait is a small country with a surface area of 17,820 sq. km.<sup>369</sup> It is home to a population of 3,892,115 as of 2015,<sup>370</sup> of which only about one third of the population are citizens of the state.<sup>371</sup> Many migrate to work in domestic households and other sectors in Kuwait.<sup>372</sup> A distinct history of Kuwait must also acknowledge the 1990 act of aggression against Kuwait by the then Saddam Hussein regime that has left quite a bit of damage.<sup>373</sup> The state was liberated in February of 1991, but the impact of this event may have been too immense to simply recover from in a decade or two.<sup>374</sup>

The State of Kuwait is a constitutional monarchy, or emirate,<sup>375</sup> ruled by the descendants of *Mubarak Al Kabir* (Mubarak the Great) and became independent from the British protectorate status in 1961,<sup>376</sup> where the constitution was issued and a distinct feature of the country within its sub-region was created, *Majlis Al Oma*, the parliament.<sup>377</sup>

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<sup>369</sup> *World Development Indicators: Kuwait*, WORLD BANK DATA, <http://databank.worldbank.org/data/reports.aspx?source=2&country=KWT> (last visited Feb. 14, 2017).

<sup>370</sup> *Kuwait Population Total*, WORLD BANK DATA, [http://data.worldbank.org/indicator/SP.POP.TOTL?locations=KW&year\\_high\\_desc=false](http://data.worldbank.org/indicator/SP.POP.TOTL?locations=KW&year_high_desc=false) (last visited Feb. 9, 2017).

<sup>371</sup> Andrea Salvini, *The Kuwaiti Labour Market and Foreign Workers: Understanding the Past and Present to Provide a Way Forward* 8-9 (Working Paper ILO & MAGNET Joint Publication, 2014).

<sup>372</sup> *Id.* at 9–18.

<sup>373</sup> For a more elaborate illustration about this conflict, see Mohammad Hussein Gholoum, *Alihtilal Aliraqi Almumarasat Walwaqaa Min Shahed Ayan* [*The Iraqi Invasion: Practices and Incidences from Eyewitnesses*], in ALIHTILAL ALIRAQI LILKUWAIT [THE IRAQI INVASION TO KUWAIT] 157–96 (Kuwait Nat’l Council for Culture, Arts & Literature ed., 1995) (giving a detailed description about the armed conflict since its beginning on August 2, 1990 and referring to eyewitnesses to the conditions on the ground.)

<sup>374</sup> It was reported that around 700 oil rigs were purposefully burned towards the end of the armed conflict with a loss of 2–6 million barrels of oil per day. Amer Altamimi, *Alabaad Aleqtesadiya Lilghazou* [*The Economic Dimensions of the Invasion*], in ALIHTILAL ALIRAQI LILKUWAIT [THE IRAQI INVASION TO KUWAIT], *supra* note 373, at 235–45 (providing an analysis of the economic consequences of the armed conflict.)

<sup>375</sup> The Explanatory Memorandum of the Constitution of the State of Kuwait provides an explanation of the governance structure by emphasizing that it primarily adopts a democratic governance feature and combines the characteristics of both a parliamentary and presidential system though slightly closer to the former than the latter. DUSTOOR DAWLAT ALKUWAIT [CONSTITUTION] (1962), annex, *Almuthakara Altafseeriyah Lidistoor Dawlat AlKuwait* [Explanatory Memorandum of the Constitution] (Kuwait).

<sup>376</sup> Ghanim Alnajjar, *The Challenges Facing the Kuwaiti Democracy*, 54 MID. E. J. 242, 243–44 (2000). Article 4 of the Kuwaiti Constitution provides, “Kuwait is a hereditary Amirate held in succession in the descendants of the Mubarak Al Sabah.” DUSTOOR DAWLAT ALKUWAIT [CONSTITUTION] (1962) (Kuwait) [hereinafter KUWAITI CONSTITUTION].

<sup>377</sup> The country saw its first parliamentary efforts through the Shura Council in 1921 and later Legislative Council in 1938. Alnajjar, *supra* note 376, at 243–44.

In terms of the Kuwaiti economy, the gross domestic product (GDP) of the state is 114.041 Billion US dollars in the numbers provided by the World Bank for 2015.<sup>378</sup> The gross national income (GNI) per capita of the country (Atlas Method) is 42,150 US dollars and GNI purchasing power parity (PPP) is 84,360.0 US Dollars in the same year.<sup>379</sup> The foreign direct investment net inflow is 284,647,623.8 US dollars for 2015 after it was 485,806,657.8 in 2014. And while 54.4% is exports of goods and services, of which crude oil holds the dominant share, precisely 95% of its export revenues and 60% of its GDP,<sup>380</sup> while 45.3% are imports in 2015.<sup>381</sup>

### Saudi Arabia

The Kingdom of Saudi Arabia, as the state is officially called, is by far the largest of the 6 GCC member states. It holds a surface area of 2,149,690.0 sq. km and is home to 31,540,372.0 people.<sup>382</sup> Likewise, there are a significant number of foreign workers who make up the Saudi population.<sup>383</sup> It is also noteworthy to point out the increasing young population (Ages 0-14) in Saudi Arabia as of 2018 as seen in the chart below.

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<sup>378</sup> *Kuwait Data Bank*, WORLD BANK DATA, <http://data.worldbank.org/country/kuwait> (last visited Feb. 14, 2017).

<sup>379</sup> *Id.*

<sup>380</sup> ORG. PETROLEUM EXPORTING COUNTRIES (OPEC), ANNUAL STATISTICAL BULLETIN, tbls. 1.1 & 1.2 (2016) [hereinafter OPEC ANNUAL STATISTICAL BULLETIN 2016].

<sup>381</sup> *World Development Indicators: Kuwait*, *supra* note 369.

<sup>382</sup> *World Development Indicators: Saudi Arabia*, WORLD BANK DATA, <http://databank.worldbank.org/data/reports.aspx?source=2&country=SAU> (last visited Feb. 15, 2017).

<sup>383</sup> *Population by Gender, Age Groups, and Nationality (Saudi/Non-Saudi)*, GEN. AUTH. STATISTICS SAUDI ARABIA (2018), <https://www.stats.gov.sa/en/43> (last visited Dec. 5, 2019).

Figure 5: Population by Gender, Age, and Nationality in Saudi Arabia as of Mid-2018

السكان حسب الجنس وفئات العمر والجنسية ( سعودي/ غير سعودي )									
Population by Single Age , Nationality (Saudi/Non-Saudi) and Gender									
منتصف العام 2018									
فئات العمر Age group	سعوديون Saudi			غير سعوديين Non-Saudi			اجمالي المملكة Total		
	MALE ذكور	FEMALE اناث	Total جملة	MALE ذكور	FEMALE اناث	Total جملة	MALE ذكور	FEMALE اناث	Total جملة
4 - 0	1,123,261	1,084,529	2,207,790	298,126	283,015	581,141	1,421,387	1,367,544	2,788,931
9 - 5	1,097,810	1,060,664	2,158,474	377,142	360,021	737,163	1,474,952	1,420,685	2,895,637
14 - 10	979,511	952,700	1,932,211	310,548	293,553	604,101	1,290,059	1,246,253	2,536,312
19 - 15	926,156	894,846	1,821,002	254,562	237,191	491,753	1,180,718	1,132,037	2,312,755
24 - 20	1,072,129	980,185	2,052,314	300,596	223,588	524,184	1,372,725	1,203,773	2,576,498
29 - 25	996,017	975,252	1,971,269	764,993	453,068	1,218,061	1,761,010	1,428,320	3,189,330
34 - 30	896,790	881,961	1,778,751	1,001,237	450,453	1,451,690	1,898,027	1,332,414	3,230,441
39 - 35	786,779	768,617	1,555,396	1,470,571	579,037	2,049,608	2,257,350	1,347,654	3,605,004
44 - 40	665,841	641,244	1,307,085	1,388,695	528,066	1,916,761	2,054,536	1,169,310	3,223,846
49 - 45	559,539	529,550	1,089,089	1,021,389	283,517	1,304,906	1,580,928	813,067	2,393,995
54 - 50	446,271	421,928	868,199	695,508	106,590	802,098	1,141,779	528,518	1,670,297
59 - 55	348,081	319,715	667,796	416,427	69,675	486,102	764,508	389,390	1,153,898
64 - 60	252,157	235,932	488,089	222,927	49,848	272,775	475,084	285,780	760,864
69 - 65	153,429	162,787	316,216	77,344	30,741	108,085	230,773	193,528	424,301
74 - 70	111,979	114,965	226,944	35,395	19,851	55,246	147,374	134,816	282,190
79 - 75	72,990	74,509	147,499	16,526	4,882	21,408	89,516	79,391	168,907
+ 80	87,155	93,348	180,503	13,075	6,876	19,951	100,230	100,224	200,454
الجملة	10575895	10192732	20768627	8665061	3979972	12645033	19240956	14172704	33413660

Source: General Authority for Statistics of the Kingdom of Saudi Arabia

The GDP of the state is 646,001,866,666.7 US Dollars for 2015, and the GNI per capita (Atlas Method) is 23,550.0 and GNI PPP is 54,840.0.<sup>384</sup> Its exports of goods and services are 54.4% of its GDP and 45.3% are imports. The net foreign direct investments inflow is 8,141,026,666.7.<sup>385</sup> The country possesses 18% of the world's petroleum reserves and is the top producer globally.<sup>386</sup> The oil and gas sector is 50% of its GDP and 85% of its exports share.<sup>387</sup>

The governance structure in the Kingdom is one of its distinct features and will certainly be one of the most important factors that shape the course of this study when it comes to the role of the private sector within the PPP framework. Scholars highlight and discuss the role of

<sup>384</sup> World Development Indicators: Saudi Arabia, supra note 382.

<sup>385</sup> Id.

<sup>386</sup> OPEC ANNUAL STATISTICAL BULLETIN 2016, supra note 380, tpls. 1.1 & 1.2.

<sup>387</sup> Id.

rentierism in the Saudi society.<sup>388</sup> The state is nonetheless governed by the strong central rule of the *Al Saud* family.<sup>389</sup> The sharp autonomy the Al Saud's enjoy in comparison with other segments of the society allowed them to freely shape the institutions of their Kingdom and its identity.<sup>390</sup> King Abdulaziz is the founder of the modern Saudi state in the mid twentieth century.<sup>391</sup> When King Abdulaziz ruled *Hijaz* in 1926, he immediately declared *Sharia* as the law of the land and a religious council was further appointed with *ulama* (scholars) overseeing the implementation of Islamic principles.<sup>392</sup> Islamic rules remained the supreme law of the Kingdom even with the promulgation of the three ordinances that were perceived as components of a Saudi constitution in 1992, *Alnitham Alasasy Lilhokom* (the Basic Ordinance of Governance), *Nitham Majlis Alshoura* (the Ordinance of the Consultative Council), and *Nitham Almuhafathat* (Ordinance of the Provinces).<sup>393</sup> Article 1 of the Basic Ordinance reads, "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."<sup>394</sup> This Islamic identity is an important figure in the identity of this state, and a more detailed analysis of the legal structure of Saudi Arabia will follow.

### The U.A.E.

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<sup>388</sup> See STEFFEN HERTOG, PRINCES, BROKERS, AND BUREAUCRATS: OIL AND THE STATE IN SAUDI ARABIA 9–13 (2010).

<sup>389</sup> *Id.* at 10–11.

<sup>390</sup> *Id.* at 15.

<sup>391</sup> Esther van Ejik, *Sharia and National Law in Saudi Arabia*, in SHARIA INCORPORATED: AN OVERVIEW OF THE LEGAL SYSTEMS IN TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 143-46 (Jan Michiel Otto, ed., 2010).

<sup>392</sup> *Id.* at 144–45.

<sup>393</sup> *Id.* at 151.

<sup>394</sup> ALNITHAM ALASASY LILHOKOM [BASIC ORDINANCE OF GOVERNANCE] art. 1 (1992) (Saudi Arabia). This document serves as the main component of a Saudi Arabian State Constitution. An English version can be found on International Constitutional Law (ICL): Project, [http://www.servat.unibe.ch/icl/sa00000\\_.html](http://www.servat.unibe.ch/icl/sa00000_.html) (last visited Feb. 16, 2017).

The U.A.E is a constitutional federation composed of seven different emirates: Abu Dhabi, Dubai, Sharjah, Umm Al Qawain, Ajman, Fujairah, and Ras Al Khaimah.<sup>395</sup> The federal structure makes it distinct from its other GCC member states. And while jurisdictional autonomy in each *emara* preserves the application of its local laws and prevalence of its institutions, a sort of supremacy clause exists, that is relatively quite expansive in giving the federal government and its laws a more generous role over the local laws of each *emara*.<sup>396</sup>

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<sup>395</sup> *About U.A.E.*, U.A.E. GOV'T, <http://government.ae/en/uae;jsessionid=wXlpUGXr7F9bI58OwSyRFsZr.undefined> (last visited Feb. 16, 2017).

<sup>396</sup> Butti Sultan & Ali Al-Muhairi, *The Development of the UAE Legal System and Unification with the Judicial System*, 11 ARAB L. Q. 116, 140–41 (1996). Article 120 of the Emirati Constitution reads: “The Union shall have exclusive legislative and executive jurisdiction in the following affairs: 1. Foreign affairs; 2. Defence and the Union Armed Forces; 3. Protection of the Union's security against internal or external threat; 4. Matters pertaining to security, order and rule in the permanent capital of the Union; 5. Matters relating to Union officials and Union judiciary; 6. Union finance and Union taxes, duties and fees; 7. Union public loans; 8. Postal, telegraph, telephone and wireless services; 9. Construction, maintenance, and improvement of Union roads which the Supreme Council has determined to be trunk roads. The organization of traffic on such roads; 10. Air Traffic Control and the issue of licences to aircraft and pilots; 11. Education; 12. Public health and medical services; 13. Currency board and coinage; 14. Measures, standards and weights; 15. Electricity services; 16. Union nationality, passports, residence and immigration; 17. Union properties and all matters relating thereto; 18. Census affairs and statistics relevant to Union purpose; 19. Union information. Article 121 reads: “Without prejudice to the provision of the previous article, the Federation shall solely be in charge of enacting laws on the following matters: Work relation and social securities, real estate ownership and expropriation for public interest; handover of criminals; banking; insurance of all kinds; protection of fauna & flora; major legislations related to Penal Code, Civil & Commercial Transactions Code, Companies Law, Code of Procedures before the civil and penal courts; protection of moral, technical and industrial property rights; copyrights, printings and publication rights; import of weapons and ammunitions unless the same was for the use of the Armed Forces or Security Forces of any Emirate – other aviation affairs which are not within the Federation executive competencies; determination of territorial waters and organization of navigation overseas; organization and method of establishing financial free zones and scope of excluding the same from the implementation of the Federal Legislations provisions. And Article 122 reads, “The Emirates shall have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Union in accordance with the provisions of the two preceding Articles.” DUSTOOR DAWLAT ALEMARAT AL ARABIYAH ALMUTAHIDA [CONSTITUTION] (U.A.E.). An English version of the Emirati Constitution may be found on CONSTITUTEPROJECT.ORG [https://www.constituteproject.org/constitution/United\\_Arab\\_Emirates\\_2004.pdf](https://www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf) (last visited Feb. 16, 2017).



Figure 6: Map of the U.A.E.



Source: <http://www.mappery.com/maps-United-Arab-Emirates>

The late President of the U.A.E. Alshaik Zayid bin Sultan Al Nhayan united these emirates on December 2, 1971.<sup>397</sup> The ruler of the U.A.E. is chosen from one of the *emaras*, all of whom are members of the Federal Supreme Council.<sup>398</sup> The ruler is precisely chosen from Abu Dhabi, and his vice president and prime minister is from Dubai.<sup>399</sup>

<sup>397</sup> *About U.A.E.*, *supra* note 395.

<sup>398</sup> Sultan & Al-Muhairi, *supra* note 396, at 118.

<sup>399</sup> *About U.A.E.*, *supra* note 395. This rule of choosing the president of the U.A.E. from the ruler of Abu Dhabi finds its authority in custom. Sultan & Al-Muhairi, *supra* note 396, at 120.

The U.A.E. is made up of a population of 9,156,963.0 as of 2015.<sup>400</sup> Twelve percent of the population is reported to be U.A.E. nationals and up to 8 million foreigners and thus non-U.A.E. nationals dominate 90% of the private sector.<sup>401</sup> As for the Emirati economy, the GDP of the state is 370,296,255,956.4 US Dollars for 2015, and the GNI per capita (Atlas Method) is 43,090.0 and GNI PPP is 70,020.0.<sup>402</sup> Its exports of goods and services are 97.4% of its GDP and 83.1% are imports.<sup>403</sup> The net foreign direct investments inflow is 10,975,829,700.3.<sup>404</sup> Around 40% of the country's GDP is directly from the oil and gas sector, which is still lower than the share of the previously mentioned GCC states.<sup>405</sup>

Dubai is the federation's most populous city with 3,192,275 residents as of the end of 2018 jumping from about 690,000 back in 1995.<sup>406</sup> It is also amongst the worlds most visited cities in the world annually.<sup>407</sup> Dubai's GDP for 2018 was valued at 398.129 Billion Emirati Dirhams (AED) (About 108 Billion US Dollars) of which the largest contributions into this GDP are concentrated in wholesale and real trade, repair of motor vehicles and motorcycles (26.4%), transportation and storage (12.3%), financial and insurance activities (10.2%), and

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<sup>400</sup> *World Development Indicators: United Arab Emirates*, WORLD BANK DATA, <http://databank.worldbank.org/data/reports.aspx?source=2&country=ARE> (last visited Feb. 15, 2017).

<sup>401</sup> *United Arab Emirates*, INT'L LAB. ORG., [http://www.ilo.org/beirut/countries/united-arab-emirates/WCMS\\_533531/lang--en/index.htm](http://www.ilo.org/beirut/countries/united-arab-emirates/WCMS_533531/lang--en/index.htm) (last visited Feb. 16, 2017).

<sup>402</sup> *World Development Indicators: U.A.E.*, *supra* note 400.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> OPEC ANNUAL STATISTICAL BULLETIN 2016, *supra* note 380, tbls. 1.1 & 1.2.

<sup>406</sup> DUBAI STATISTICS CENTER, POPULATION BULLETIN: EMIRATE OF DUBAI 2018, at 2 (2019); Mahmoud Hisham El Burai, *How Dubai Can Solve its Lack of Affordable Housing*, WORLD ECONOMIC F. (Mar. 27, 2019), <https://www.weforum.org/agenda/2019/03/how-dubai-can-solve-its-lack-of-affordable-housing/>.

<sup>407</sup> Tom Murray, *The 20 Most Visited Cities Around the World in 2018*, BUS. INSIDER (Dec. 5, 2018, 12:09 PM), <https://www.businessinsider.com/most-visited-cities-in-the-world-2018-9>.

manufacturing (9.2%).<sup>408</sup> Dubai's GDP jumped from US \$11 Billion back in 1995 to up to US \$105 Billion now of which is non-oil revenue dependent.<sup>409</sup>

The comparison between both the Federal Government's capital, Abu Dhabi's, revenue, and Dubai's revenue to the Federal budget, is stark. In both 2015 and 2016, Abu Dhabi contributed AED 17,741,600,000 Billion (About US \$48.3 Billion), whereas Dubai contributed AED 1.2 Billion (US \$3.26 Billion).<sup>410</sup> This is largely due to the oil revenue the Federal Government in Abu Dhabi generates. This emirate of Dubai ultimately receives federal funding for federal infrastructure projects in accordance with federal capital expenditure rules.<sup>411</sup> Dubai consequently significantly contributes to the country's business activity and non-oil revenue and as such stands out with no real comparison in other GCC States' cities.

#### GCC Envisioned Development Plans: Private Sector Status Quo, SMEs, SWFs, and Beyond

##### *Similarities of GCC Member States and the Idea of Integration*

It might not be difficult to acknowledge that while the three-case study GCC member states have particular features in certain instances, they undeniably share plenty of characteristics. First and foremost, the traditional monarchy theme is prevalent in all three.<sup>412</sup> One additional trait as well is the shared dependence on foreign labor.<sup>413</sup> Remittances are

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<sup>408</sup> DUBAI STATISTICS CENTER, GROSS DOMESTIC PRODUCT AT CONSTANT PRICES: EMIRATE OF DUBAI 2017–2018 (2018).

<sup>409</sup> El Burai, *supra* note 406.

<sup>410</sup> Federal Law No. 5 of 2015, Concerning Linking the General Federal Budget and the Supplementary Budgets of Autonomous Federal Entities of Fiscal Year 2015, 153 (U.A.E.); Federal Law No. 2 of 2016, Concerning Linking the General Federal Budget and the Supplementary Budgets of Autonomous Federal Entities of Fiscal Year 2015 (U.A.E.).

<sup>411</sup> Federal Law No. 8 of 2011, arts. 17–19, Rules of the Preparation of the Public Budget (U.A.E.).

<sup>412</sup> ECONOMIC INTEGRATION IN THE GCC, *supra* note 367, at 2.

<sup>413</sup> *Id.* at 3–4.

consequently a significant characteristic of the flow of capital outside the three states to countries, precisely developing countries, where the foreign workers do belong.<sup>414</sup>

The heritage and descendants across the GCC member states share many familial and moreover more broadly tribal connections. The Arab patriotic sentiment in these countries that are penned in their constitutions is a prideful feature for these societies albeit perhaps not as sharp these days as has been before.<sup>415</sup> The rooted presence and tribal ties within Kuwait, Saudi Arabia, and the UAE as with the other GCC member states further strengthen the state level bonds as well.<sup>416</sup> The idea of integrating policies of the GCC member states thus becomes more possible and perhaps even more desirable. One of these policies in the context of this study is a cohesive sustainable development policy.

#### *All Railroads Lead to Development: GCC Development Plans*

In an attempt to diversify the economies in the three GCC state members that have heavily relied on non-renewable energy as the major source of income, certain joint development

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<sup>414</sup> SUPRIYO DE ET AL., INT'L MONETARY FUND, HOW THE OIL PRICE DECLINE MIGHT AFFECT REMITTANCES FROM GCC (2015).

<sup>415</sup> The Preamble of the Kuwaiti constitution states: "Striving towards a better future in which the Nation may enjoy an abundance of comfort and a higher international standing, a future which shall provide citizens with ample political freedom, equality and social justice as well, which shall brace the props of those traits in which the Arab spirit is kneaded such as pride in the dignity of the individual, jealous watch over the commune bonum, counsel in rule and safeguard of the homeland's unity and stability." And the first article of this Constitution shapes the identity of the State by providing: "Kuwait is an Arab, independent, fully sovereign State. There shall be no surrender of its sovereignty nor cession of any part of its territories. The people of Kuwait are part of the Arab Nation." KUWAITI CONSTITUTION, art. 1. See also SAUDI BASIC ORDINANCE OF GOVERNANCE, art. 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."). U.A.E. CONSTITUTION, art. 6 ("The Union shall be part of the Great Arab Nation, to which it is bound by the ties of religion, language, history and common destiny. The people of the Union shall be a single people, and shall be part of the Arab Nation.").

<sup>416</sup> F. GREGORY GAUSE, OIL MONARCHIES: DOMESTIC AND SECURITY CHALLENGES IN THE ARAB GULF STATES 18–25 (1994); Mohamed A. Ramady, *Overview*, in THE GCC ECONOMIES: STEPPING UP TO FUTURE CHALLENGES at xxii (Mohamed A. Ramady ed., 2012).

policies were illustrated. The phenomena, if it safe to put it that way, of mega infrastructure projects have been taking aground and bursting out of the deserts,<sup>417</sup> meanwhile engaging the private sector as a major component of the projects' successes.<sup>418</sup> In the two boxes below, the first is an aerial view of how much land surface area is plain desert, and the other, of a typical image of a drive on the highways of the rural areas and shared borders of Kuwait, Saudi Arabia, and the UAE.

*Figure 7: Image of the Deserts of Saudi Arabia*



Source: <https://stock-clip.com/video-footage/saudi+arabia+map/4>

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<sup>417</sup> Mega projects have been described as those projects that are sizeable in terms of price value and complexity, of which this last term includes task, social, and even cultural complexity, amongst other criteria. Christian Brockmann & Gerhard Girmscheid, Complexity of Megaprojects 219-29 (CIB 031 World Building Congress Conference Paper, 2007).

<sup>418</sup> Nabil Sultan, *Working for a Sustainable GCC Future: Reflections on Policies and Practices* in THE GCC ECONOMIES, *supra* note 416, at 3.

Figure 8: Image of the Deserts of Saudi Arabia



Source: <http://www.gettyimages.co.uk/detail/video/shot-of-traffic-moving-on-highway-in-open-land-at-stock-video-footage/158065799>.

This is certainly not to hint that the Gulf States are a 19<sup>th</sup> century image of a deserted land with camels being the means of transportation for long distance travels. Rather, the point being made here is that the structure of these states may not particularly accommodate everyone, and resources are perhaps not optimally utilized.

Opting for PPPs as a method to deliver infrastructure projects and public services could be incentivized by gaining more efficiency in public services from the expertise of private actors in many sectors, such as transportation, technology, and public health.<sup>419</sup> Yet more broadly, it may be utilized to achieve the states' greater development plans, which link an amalgam of sectors.

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<sup>419</sup> Robert D. Anderson et al., *The Relationship between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs* 236 (WTO Working Paper ERSD-2014-2, 2014).

The Long-term Comprehensive Development Strategy for GCC States (2010-2025) (GCC Development Strategy) mentions a broad aim of sustainable development. It also mentions a unified integrated external policy with regional and international economic blocs. The Secretariat General and the Planning & Development Committee oversees such efforts and the implementation of this strategy.<sup>420</sup>

The Development Strategy touched on certain themes. First, on the Issue of Sustainable Development, the policy explains the emphasis on a prolonged generation-lasting interaction between human beings and existing resources, which necessarily implies the attempt to push for the increased use of renewable energy sources of energy by advancing technological solutions in this regard.<sup>421</sup> The Strategy ensures that the ceiling in the threshold in utilizing resources should stop where the environment is at stake. Yet, the meaning of sustainable development according to this Policy goes beyond an exclusive focus on environmentally friendly solutions. The Strategy provides:

- Clearly understanding the modern functions of the state, thereby ensuring sustainable development and adopting policies that ensure economic and social stability and the performance in terms of development.

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<sup>420</sup> Secretariat General of the Cooperation Council for the Arab States of the Gulf, Long-Term Comprehensive Development Strategy for the GCC States (2010-2025) [hereinafter GCC Development Strategy] (2011), <https://www.gcc-sg.org/en-us/CognitiveSources/DigitalLibrary/Lists/DigitalLibrary/Economy/1274259140.pdf>.

<sup>421</sup> *Id.* (“Realization of the main strategic and integrated goal for the GCC states will be completed within the framework the comprehensive concept of sustainable development. Therefore, the first strategic objective is embodied in the following: The comprehensive concept of sustainable development should be promoted during the time period in which this strategy will be implemented. This is because the concept of sustainable development stresses the fact that development is a continuous process transcending generations and that it is as result of interaction of human beings with the existing resources as well the prevailing conditions that causes constant advancement of society and increases its efficiency in utilizing the human, material and technological resources. That requires adopting the following paths: Optimum utilization of the available resources and allocation of human and material resources in an appropriate manner; Deriving maximum benefit from the technical capabilities and adapting their use for inducing upward growth and in advancing the human capacities; Preservation of environment.”).

- Enlisting participation of all institutions in the society in the development process and seriously handling the options before the society and its priorities.
- Advancing the institutional capacities and creating a good environment for the general economic and social policies.
- Evolving pre-emptive programs to protect some groups in the society. For example, initiating unemployment insurance and social care programs.
- Emphasizing the reciprocal role between productive work and the sphere of human resources development.
- Enlisting the participation of the work force in productive economic activities and guaranteeing their rights and constantly rehabilitating and training them for the job market.
- Activating the market forces (demand and supply) and safeguarding the fundamentals of the free market.<sup>422</sup>

Under the “Third – Economic Issues”, the GCC plan goes on to stress that the means to achieve GCC sustainable development should not highly and exclusively rely on the public budget. Private finance should be integrated as a major solution to implement infrastructure projects that serve public needs.<sup>423</sup>

The GCC provides the block members with joint and reciprocal advantages in conveying similar national treatment accorded to all citizens of the GCC and their business activities in each

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<sup>422</sup> *Id.*

<sup>423</sup> *Id.* The GCC Development Strategy provides: “(1) Realizing Integrated Economic Partnership: The achievement of this objective calls for adopting the following measures: The member states should, singly and collectively, institute partnership between the Government and institutions of the society in financing development projects specified by the development plans and the public budget.



GCC State. This includes enabling easier flow of trade between the GCC members.<sup>424</sup> This treatment is documented and further given effect in other agreements between the Gulf members.

Moreover, the Strategy added with regards to infrastructure and public assets that the goal should entail, “Deriving maximum benefit from infrastructure facilities as they are principal ingredients of development in the manufacturing sector.” The Development Strategy reiterated the importance of optimizing energy use through targeted infrastructure projects that include further generation stations and water desalination plans.<sup>425</sup> This largely highlights the role of underutilized solar sources of energy in addition to creating manufacturing sectors of oil products to move beyond mere crude oil exportation. This infrastructure especially in transport, electricity, and communication, should aim to be interconnected between the GCC States.<sup>426</sup> This would demand significant joint infrastructure projects capable of penetrating global markets. The road map underlines the importance of foreign investors in addition to the local industry to implement these projects and ultimately preserve high value infrastructure at the best price.<sup>427</sup>

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<sup>424</sup> *Id.* The GCC Development Strategy provides: “Removing all hurdles, which prevent the movement of economic resources between the GCC States; According the natural and the naturalized citizens of the GCC states the same treatment that is accorded to the citizen of the member state in all economic activities; Enhancing and reinforcing inter- trade among the GCC states.”

<sup>425</sup> *Id.* The Plan provides: “Following are the main paths leading to the realization of this objective: Deriving optimum benefit from suspended or unexploited energy by utilizing the infrastructure facilities like, energy - generation stations, water desalination plants, ports and means of transportation and communication.”

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* The Strategy in this regard provides for: (5) Building joint large-scale Gulf projects, as these projects are capable of penetrating into the international markets. They grow by making individual and collective profit and they have the capacity for technical and scientific applications. Alternative utilization of oil resources must also be sought.” The Strategy follows with the means of achieving this by elaborating: “These objectives can be realized by adopting the following strategic paths: Adopting standards, which strengthen the negotiating and competitive position of the GCC states in the world markets and makes them standard bearers of technology and capitalism; Laying down the priorities for building joint projects in a manner that they hinge around two types of projects. The first type caters to the demands of manufacturing import alternatives and the second enhances export capacity. The absorption capacity of Gulf and foreign capital should be raised so that it imparts the power to achieve high value – addition and leads to harnessing of the local natural resources to the optimum. In addition, modern manufacturing technology should be used. There should be a production inter-link and national manpower should be employed; Undertaking joint projects in the services sector side by side with the manufacturing sector with emphasis on achieving a competitive edge.”

Some of these GCC efforts to jointly construct and operate infrastructure projects such as the GCC rail amongst other projects have been largely stalled lately due to the certain disagreements between its members. These differences have been reflected in the unfortunate divide primarily between Saudi Arabia, the UAE, and Bahrain on one side and Qatar on the other.<sup>428</sup>

One of the most sparking examples of a GCC development plan is that of Saudi Arabia referred to as “Saudi Vision 2030”,<sup>429</sup> with the Council of Economic and Development Affairs in the country overseeing this plan,<sup>430</sup> and a Constitution that at its core, further provides, “Economic and social development is to be achieved according to a just and scientific plan.”<sup>431</sup>

This Development Plan highlights the anticipated role of the private sector by providing:

Although we believe strongly in the important role of the private sector, it currently contributes less than 40 percent of GDP. To increase its long-term contribution to our economy, we will open up new investment opportunities, facilitate investment, encourage innovation and competition and remove all obstacles preventing the private sector from playing a larger role in development.

We will continue to improve and reform our regulations, paving the way for investors and the private sector to acquire and deliver services - such as health care and education - that are currently provided by the public sector. We will seek to shift the government’s role from providing services to one that focuses on regulating and monitoring them and we will build the capability to monitor this transition.

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<sup>428</sup> *Why Gulf Countries are Feuding with Qatar*, ECONOMIST (June 21, 2018), <https://www.economist.com/special-report/2018/06/21/why-gulf-countries-are-feuding-with-qatar>.

<sup>429</sup> See VISION2030, *supra* note 24. The other GCC state members also share similar visions. For instance, Kuwait has Vision 2035 that embodies the same principles and aims. See NEW KUWAIT, *supra* note 24. The U.A.E. likewise has the U.A.E. Vision 2021. See U.A.E. VISION 2021, *supra* note 24.

<sup>430</sup> SAUDI VISION 2030 REPORT, at 13, [http://vision2030.gov.sa/sites/default/files/report/Saudi\\_Vision2030\\_EN\\_0.pdf](http://vision2030.gov.sa/sites/default/files/report/Saudi_Vision2030_EN_0.pdf) (last visited Feb. 27, 2017).

<sup>431</sup> SAUDI BASIC ORDINANCE OF GOVERNANCE, art. 22.

We will seek to increase private sector contribution by encouraging investments, both local and international, in healthcare, municipal services, housing, finance, energy and so forth.<sup>432</sup>

And in terms of particular hard infrastructure, the plan goes on to explain:

We have already invested heavily in the construction of ports, railways, roads and airports. To take full advantage of these investments, we plan to work with the private sector and enter into a new series of international partnerships to complete, improve and link our infrastructure internally and across borders. We will also unlock our “hard” infrastructure with systems that can drive higher performance, including more rigorous governance, leaner processes and a more efficient customs system. We will improve and implement existing laws and regulations. Air, maritime, and other transport operators will be encouraged to make the most of their capacity: achieving durable links between existing trade hubs, as well as opening new trade routes. This will reinforce our position as a distinctive logistical gateway to the three continents.<sup>433</sup>

And with regards to renewable energy, the plan emphasizes:

We will review the legal and regulatory framework that allows the private sector to buy and invest in the renewable energy sector. To localize the industry and produce the necessary skill-sets, we will also encourage public-private partnerships. Finally, we will guarantee the competitiveness of renewable energy through the gradual liberalization of the fuels market.<sup>434</sup>

A similar partnership would also exist between the government and the private sector to build a resilient digital infrastructure in Saudi Arabia. This would refer to enhancing telecommunications in the country and information technology by further providing high speed broadband on a broader basis that includes many more cities in the Kingdom’s vast lands.<sup>435</sup>

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<sup>432</sup> SAUDI VISION 2030 REPORT, *supra* note 430, at 45. The Plan even clarifies that the national private sector would be nurtured to grow where: “Rather than competing generically across the board, we will concentrate on our comparative advantages, national strengths and the areas that will assure leadership status. Initially, our priority will be to fully support major national companies, which have already gained a leading market share, by promoting their products and services regionally and globally, especially in the fields of oil, petrochemicals, banking, telecommunications, food, health care, and retail. We will also seek to support Saudi companies with promising growth opportunities so they develop into new regional and global leaders. Finally, we will fully support our national industries, assisting them to market themselves abroad and to export their products.” *Id.* at 59.

<sup>433</sup> *Id.* at 58.

<sup>434</sup> *Id.* at 49.

<sup>435</sup> *Id.* at 57.

The Kingdom of Saudi Arabia in light of the large undertakings illustrated above paves the way for significantly limiting the state's role and confining such to regulating the proper business environment for the private sector to function. The Plan acknowledges the extent to which the government in Saudi Arabia has largely crowded out the private sector in performing many services and consequently aims to alter that reality and go even further by allowing the private sector space to provide even the most essential public needs for the society in health and education. This shows the extreme that the Kingdom's private sector enablement policy is willing to go.

The other GCC states adopt comparable policies.

[To] transform Kuwait into a financial and trade center, attractive to investors, where the private sector leads the economy, creating competition and promoting production efficiency, under the umbrella of enabling government institutions, which accentuates values, safeguards social identity, and achieves human resource development as well as balanced development, providing adequate infrastructure, advanced legislation, and an inspiring business environment.

Kuwait's ruler, Sabah Al-Ahmad Al-Jaber Al-Sabah stated addressing the country's 2035 vision.<sup>436</sup>

Kuwait emphasizes that its development plan for the upcoming years would importantly be financed by the private sector in addition to the public budget sources. The secretary general of the Supreme Council for Planning and Development, Khaled Mahdi said, "Financing of the current five-year development plan was being shared by both the public and private sectors. He said that the general government sector was providing 49.3 percent, oil sector was contributing 33.8 percent while the private sector was contributing 16.9 percent."<sup>437</sup>

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<sup>436</sup> NEWKUWAIT, *supra* note 24.

<sup>437</sup> Mahdi elaborated on the upcoming different infrastructure projects and the importance of triggering private sector growth and participation in the country's development plans. *Kuwait to Invest KD 4.75bn in New Development Plan – Financing Shared by both Public and Private Sectors*, KUWAIT TIMES (Aug. 1, 2016)

The third phase of Kuwait's medium-term development plan is being launched for the period 2020-2025.<sup>438</sup> This phase shall focus on enabling the private sector by constructing concrete steps to transform the government from operator to regulator of economic activity.<sup>439</sup> This period shifts to the mechanisms in which the private sector can best contribute to the economy. And the plan seems to rightly attempt to address the abstracts of the desire for private participation in Vision 2035 to actual roadmaps for means in which such participation may best take place. These efforts are pending.

And the UAE Vision 2021 embodies similar aims in diversifying the economy and inducing private sector participation in the country's development plan.<sup>440</sup> There are also further different components in Dubai Plan 2021 that even aim to achieve higher levels of happiness by having "happy individuals proud of their culture".<sup>441</sup> This would certainly be balanced out where Dubai may have a stronger private sector role than other emirates. This may explain the reason for the language in this plan entailing more of maintaining the high level of business sector performance and boasting about the business-friendly environment and an investment-appealing destination, yet still focusing at this stage on empowering the level of innovation in Dubai.<sup>442</sup>

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<http://news.kuwaittimes.net/website/kuwait-invest-kd-4-75bn-new-development-plan-financing-shared-public-private-sectors/>. To get more details about the country's development plan for the next period, see *Development Plans*, MIN. PUB. WORKS KUWAIT,

<http://www.mpw.gov.kw/sites/en/developmentplans/Pages/DevelopmentPlans.aspx> (last visited Feb. 28, 2017); GEN. SEC. SUPREME COUNCIL FOR PLANNING & DEV., A DRAFT STRATEGIC VISION FOR THE STATE OF KUWAIT 2010-2035: AN EXECUTIVE SUMMARY 3-5,

<https://www.scpd.gov.kw/archive/The%20Vision%20of%20The%20State%20of%20Kuwait.pdf> (last visited Apr. 18, 2019).

<sup>438</sup> (*Atakhteet*): *Tarkeez Alkhita Alinmaiya Athaltha Ala Ishrak Alqitaa Alkhas Bitanmiya [(Planning): Focusing the Third Development Phase on Private Sector Participation in Development]*, KUNA NEWS (May 22, 2019),

<http://www.alkuwaityah.com/Article.aspx?id=493139>.

<sup>439</sup> *Id.*

<sup>440</sup> See U.A.E. VISION 2021, *supra* note 24.

<sup>441</sup> DUBAI PLAN 2021, *supra* note 24.

<sup>442</sup> *Id.*

Other emirates of the UAE lack Dubai's regional peculiarity, which is what brings them closer to the current status of their Gulf peers and distances Dubai in this regard. And so, in Dubai, it may not be solely about empowering and enabling the private sector as a goal in itself because of an overly expansive government role in the economy. The private sector is still invited to participate in not only commercial services, but public services to residents of the *emara* through PPPs too. And since the city aspires to being amongst the most innovative cities of the world, it aspires to have public infrastructure that is globally competitive and the most up to date.<sup>443</sup>

In fact, Dubai has already moved on and advanced in the implementation of smart cities with smart roads to meet artificial intelligence (AI) demands in the near future as part of the Smart City and Artificial Intelligence Programme.<sup>444</sup> This includes both smart infrastructure and vehicles in addition to progressive information technology and communication.<sup>445</sup> The furthermore Autonomous Transportation Strategy launched in Dubai back in 2016 promises reaching the target of transforming means of transport to 25% autonomous vehicles by 2030.<sup>446</sup> This initiative is expected to meet different public goals in curbing traffic and travel time, cutting carbon emissions, and ultimately generating about US \$5 Billion in revenues by 2030.<sup>447</sup> These are all characteristics the private sector may best offer when providing innovative approaches. So, Dubai, in summary, is noticeably taking rapid concrete steps when compared with its Gulf peers in the adoption of a knowledge-based economy, which Roberto Mangabeira Unger

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<sup>443</sup> *Id.*

<sup>444</sup> *Accomplishing 75 Smart City and Artificial Intelligence Projects*, 132 ALMASAR, June 2019, at 6, [https://www.rta.ae/links/magazine/masar/AI\\_Masar\\_132\\_Eng.pdf](https://www.rta.ae/links/magazine/masar/AI_Masar_132_Eng.pdf).

<sup>445</sup> *Id.*

<sup>446</sup> *Dubai Aims to Improve Public Transport with the help of AI*, *supra* note 267.

<sup>447</sup> *Dubai's Autonomous Transportation Strategy*, *supra* note 267.

describes as entailing, “permanent innovation in procedures and methods as well as in products and technologies.”<sup>448</sup> The premise of this economy exceeds traditional means in the production of goods and services, and is rather a “paradigm of production that keeps reinventing itself.”<sup>449</sup>

The GCC States have also commonly faced challenges of upcoming generations who fear unemployment may actually be a factor in their way of life. And the benefits that their ancestors once enjoyed with free housing, health care, employment guarantees, and education, may not quite be taken for granted anymore.<sup>450</sup> Government employment has appeared to broach its over-populated over-employed environment where nationals retreat to an individually stable income.<sup>451</sup> The private sector has not been completely seen as a major source of job opportunities and a key player to combat future unemployment of today’s youths. The GCC Development Plan even acknowledged that amongst the challenges faced by its state members is, “[I]ncongruence between the role of the private sector in development and the level of incentives provided by the State for institutions of the private sector.”<sup>452</sup>

Moreover, the need for infrastructure perhaps comes at a point where urbanization becomes the inevitable norm all populations expect throughout the world. The likelihood of an ever-growing population in the GCC from Saudi Arabia to Kuwait and the UAE are unavoidably met with an equal demand for better links to urban centers.<sup>453</sup>

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<sup>448</sup> ROBERTO MANGABEIRA UNGER, *THE KNOWLEDGE ECONOMY* 20 (2019).

<sup>449</sup> *Id.*

<sup>450</sup> Sultan, *supra* note 418, at 5–6.

<sup>451</sup> *Id.*

<sup>452</sup> GCC Development Strategy, *supra* note 420.

<sup>453</sup> MARKA ADVISORY, *PUBLIC PRIVATE PARTNERSHIPS: A VEHICLE FOR THE NEXT WAVE OF INFRASTRUCTURE DEVELOPMENT IN THE GCC* 29 (2012). Kuwait has seen a recent annual population growth of 5.44%, Saudi Arabia at 2.81%, and the U.A.E. at 2.03%. U.N. DEP’T ECON & SOC. AFF., *WORLD POPULATION PROSPECTS: THE 2017 REVISION*, U.N. Doc. ST/ESA/SER.A/398 (2017).

### What Infrastructure Matters to the GCC?

Further juxtaposing the ambitious aforementioned development plans with actual sun-soaked energy facilities and connected roads and rails in project pipelines within the Gulf countries' PPP programs is necessary. When it comes to the magnitude of infrastructure projects the GCC is generally introducing to its pipelines, enormous aspirations are evident. The type of proposed infrastructure makes more sense when considering one of the single-most shared objectives triggering enlarged GCC projects pipelines which is diversification away from depending on a single-source income based on oil rents, with the exception of Dubai particularly in the UAE but not the federation itself which strongly shares the collective aim. The introduction of the private partner to implement key sectoral or multi-sectoral projects frees up public resources in the meantime to focus on other essential public needs. This also helps tackle short term budgetary constraints caused by the high volatility in the oil market of which many of the States have largely depend upon for financing their capital expenditures.<sup>454</sup>

First and foremost, to give a glimpse of the size of what these Gulf States promise of projects ranges from a promising development of whole new entertainment, logistics, and manufacturing cities worth US \$500 Billion and above, including gigaproject NEOM city and Red Sea development projects in Saudi Arabia in addition to the Silk City (*Madinat Al Harir*) and Five Islands development project in Kuwait, also known as the Economic Zone, with pipelines projected to total or exceed a massive US \$1 Trillion in Saudi Arabia alone.<sup>455</sup> These

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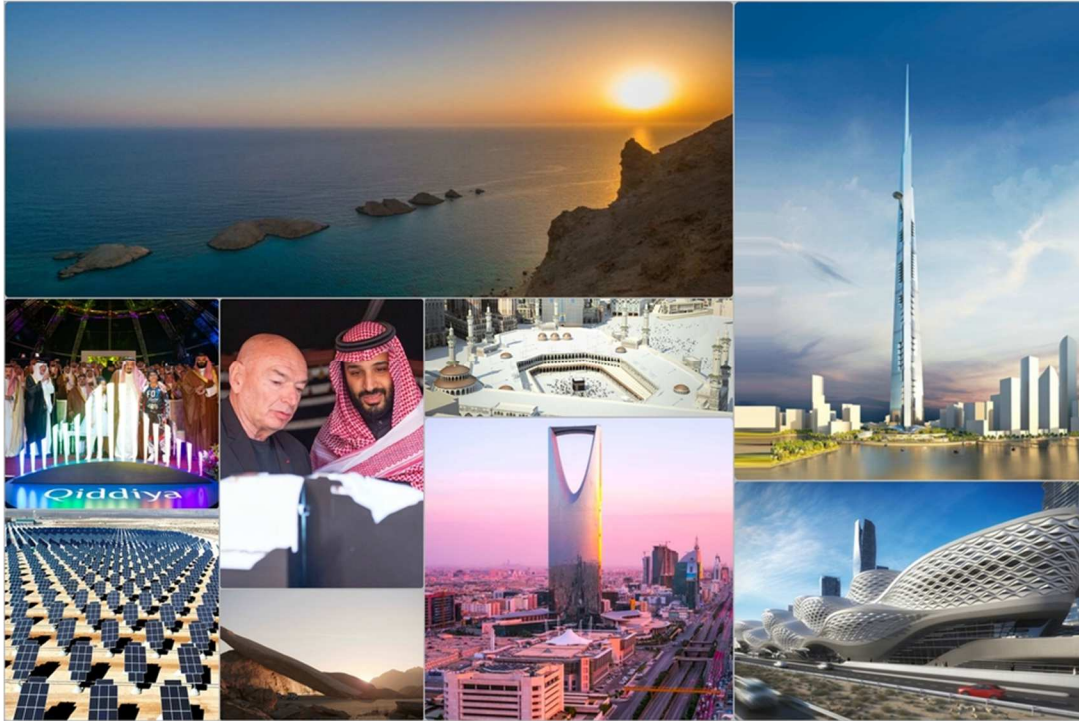
<sup>454</sup> *What Drives Crude Oil Prices? An Analysis of 7 Factors that Influence Oil Markets, with Chart Data Updated Monthly and Quarterly*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/finance/markets/crudeoil/> (last visited Apr. 22, 2019).

<sup>455</sup> Neha Bhatia, *Saudi Arabia's Top 20 Construction Projects to Watch in 2019*, CONSTRUCTION WEEK ONLINE (Feb. 18, 2019), <https://www.constructionweekonline.com/projects-tenders/169387-list-of-saudi-arabias-top-construction-projects-of-2019>; Ranju Warriar, *Saudi Arabia Construction Projects Hit \$1tn Despite \$163bn on Hold*, CONSTRUCTION WEEK ONLINE (Mar. 7, 2019), <https://www.constructionweekonline.com/projects->



projects essentially involve private sector participation, especially foreign investors, yet are not all necessarily PPPs to be precise.

Figure 9: Saudi Arabia's Different Projects



Source: Construction Week Online; <https://www.constructionweekonline.com/projects-tenders/169387-list-of-saudi-arabias-top-construction-projects-of-2019>

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tenders/169858-saudi-arabia-construction-companies-projects-contractors-consultants-q1-2019-research-data; Khaled Al-Mutairi, *The Silk City Project Puts Kuwait on Global Investment Map*, KUNA NEWS (July 11, 2018), <https://www.kuna.net.kw/ArticleDetails.aspx?id=2736653&language=en>.

Figure 10: Image of Kuwait's Silk City and Five Islands Development Project



Source: KUNA News; <https://www.kuna.net.kw/ArticleDetails.aspx?id=2736653&language=en>

The pipeline of projects that appeared to have pursued the PPP route has been documented in multiple databases, which ultimately entices the capital required to finance these projects and particular expertise needed to design, build, and operate and maintain them; skills and resources abundantly found in the private sector. Some of such databases are IJGlobal and InfraPPP.<sup>456</sup>

Kuwait's pipeline of projects includes a predominant share of energy projects ranging from oil and gas, power, and renewable energy such as the Kabd Waste-to-Energy Facility PPP, Al-Khairan IWPP (1800MW), Az-Zour North IWPP, and Kuwait Solar (50MW).<sup>457</sup> These

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<sup>456</sup> IJ GLOBAL, <https://ijglobal.com/> (last visited Nov. 30, 2019); INFRAPPP, <http://www.infrappworld.com/> (last visited Nov. 30, 2019).

<sup>457</sup> *KAPP Projects*, *supra* note 16; *Transaction Data, MENA: Kuwait*, IJ GLOBAL, <https://ijglobal.com/data/search-transactions> (follow "Regions" hyperlink; then follow "MENA: Kuwait" hyperlink) (last visited Apr. 23, 2019); *Project Tracker: Database of PPP Projects*, INFRAPPP, <http://www.infrappworld.com/project->

projects complement the broader GCC push for introducing alternative more environmentally friendly renewable energy sources within, at least timidly pronounced, a global shift away from traditional global fossil fuels in the outset of pivotal international instruments,<sup>458</sup> such as the Paris Convention on Climate Change in the wake of adverse climate change effects.<sup>459</sup> Kuwait has also attempted to initiate the tendering of a PPP project that was called the Abdaliya Integrated Solar Combined Cycle Project that would have developed “the first solar thermal power plant in Kuwait.” The problem is that this project has apparently put on hold and promised to be retendered with no further actions taken as of this moment.<sup>460</sup>

In the transport sector, both previously mentioned Kuwait National Rail Road System (KNRR) and Kuwait Metropolitan Rapid Transit System are amongst the most distinct.<sup>461</sup> There has also been an announcement to build an airport in the Northern part of Kuwait through private sector participation prices at US \$12 Billion, where the airport would supposedly be built, operated, and managed in partnership with the private party, according to the Head of the Directorate General of the Civil Aviation.<sup>462</sup> Water projects also exist, like the Umm Al-Hayman Waste Water Treatment Plant and Kuwait Desalination Plant.<sup>463</sup> There are additionally social

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tracker?orderby=&ordersort=&selectall=0&country%5B%5D=123&investment=&datefinancialclose1=&datefinancialclose2=&project=&company=&wpv\_filter\_submit=Search&page=1&page2=1 (last visited Aug. 30, 2017).

<sup>458</sup> GCC and UNEP Partner, *supra* note 18; FERROUKHI ET AL., *supra* note 18, at 11-17.

<sup>459</sup> GCC and UNEP Partner, *supra* note 18; FERROUKHI ET AL., *supra* note 18, at 11-17.

<sup>460</sup> ISCC, *supra* note 20; Barkatali & Kirton, *supra* note 20; Bintcliffé, *supra* note 20.

<sup>461</sup> MENA: Kuwait Transaction Data, *supra* note 457; Project Tracker, *supra* note 457; KAPP Projects, *supra* note 16. Nevertheless, there have been continuous delays to these projects. See Zakariya Mohammed, *Alhukooma Tashko Alhay'atayn [The Government Complains about the Two Authorities]*, AL QABAS NEWS. (Apr. 19, 2019), <https://bit.ly/2Pap6vy>.

<sup>462</sup> Kuwait Plans New Airport in the North- DGCA Chief, KUNA NEWS (Mar. 21, 2018), <https://www.kuna.net.kw/ArticleDetails.aspx?id=2704198&language=en>.

<sup>463</sup> KAPP Projects, *supra* note 16; MENA: Kuwait Transaction Data, *supra* note 457; Project Tracker, *supra* note 457.

infrastructure projects like the Kuwait Schools Development Program PPP which appear to be at a very early stage with uncertain prospects though.<sup>464</sup>

An important fact remains in Kuwait, it has been promising a relatively large pipeline of PPP projects for about a decade now and has issued the relevant regulatory framework exceeding its peers, yet a major impediment remains, only two of such projects, namely Az-Zour North IWPP and Umm Al-Hayman Waste Water Treatment Plant and Kuwait Desalination Plant have taken aground.<sup>465</sup> This fact worries investors and hints towards difficulties implementing the country's PPP program, an issue significantly tied to the government's institutional capacity.<sup>466</sup> A big promise to live up to.

Saudi Arabia certainly has the largest pipeline of projects amongst these three states to feed its vast landmass at a value ranging up to a big US \$1 Trillion. The extent of private participation in such projects may be unclear at instances since no clear standardized manner of project procurement has been set, an issue discussed later in this study. Nonetheless, in transport itself, the state is seeing the prospects of multiple projects such as the BOT of the Taif International Airport and expansion of both Yanbu and Jubail Airports, in addition to privatization of the operation and maintenance of Riyadh's King Khaled International Airport,<sup>467</sup>

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<sup>464</sup> Al Andalus Hospital Kuwait appeared to be part of the pipeline but has been cancelled by the government. *MENA: Kuwait Transaction Data*, *supra* note 457; *Project Tracker*, *supra* note 457.

<sup>465</sup> Bintcliffe, *supra* note 20; *KAPP Projects*, *supra* note 16; KUWAIT STATE AUDIT BUREAU, TAQREER TAQEEM KAFLET WA FAELEYAT ALHAYA ALAMA LIMASHROOAT ASHARAKA BAIN ALQITAEN ALAM WA ALKHAS [REPORT ON THE ASSESSMENT OF KAPPS COMPETENCIES AND EFFECTIVENESS] (2d ed. 2018), <https://bit.ly/2DXOteW>.

<sup>466</sup> Bintcliffe, *supra* note 20. There have been similar concerns that have been brought up with other countries that have had promising investor opportunities, yet political disputes have adversely affected the infrastructure market reputation. Mexico has endeavored on a \$13.3 Billion international airport project, Nuevo Aeropuerto Internacional de Mexico, that has completed 31% of its construction, however, newly elected president eventually decided to cancel this project. Angus Leslie Melville, *Airports- A Folly by any other NAIM*, IJ GLOBAL (Nov. 9, 2018, 2:42 PM), <https://ijglobal.com/articles/136442/airports-a-folly-by-any-other-naim>.

<sup>467</sup> *Transaction Data, MENA: Saudi Arabia*, IJ GLOBAL, <https://ijglobal.com/data/search-transactions> (follow "Regions" hyperlink; then follow "MENA: Saudi Arabia" hyperlink") (last visited Aug. 30, 2017); *Project Tracker*, *supra* note 457; Warrier, *supra* note 455.

and King Abdullah Port Expansion and Haramain High-Speed Rail Phase II.<sup>468</sup> A US \$3.5-4 Billion King Hamad Causeway has also been announced to connect Bahrain and Saudi Arabia as to be implemented under a PPP model of a BOT project to start in 2021, but not much further information was provided at this moment.<sup>469</sup>

Nonetheless, energy projects possesses the lion's share of the Saudi pipeline, including renewable energy projects like the Alfaisaliah Solar PV Plant (600MW), Dumat Al Jandal Wind Farm (400MW), Midyan Wind Farm (400MW), Sakaka PV Solar Plant (300MW), Al Khafji Solar Desalination Plant, normally following BOO schemes.<sup>470</sup> Moreover, water and waste projects also exist, including the Yanbu, Shuqaiq, and Rabigh 3 Independent Water Projects, claimed to be world's largest independent water desalination plant, and Shuaibah Power and Water Plant Expansion.<sup>471</sup> Saudi Arabia has already implemented mega infrastructure projects

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<sup>468</sup> *MENA: Saudi Arabia Transaction Data*, *supra* note 467.

<sup>469</sup> *Work on \$4bn King Hamad Causeway to Begin in 2021*, ARABIAN BUS. (Sept. 2018, 10:22 AM), <https://www.arabianbusiness.com/construction/404499-work-on-4bn-king-hamad-causeway-to-begin-in-2021>. See also *Minister of Transport Discusses with Bahraini Counterpart Updates to King Hamad Causeway Project and Linking Railway between the Two Countries*, SAUDI MIN. TRANSPORT (Sept. 14, 2018), <https://www.mot.gov.sa/en/MediaCenter/News/Pages/news885.aspx>.

<sup>470</sup> Whiteaker, *supra* note 20; *MENA: Saudi Arabia Transaction Data*, *supra* note 467; Press Release, Saudi Arabia Awards First NREP Solar Project (Feb. 6, 2018), <https://www.powersaudi Arabia.com.sa/web/attach/news/300MW-Sakaka-Solar-PV-Project-Awarded.pdf>; Press Release: Saudi Arabia Opens Bids for First Utility-Scale Wind Farm (July 23, 2018), <https://www.powersaudi Arabia.com.sa/web/index.html>; *The Ministry of Energy, Industry, and Mineral Resources Launches the Second Round of Renewable Energy Program*, MIN. ENERGY, INDUS. & MINERAL RESOURCES (Jan. 30, 2019), <https://www.meim.gov.sa/arabic/mediacenter/press-releases/Pages/meim-launches-second-round-of-renewable-energy-program.aspx>; *Sakaka PV Solar Plant*, IJ GLOBAL, <https://ijglobal.com/data/transaction/38936/sakaka-pv-solar-plant-300mw-ipp> (last visited Nov. 30, 2019); *Dumat al Jandal Wind Farm*, IJ GLOBAL, <https://ijglobal.com/data/transaction/38521/dumat-al-jandal-wind-farm-400mw> (last visited Nov. 30, 2019); *Al Faisaliah Solar PV Plant*, IJ GLOBAL, <https://ijglobal.com/data/transaction/45611/alfaisaliah-solar-pv-plant-600mw-ipp> (last visited Nov. 30, 2019); *Qurayyat Solar PV Plant: Phase I*, IJ GLOBAL, <https://ijglobal.com/data/transaction/45614/qurayyat-solar-pv-plant-phase-i-200mw-ipp> (last visited Nov. 30, 2019).

<sup>471</sup> *MENA: Saudi Arabia Transaction Data*, *supra* note 467; *Project Tracker*, *supra* note 457; *Signing the Agreement of Shuqaiq-3 Independent Water Plant*, SAUDI WATER PARTNERSHIP PROJECT (Jan. 29, 2019), <http://www.wec.com.sa/NewsAndEventsDetail.aspx?newsID=61>; Andrew Roscoe, *Consortium Signs Contract for Saudi Arabia's Shuqaiq 3 IWP*, MID. E. BUS. INTELL. (Jan. 30, 2019), <https://www.meed.com/consortium-signs-contract-saudi-arabias-shuqaiq-3-iwp/>; *Construction of World's Largest Independent Water Desalination Plant Awarded to ACWA Power*, SAUDI GAZ. (Dec. 25, 2018), <http://www.saudigazette.com.sa/article/551028/BUSINESS/Construction-of-worlds-largest-independent-water-desalination-plant-awarded-to-ACWA-Power>; *Request for Expressions of Interest for Yanbu 4 Independent Water*

using both BOT models to meet the demands of millions of annual Muslim visitors during the *hajj* period for pilgrimage and throughout the year for *umra*, one of the Islamic practices, where a whole new Hajj Terminal has been established in the city of Jeddah in addition to a Madina Airport that is set to serve the same purposes and other connecting airports throughout the Kingdom to expand the number of visitors per year.<sup>472</sup>

The UAE is generally undertaking a proportionately large scale of infrastructure projects as well to be conducted as PPPs.<sup>473</sup> Now, with Dubai, it has been charging its pipeline of projects in preparation for it hosting the global event EXPO 2020 and onwards.<sup>474</sup> EXPO Dubai is a major event in its first version to be held in the Middle East, promising to address critical themes that include improving mobility by making it smarter worldwide and stressing sustainability in providing for alternative sources of food, water, clean and renewable energy, and the preservation of the environment.<sup>475</sup> This event is actually expected to boost the whole UAE economy by a good US \$33.4 Billion or 1.5% and add 905,200 jobs for the period from 2013-2031 according to a study conducted by global consultancy firm Ernst & Young.<sup>476</sup> Transport projects have thus been more so a focus of the Government. The Dubai International Airport & Al Maktoum International Airport are being expanded,<sup>477</sup> Dubai's Route 2020 Metro Project and

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*Project*, SAUDI WATER PARTNERSHIP PROJECT (Mar. 28, 2019), <http://www.swpc.sa/yanbu-4-iwp/>; *Shuaibah 3 Expansion II IWP*, SAUDI WATER PARTNERSHIP PROJECT .

<sup>472</sup> MARKA ADVISORY, *supra* note 453, at 24–25.

<sup>473</sup> The pipeline of projects is valued at \$182,870 Billion, which is the total value for all projects from Dubai and the rest of the U.A.E. Dubai projects are valued at about \$13.952 Billion. *Transaction Data, MENA: United Arab Emirates*, IJ GLOBAL, <https://ijglobal.com/data/search-transactions> (follow “Regions” hyperlink; then follow “MENA: United Arab Emirates” hyperlink) (last visited Dec. 4, 2019).

<sup>474</sup> Bridge, *supra* note 12.

<sup>475</sup> *Expo 2020 Dubai Themes*, EXPO 2020 DUBAI, <https://www.expo2020dubai.com/en/discover/themes> (last visited May 19, 2019).

<sup>476</sup> Sam Bridge, *Revealed Dubai Expo 2020 Expected to Deliver \$33bn Boost to UAE Economy*, ARABIAN BUS. NEWS (Apr. 15, 2019, 2:19 PM), <https://www.arabianbusiness.com/politics-economics/417793-revealed-dubai-expo-2020-to-deliver-33bn-boost-to-uae-economy>.

<sup>477</sup> *MENA: United Arab Emirates Transaction Data*, *supra* note 473; *Project Tracker*, *supra* note 457.

Metro Red Line is being extended and will be operated and maintained by the private sector through 2030, which includes connecting lines to EXPO sites,<sup>478</sup> in addition to the Dubai Water Buses project.<sup>479</sup> Other social infrastructure projects comprise of Dubai Health Care City and Dubai Emergency Care and Trauma Hospital,<sup>480</sup> while the power project of Jebel Ali Dubai Power Plant (1330MW) and Mohammed bin Rashid Al Maktoum CSP and Solar PV Plant Phase IV (950MW) and Phase III (800MW) is also part of the scheme of the infrastructure pipeline in Dubai.<sup>481</sup>

And here particularly amongst all the GCC States above, energy diversification is certainly noticeable in comparison with all other sectors in terms of potential for private participation. Fossil fuels have been a source of power generation for the Gulf States for decades,<sup>482</sup> but the reasoning behind renewable energy like solar is rather logical when considering the geographic and climatic positioning to generate electricity for consumers in the country. These states have possessed great solar potential.<sup>483</sup> And while the sun has been a great source of energy, it has also been a significant source of heat during the Gulf countries' extremely hot summers, reaching and exceeding temperatures of 50 Degrees Celsius (120+ Fahrenheit). This means the demand for cooling systems is noticeably high, which makes this part of the world the highest energy consuming region.<sup>484</sup>

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<sup>478</sup> James Hebert, *Dubai to Launch RFQ for Metro O&M*, IJ GLOBAL (Apr. 24, 2019), <https://ijglobal.com/articles/139495/dubai-to-launch-rfq-for-metro-o-and-m>; *MENA: United Arab Emirates Transaction Data*, *supra* note 473.

<sup>479</sup> *MENA: United Arab Emirates Transaction Data*, *supra* note 473 (last visited August 31, 2017).

<sup>480</sup> *Id.*

<sup>481</sup> The pipeline of projects is valued at \$182,870 billion, which is the total value for all projects from Dubai and the rest of the U.A.E. Dubai projects are valued at about \$13.952 billion. *MENA: United Arab Emirates Transaction Data*, *supra* note 473.

<sup>482</sup> Laura El-Katiri & Muna Husain, *Prospects for Renewable Energy in GCC States: Opportunities and the Need for Reform 2* (Oxford Institute for Energy Studies Paper MEP 10, 2014).

<sup>483</sup> RABIA FERROUKHI ET AL., IRENA, RENEWABLE ENERGY MARKET ANALYSIS: GCC 2019, at 30-31 (2019).

<sup>484</sup> El-Katiri & Husain, *supra* note 482, at 1.

Yet, solar-sourced energy demands necessitate advanced technologies in electricity conversions and storing as batteries become more efficient. Innovative capabilities to produce solar energy are certainly qualities the private sector may best offer. And so ultimately, the cheaper solar energy becomes, the easier it is to utilize such source. Price reductions in solar energy generation are in fact real and seem to only be heading downwards.<sup>485</sup> In a study that assessed the costs of solar panel installations of a dataset covering the period from 2005-2011, there was a consistent trend of cost reduction with increased manufacturing of this type of energy technology.<sup>486</sup> And one of the principal ingredients in price reduction has been due to a decrease in the price of one of the key component raw materials in solar panel technologies, polysilicon, with forecasts of further declines in such prices.<sup>487</sup> China in this regard has significantly led the rapid increase in solar panel technology installations.<sup>488</sup>

Oil as a source of electricity generation largely utilized in the Gulf States is both costly and may produce adverse environmental impacts.<sup>489</sup> Discussions about solar energy do not disregard the potential for other renewable sources in the GCC like wind.<sup>490</sup> And here the discussion about obsolescence applies as mentioned about the future role of automated vehicles. The decreased costs of renewable energy capable of generating similar amounts of electricity makes fossil fuel electricity more costly and thus less desirable.<sup>491</sup> This is especially true where energy storage comes into play and its use can be utilized throughout any given moment of the

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<sup>485</sup> FERROUKHI ET AL., *supra* note 483, at 84–85.

<sup>486</sup> Unni Pillai & Kyle Kruz, *Source of Cost Reduction in Solar Photovoltaics* 2, 5–6, 22–23 (MPRA Paper No. 46657, 2013).

<sup>487</sup> Unni Pillai & Jamison McLaughlin, *A Model of Competition in the Solar Panel Industry* 20-21 (MPRA Paper No. 46655, 2013).

<sup>488</sup> Pillai & Kruz, *supra* note 486, at 4, 10–11, 22.

<sup>489</sup> El-Katiri & Husain, *supra* note 482, at 3, 5–6.

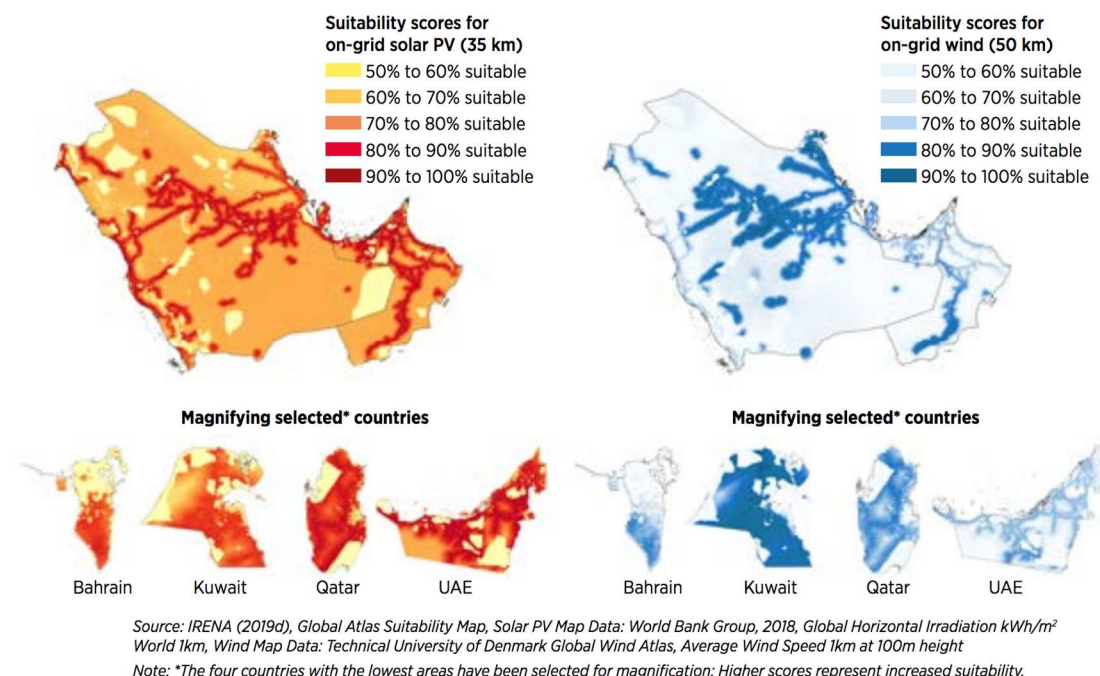
<sup>490</sup> FERROUKHI ET AL., *supra* note 483, at 33–34, 86–88.

<sup>491</sup> Pillai & Kruz, *supra* note 486, at 1–2.



day and weather condition. At the same time, this so to say new sector to GCC States could perhaps offer new job opportunities, with caution about the extent of such employment in light of previous discussions in this study. Nonetheless, the energy market in the GCC does have its specificities in terms of its regulatory schemes.

Figure 11: Suitability Analysis Results for On-Grid Solar PV (Left) and On-Grid Wind (Right) in Select GCC States



### Natural Resources' Regulatory Sensitivity

Some GCC governments have been more sensitive towards contracting with a private partner in certain sectors more than others. While different energy projects have taken their fair share of current and future infrastructure pipeline activity, challenges remain in government to private sector relationships in such fields, namely, non-renewable energy projects, i.e. oil and gas particularly in these countries.

The Constitution of Kuwait provides in Article 21, “Natural resources and all revenues therefrom are the property of the State. It shall ensure their preservation and proper exploitation

due regard being given to the requirements of State security and the national economy.”<sup>492</sup> And so, evidently, the state is the sole owner of such resources, which shapes the type of contractual relationship it may enter with any private party in any upstream, downstream, or midstream-type project.<sup>493</sup>

Article 14 of the Saudi Arabian Basic Ordinance of Governance, Constitution, similarly provides, “All God's bestowed wealth, be it under the ground, on the surface or in national territorial waters, in the land or maritime domains under the state's control, are the property of the state as defined by law. The law defines means of exploiting, protecting, and developing such wealth in the interests of the state, its security and economy.”<sup>494</sup>

Moreover, the UAE Constitution draws on the same conclusions as its other GCC States, asserting, “The natural resource and wealth in each Emirate shall be considered the public property of that Emirate. Society shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy.”<sup>495</sup>

And while Law 116 of 2014 Regarding Public-Private Partnerships in Kuwait (Kuwait PPP Law), as shall be displayed in more detail further in this study, does not explicitly exempt any sector from PPPs as per Article 1(1) of this Law, this is contingent on Articles 152 and 153 of the Constitution.<sup>496</sup> Article 153 prohibits monopolies except for by law and for a limited time,

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<sup>492</sup> KUWAITI CONSTITUTION, art. 21.

<sup>493</sup> Upstream would refer to the process of exploring after identification of geographic areas containing oil and gas such reserves; midstream refers to transportation of resources through means like pipelines to be processed and enable their chemical enhancements, and downstream is the refining and marketing process itself. Rolando Ossowski & Harvard Halland, *Key Aspects of Fiscal Management in Resource-Rich Countries*, in *BALANCING PETROLEUM POLICY: TOWARD VALUE, SUSTAINABILITY, AND SECURITY* 4–6 (Alexander Hurdeman & Anastasiya Rozhkova eds., 2019).

<sup>494</sup> SAUDI BASIC ORDINANCE OF GOVERNANCE, art. 14.

<sup>495</sup> U.A.E. CONSTITUTION, art. 23.

<sup>496</sup> Kuwait Public Tenders Law, art. 1(1) (“Public Private Partnership Project or PPP Project: a project to implement an activity through which the State targets to provide a public service of economic, social or service importance, or to improve an existing public service or to develop, reduce the costs or increase the efficiency of any such service, procured by the Authority in cooperation with the Public Entity and in accordance with the PPP Model after the

while Article 152 provides, “No concession for exploitation of either a natural resource or a public service may be granted except by a law and for a limited period. In this respect, the preparatory measures facilitate the operations of prospecting and exploration and ensure publicity and competition.” The particular legislative requirement to conduct specific tasks within the energy sector may prove to be an impediment and could challenge the very idea of efficiency, an idea both public and private sectors thrive for in such mega projects, especially when certain state institutions struggle with the idea of cooperation.<sup>497</sup> This is not to imply liberalizing the oil and gas sectors completely and allowing neoclassical economic theories of supply and demand and elimination of price ceilings to prevail, such as the reaction to negative periods in the United States during the 1970s with shortage of gas supply, and Reagan’s free market journey.<sup>498</sup> This is rather certainly contextual and constitutional provisions in these GCC States have been in place to achieve their own version of welfare. Whereas foreign corporations operated in oil and gas production at early stages when supply was high, GDPs of the GCC States were low, and necessary local technical expertise was unavailable until these Gulf countries retained this role on a strategic and national security basis, and thus a wave of nationalization policies took over and capable national oil and gas corporations were established,

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approval of the Higher Committee, provided it does not contradict with the provisions of Articles 152 and 153 of the Constitution.”).

<sup>497</sup> Kuwait, for instance, has witnessed quite some time of political instability where the Emir, by means of his authority in Article 107 of the Kuwaiti Constitution, has dissolved the parliament seven times over the last decade. *Kuwait Parliament Dissolved Amid Tensions*, THE NAT’L (Oct. 16. 2016, 4:00 AM), <https://www.thenational.ae/world/kuwait-parliament-dissolved-amid-tensions-1.163329>; Courtney Freer, *Pessimism of the Kuwaiti Opposition in the Face of Upcoming Elections*, ARAB GULF STATES INST. WASH. (Oct. 7, 2016), <http://www.agsiw.org/pessimism-of-the-kuwaiti-opposition-in-the-face-of-upcoming-elections/>.

<sup>498</sup> It could conversely be debated that what is termed deregulation leads to imperfect distributions of profits amongst oil and gas producers achieve unwarranted welfare results that certainly result in no populist agenda. Richard J. Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 69–74 (1982).

yet certain technical expertise remained within certain multinational corporations.<sup>499</sup> Saudi and Emirati policies in this regard remain more lenient and allow for more participation from the private sector in oil and gas production.<sup>500</sup>

Moreover, Law No. 22 of 2015 Regulating PPP in the Emirate of Dubai (Dubai PPP Law) exempts from its scope of application, “a. Electricity and water production Partnership Projects governed by the above-mentioned Law No. (6) of 2011 (Regulating Participation of the Private Sector in Electricity and Water Production in the Emirate of Dubai)...”<sup>501</sup> Independent Water and Power Projects (IWPP) do have specific provisions and Dubai seemed to have been extensively initiating multiple projects under this model in comparison with other GCC States.<sup>502</sup> A similar Kuwaiti approach is pursued as to water and electricity sectors, yet Saudi Laws provide no such explicit provisions that exempt sectors and seem to leave this on a rather ad hoc basis.<sup>503</sup>

Oil and gas sectors are moreover generally either exempt from falling under traditional provisions within tendering and public procurement laws in GCC States like Kuwait, or need to follow other *sui generis* procedures.<sup>504</sup> The contractual arrangements pertaining to such natural

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<sup>499</sup> GULF CENTER FOR DEV. POL’Y, ALTHABET WAL MUTAHAWEL 2014: ALKHALEEJ BAIN ALSHIQAQ ALMUJTAMAEY WA TARABOT ALMAL WALSULTA [THE CONSTANT AND THE CHANGING 2014: THE GULF BETWEEN SOCIAL DISMANTLING AND ASSOCIATION OF MONEY AND POWER] 138–41 (2014).

<sup>500</sup> *Id.* at 149.

<sup>501</sup> Law No. 22 of 2015, art. 4(2)(a), Regulating PPP in the Emirate of Dubai [hereinafter Dubai PPP Law].

<sup>502</sup> MARKA ADVISORY, *supra* note 453, at 32.

<sup>503</sup> Relevant Saudi regulations at the current stage include: Royal Decree No. M/15, 5/1/1421H (2000) Foreign Investment Law (Saudi Arabia) [hereinafter Saudi Foreign Investment Law]; Royal Decree No. M/25, 4/5/1425H (2004), Competition Regulation (Saudi Arabia); Royal Decree No. M/18, 20/3/1427H (2006), Classification of Contractors Regulation (Saudi Arabia); Royal Decree No. M/58, 4/9/1427H (2006), Regulating Government Tenders and Procurement (Saudi Arabia) [hereinafter Saudi Government Procurement Law] (“[A]ll government works and procurements shall be put up for public tender except those exempted under the provisions of this Law.”); Cabinet Resolution No 355, 07/06/1438H (April 2, 2017), Organization of the National Center for Privatization (Saudi Arabia) [hereinafter Saudi NCP Law] (“For the purpose of application of privatization, the projects related to the participation of private and public sector shall be included in the privatization.”); Saudi Implementing Procurement Regulation; Resolution No. 510, 23/11/1426H (2005), Regulating the Saudi Authority for Contractors (Saudi Arabia). Such regulations shall be the basis of further research in a later stage of this study.

<sup>504</sup> *See, e.g.*, Kuwait Public Tenders Law, art. 2. The other GCC States make no explicit procedures or exemptions for such contracts.

resources fall under different institutional schemes where central tenders agencies do not exercise the same functions to procure projects and regular monetary authorities exercise different rights.<sup>505</sup> This practice is similar to what many legal systems acknowledge defense contracts as falling outside the scope of general procurement laws worldwide due to their sensitivity and national security element. Consequently, for oil contracts in Kuwait, the same exceptional rules should apply when such contracts adopt PPPs as their arrangement. This is especially in light of the fact that the country has namely established SOEs, like Kuwait Petroleum Corporation, for the particular purpose of administering the oil sector.<sup>506</sup>

Ultimately, specific enabling regulatory environments must exist for public-private partnerships to transpire in certain sectors and such approach hints towards the changing dynamics towards key players in GCC states' policies and economic, political, and societal structures, and push for diversification of state revenues as well.

This illustration of a decade's or two worth scheme that involves numerous infrastructure projects necessarily raises the question as to the extent to which the private sector can partner with governments to achieve these countries' future development plans and how this sector would be enabled to assume such role. If there is one thing to conclude and further excavate in connection with all previously mentioned GCC development plans and corresponding infrastructure projects, it is emphatically that they all in varying levels entice a future that builds on one primary model, neoliberalism.<sup>507</sup>

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<sup>505</sup> See, e.g., *id.*

<sup>506</sup> *About Us*, KUWAIT PETROLEUM CO., <https://www.kpc.com.kw/> (last visited May 20, 2019).

<sup>507</sup> Certainly, to a lesser degree in Dubai in comparison with the Abu Dhabi development plan and other GCC members, Kuwait especially strongly emphasizing this model in its different sectors, which could be because it has been the most conserved with regards to the oil and gas sector. ALTHABET WAL MUTAHAWEL 2014, *supra* note 499, at 164–65.

### *Governance and the Problem of Publicly Led Infrastructure Projects in the Gulf*

While government initiates and administers many infrastructure services that might not be ideal in terms of the caliber of services, private expertise could fill a gap and provide higher quality infrastructure and services. The importance of looking into development promises and project performance of Gulf Arab states is the dynamics of publicly *vis-à-vis* privately led infrastructure projects and provision of public services models. Yet, sometimes, there can be grey areas when the nature of the public or private sector is not that clear. There are entities that appear to be state owned and state subsidized albeit are essentially of a private nature. The presence of government support to local private corporations is neither a new phenomenon nor completely negative in itself. Economic growth in one of the world's perhaps most successful economies, Korea, started with state subsidization of local private entities to help stimulate their grow and allow them to subsequently compete globally.<sup>508</sup> To put things more into perspective regarding the disparity of public or private participation in infrastructure though, the function and characteristics of widespread public corporations, or state-owned enterprises (SOEs) in the Gulf and infrastructure projects are the rather important theme. Safeguards to ensure healthy fair business environments and proper corporate governance are the where discussions may more constructively take place.

### *The Role of SWFs in Infrastructure Project Financing or Empowering the Private Sector through Local Investment?*

The topic of the role of Sovereign Wealth Funds (SWFs) in domestic investments and their supposed counterintuitive nature may have caused some controversy in terms of opting

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<sup>508</sup> MILHAUPT & PISTOR, *supra* note 360, at 116–25.

instead for foreign high-return and low risk infrastructure investment opportunities in low-income countries.<sup>509</sup> In other words, where the SWF invests in infrastructure projects in the country it is incorporated in, questions may arise in connection with the viability of such approach. A SWF would regularly be categorized as an institutional investor, a term that includes pension funds, insurance companies, and mutual funds, where the government contributes to the entity's capital, of which capital would usually be of a significant size.<sup>510</sup> Therefore, mobilizing financing of large projects from such institutional investors worth trillions may unleash large opportunities to fill infrastructure gaps globally.<sup>511</sup>

Nonetheless, there is some literature that attempts to explain the viability of SWFs intervening in instances as co-financers or co-investors in infrastructure projects, where although the return on investment may not be high, by using tools like PPPs, the SWFs would aim to achieve greater domestic social benefits and as a result incite the private sector to such market related to the project.<sup>512</sup>

SWFs are precisely a key feature of the Gulf Arab States, particularly Kuwait, Saudi Arabia, and the UAE. Kuwait was the first to establish a SWF, the Kuwait Investment Authority (KIA), in the 1950s.<sup>513</sup> KIA is ranked 5<sup>th</sup> largest SWF in the world according to the Sovereign Wealth Fund Index (SWFI) ranking for 2016 with \$592 Billion in assets,<sup>514</sup> followed by the

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<sup>509</sup> Alan Gelb, Silvana Tordo & Harvard Halland, *Sovereign Wealth Funds and Domestic Investment in Resource-Rich Countries: Love Me, or Love Me Not?*, ECON. PREMISE, no. 133, Jan. 2014, at 1.

<sup>510</sup> Raffaele Della Croce, Fiona Stewart & Juan Yermo, *Promoting Long-Term Investment by Institutional Investors: Selected Issues and Policies*, 2011 OECD J., Sept. 2011, no. 1, at 145, 148.

<sup>511</sup> Raffaele Della Croce & Juan Yermo, *Institutional Investors and Infrastructure Financing* 8 (OECD Working Paper on Finance No. 36, 2013).

<sup>512</sup> Gelb, Tordo & Halland, *supra* note 509, at 3.

<sup>513</sup> Steffen Kern, *Sovereign Wealth Funds: State Investments on the Rise*, DEUTSCHE BANK RES., Sept. 2007, at 4.

<sup>514</sup> *Sovereign Wealth Fund Rankings*, SWFI, <http://www.swfinstitute.org/sovereign-wealth-fund-rankings/> (last visited Mar. 3, 2017).

Saudi SWF, Sama Foreign Holdings with \$576 Billion in assets,<sup>515</sup> whilst the Abu Dhabi Investment Authority is in 3<sup>rd</sup> place with an asset as large as \$792 Billion.<sup>516</sup> It must be pointed out though that the Saudi Government promises the market the largest SWF yet to come worth some \$2 Trillion after putting a part of ARAMCO, the Saudi Oil giant state owned corporation, for IPO.<sup>517</sup>

One of the criticisms SWFs face in investing domestically is the political bias or element.<sup>518</sup> It is also imperative to be alert that SWFs do not replace the private sector. Moreover, SWFs should not replace the regular national budgetary process in projects with high social and economic return in sectors such as education and health for example,<sup>519</sup> because there certainly remains an element of accountability for the government by its citizens or general infrastructure services users.

A similar discussion may be about the role of the broader institutional arrangement of state-owned enterprises (SOEs). These enterprises were defined by OECD's Guidelines on Corporate Governance of State-Owned Enterprises as:

Any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership, should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature.<sup>520</sup>

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<sup>515</sup> *Id.*

<sup>516</sup> *Id.*

<sup>517</sup> Stephanie Bianchi, *The Key Questions Asked about Saudi Arabia's \$2 Trillion Fund*, BLOOMBERG (May 5, 2016, 5:20 AM), <https://www.bloomberg.com/news/articles/2016-05-25/key-questions-raised-by-the-2-trillion-saudi-wealth-fund-plan>.

<sup>518</sup> And, in order to attempt to overcome such criticism, certain corporate governance structures within a SWF should be ensured such as, having an independent board, professional staff, transparent reporting, and independent auditing. Gelb, Tordo & Halland, *supra* note 509, at 2–3.

<sup>519</sup> *Id.* at 3–4.

<sup>520</sup> OECD, GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 14 (2015).



There could be confusion as to whether the private partner may be a SOE. One example on such ambiguity is the role of Chinese SOEs in PPP projects.<sup>521</sup> In China, the non-governmental partner in PPPs is defined as “social capital” rather than “private capital”. This hence allows SOEs to enter the bidding process for PPP projects.<sup>522</sup> And thus the idea of a public-private partnership does not become that apparent as it sounds more like a public-public relationship. This defeats the whole purpose of both private sector expertise and finance that help fill the infrastructure gap tailored to local needs. So, the GCC for instance may need private sector efficiency and innovation even more so than the fiscal benefits that private finance brings with it.

The problem of SOE participation in infrastructure projects as a bidder revolves around the whole idea of competition. To uphold a competitive business environment in the GCC, equal opportunities must be granted to different actors that decide to enter the country’s infrastructure market.<sup>523</sup> An unfair advantage granted to the country’s SOEs to bid on the same countries’ infrastructure projects is like government contracting with government, i.e. conflict of interest. The Asian Development Bank (ADB), for this reason, elicits a number of requirements to prevent SOEs from bidding on any of the Bank’s procurement processes.<sup>524</sup> The ADB necessitates its prior assessment to ensure the SOE generally:

- a) Has a separate legal personality from the state government;

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<sup>521</sup> *In China, Public-Private Partnerships are Really Public-Public*, BLOOMBERG (Feb. 27, 2017, 4:00 PM), <https://www.bloomberg.com/news/articles/2017-02-27/in-china-public-private-partnerships-are-really-public-public>.

<sup>522</sup> *Id.*

<sup>523</sup> OECD, OWNERSHIP AND GOVERNANCE OF STATE-OWNED ENTERPRISES: A COMPENDIUM OF NATIONAL PRACTICES 51–52 (2018).

<sup>524</sup> ASIAN DEV. BANK, STATE-OWNED ENTERPRISES: GUIDANCE NOTE ON PROCUREMENT 6–7 (2018).

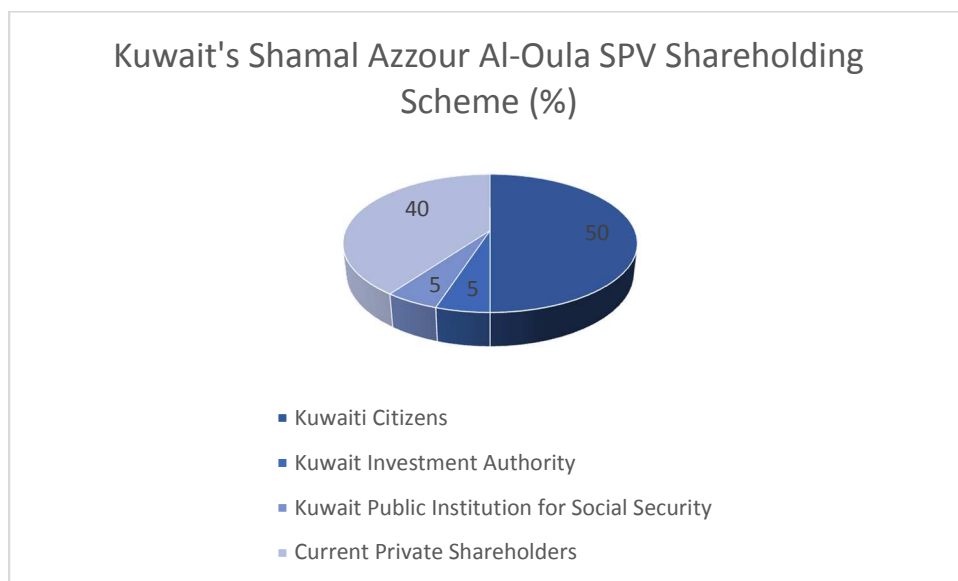
- b) Does not receive substantial subsidies, budgetary allocations, benefits, or tax exemptions provided by the state government;
- c) Operates under the same commercial conditions as private sector firms.<sup>525</sup>

Large participation of SOEs on the private financing side through SPV equity share ownerships must be carefully considered as well. Attention must be exerted so as to alert cautiousness about diminishing private accountability when such private actors ultimately rely on the high government capital as a bailout or option to simply walk away from projects and cause financial losses to the public budget. The private partner must remain incentivized to provide quality infrastructure in an efficient manner in exchange for adequate returns on investment that are best achieved when the private partner predominantly raises finance from debt and equity instead of a government lion's share. A majority government shareholder could also mean some conflict of interest when in all reality the state actually sits in board meetings of SPVs and makes critical investment-related decisions that could hold certain biases. So, the government makes decisions on two sides, the government project owner side and private, but really majority government comprised side. A display of Kuwait's Shamal Azzaour Al-Oula PPP project shareholding scheme in this Figure may illustrate this structure at play. The project that reached financial close offers up to 50% to citizens in addition to the two public entities (10%) and this does lead to a bit of confusion in terms of accountability.

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<sup>525</sup> *Id.*

Figure 12: Kuwait's Shamal Azzour Al-Oula PPP Project SPV Shareholding Structure



Source: KAPP

This is why the shareholding scheme enabling public participation in Kuwait by offering shares of established SPV to citizens is to be confined to certain thresholds as total percentages at a third or less of the total capital of the SPV so as to uphold the true essence and nature of a private participation in infrastructure project. Projects with majority public financing must consequently be called as accurately as they are, publicly financed projects and not genuinely privately financed projects.

#### From SOEs to Privatization in the Gulf: A Complex and Slow Process

Despite the abundance of SOEs in the Gulf,<sup>526</sup> the predominant public enterprise lead is not at least a particularly successful phenomenon in many other states. A sort of backlash towards the role of SOEs in the provision of infrastructure occurred in the 1960s after the rapid

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<sup>526</sup> Steffen Hertog, *How the GCC Did It: Formal and Informal Governance of Successful Public Enterprise in the Gulf Co-Operation Council Countries*, in *TOWARDS NEW ARRANGEMENTS FOR STATE OWNERSHIP IN THE MIDDLE EAST AND NORTH AFRICA* 72–73 (2012).

growth of such institutions post World War II.<sup>527</sup> Poor quality of services were associated with such public enterprises, which, first led to reforms within these enterprises, and at a later stage, by offering private investors the opportunity to provide public services. This latter stage was also attributed to the privatization wave that was perceived as a huge success. This wave did not come through without criticism, especially due to raising costs of services to end users and workers, while benefiting private investors and taxpayers.<sup>528</sup>

Gulf public enterprises do retain many of what may be perceived as essential services to the state's citizens, like education, health, and perhaps even water and electricity. And while public enterprises provide such critical services, they could be missing out on commercial benefits by charging a lower fare or fee for the service.<sup>529</sup> These same public institutions may be overstaffed as well.<sup>530</sup> Yet, for some time, the regular presence of SOEs might have minimized the GCC governments' need to contract and partner with the private sector to implement its infrastructure projects and rather rely on these entities and other state authorities to take lead.<sup>531</sup> This status quo may have resulted in some resistance or at least delays to any genuine privatization programs. Consequently, it is incumbent on Gulf governments to assess where SOEs have been unnecessarily been crowding out the private sector in providing certain public services.<sup>532</sup> These governments may perhaps better follow a clearer policy of where the private sector may provide the service to the society, to allow such to take place, especially in economic infrastructure. This helps balance the role of state governments in the GCC to differentiate

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<sup>527</sup> José A. Gómez-Ibáñez, *Alternatives to Infrastructure Privatization Revisited: Public Enterprise Reform from the 1960s to the 1980s*, at 1 (World Bank Policy Research, Working Paper No. 4391, 2007).

<sup>528</sup> *Id.*

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> MARKA ADVISORY, *supra* note 453, at 26.

<sup>532</sup> Hertog, *supra* note 526, at 89.

between its function as regulator of state services as opposed to operator and provider of all public needs, which may be both costly and less efficient.

To reiterate a previous discussion, privatization in its most extreme meaning remains an option alongside PPP to enable private participation in state infrastructure. And while privatization is a much more complex process and more difficult to implement, PPPs seem to offer Gulf States a more acceptable option to offer public services. This is not to suggest that Gulf governments should just focus on PPPs instead of privatization because government shall still be a major stakeholder in an asset. Rather, both schemes, PPPs and privatization must be assessed properly as to what provides the most economically and socially feasible solutions as a more sustainable model for future GCC generations no longer heavily reliant on oil rents.

The analysis about the extent to which the states of the GCC may be in dire need of more strengthened private solutions to balance the role of the state, is to essentially look into what opportunities and potential the private sector in the Gulf retains in the meantime. The nature of private actors in each state may differ, which is important to understand and address.

### The Private Sector in the GCC: Is Your Private Sector Like Mine?

Economist Nicholas Stern outlines the specific features of a private sector and breaks it down to,

Ownership is typically seen as the defining characteristic of public and private, but ownership is not, by itself, uniquely defined. Let me briefly list four of the many aspects of ownership: the right to manage for certain purposes; the right to income arising from the use of property; the power to transfer property; and the right to exclude others. One could go on with this list, but I want to make the point that

measuring ownership in order to say what we mean by public and private is not as simple as it sounds.<sup>533</sup>

Stern goes on to explain how difficult it is to put these aspects to practice in many instances and how they apply to firms.<sup>534</sup> He further explains that public ownership could display far more characteristics than private ownership and needs to be understood in that context in detail.<sup>535</sup> With that clarification, it is no longer surprising that studies consistently conclude that the Gulf's public sector performance is not optimal, and an enhanced private sector role is critical.<sup>536</sup> While the Gulf States emphasize the role the private sector should play in their upcoming development plans, it is perhaps necessary to look into this sector's historical maturity and current status in the Gulf.

### *History of the Private Sector in the Arab Gulf*

While this segment showcases the evolution of the private sector in the select Gulf countries, it certainly is not restricted to local private firms. Foreign private entities as well would be included in terms of their activity in these countries. The end goal is more so to

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<sup>533</sup> Amartya Sen et al., *Development Strategies: The Roles of the State and the Private Sector*, Roundtable Discussion (1990), in *Proceedings of the World Bank Annual Conference on Development Economics*, at 421, 425 (1991).

<sup>534</sup> *Id.*

<sup>535</sup> *Id.* at 425–47.

<sup>536</sup> The IMF for instance, stressed in its *Economic Prospects and Policy Challenges for the GCC Countries* report, following the Annual Meeting of Ministers of Finance and Central Bank Governors in Riyadh, Saudi Arabia on October 26, 2016, that job creation and raising productivity should be drivers towards private sector reform. INT'L MONETARY FUND, *ECONOMIC PROSPECTS AND POLICY CHALLENGES FOR THE GCC COUNTRIES REPORT 19* (2016), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Gulf-Cooperation-Council-GCC-Economic-Prospects-and-Policy-Challenges-for-the-GCC-Countries-PP4828>. The Economic Agreement between the States of the Cooperation Council (EASCC), signed at the 2001 GCC Muscat Summit identified in its preamble “enhancing market mechanisms and fostering the role of the private sector.” Secretariat General of the Cooperation Council for the Arab States of the Gulf, *Alitafaqiya Aliqtisadiya Bain Dowal Majlis Ataawon [Economic Agreement between the States of the Cooperation Council]*, 2001, <http://www.gcc-sg.org/ar-sa/CognitiveSources/DigitalLibrary/Lists/DigitalLibrary/%D8%A7%D9%84%D8%A7%D9%82%D8%AA%D8%B5%D8%A7%D8%AF/1111318748548.pdf> [hereinafter *GCC Economic Agreement 2001*].

illustrate the magnitude of private sector participation in the states' economic development over time.

Going back in history, Kuwaiti scholar Khaldoun Al-Naqeeb describes the emergence of the 'natural state' in the Gulf and Arab Peninsula not by its tribal societal feature or strict pastoral economic façade, but by what is referred to as *mudharabah*, 'speculative trade'.<sup>537</sup> Growing regard over time was to acknowledge that this sub-region does not exist in isolation and rather lives within the broader global community, especially its coastal cities.<sup>538</sup> In the 16<sup>th</sup> century, a more observed flow of international companies set sail on these regions shores such as the East India Companies. This changed the dynamics of *mudharaba* by controlling shipping routes of commodities that also entailed an imposition of protection fees by ruling figures including tribal sheikhs and sultans for such commodities coming by sea. And consequently money and political power were two associated features and such imposed fees were even confused with bribes that merchants paid for in return for protection.<sup>539</sup> These fees sometimes came hand in hand with custom dues and tariffs and were often confused with them and held different names like *Khuwa*, brotherliness.<sup>540</sup> The idea of ruling authorities at that time came in par with the notion of merchants and tradesmen, and such similar professions. Often, such ruling institutions recruited tribal militias that in many cases came from the same tribe and as a result accomplished the preservation of income and rule of certain territories.<sup>541</sup>

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<sup>537</sup> KHALDOUN NASSAN AL-NAQEEB, *SOCIETY AND STATE IN THE GULF AND ARAB PENINSULA: A DIFFERENT PERSPECTIVE* 9 (L.M. Kenny, trans., 2014).

<sup>538</sup> *Id.* at 9. In fact, the mercantile identity of the Arab Peninsula can be traced back to Umar ibn Al-Khattab, the third Islamic *khalifa* (Caliphate), and throughout the Abbasid *khilafa*, which is the perceived third Islamic dynasty. The Abbasid dynasty reigned from 1258 CE. *Id.* at 32–33.

<sup>539</sup> *Id.* at 12–13.

<sup>540</sup> *Id.* at 12–14.

<sup>541</sup> *Id.* at 15.

While tribal figures later engaged in economic activities within territories of the Gulf, they also started to pay taxes, fees, and zakat to ruling authorities, to the extent that the Emir of Kuwait in the early 20<sup>th</sup> century accrued 7% of the income of the state.<sup>542</sup> All of such components formed governance structures that could be premised on the idea of “crony capitalism”, or combining both political power and economic ownership of the state.<sup>543</sup> Commercial activities included trading in silk and spice, pearls, coffee, slaves and horses, and even manufacturing fabrics that were governed by supply and demand, a mini version of today’s capitalist structure, although later these territories witnessed monopolies take place.<sup>544</sup> There is much to say about how later imperialistic schemes also shaped the economic, political, and social structures of the Gulf countries, and the British protectorates enabled ruling institutions to preserve their ruling status by means of such protectorate agreements and no longer by particular fees imposed.<sup>545</sup>

The period around the mid 20<sup>th</sup> century onwards emanated a pivotal point for the economic history of these GCC States, the discovery of oil. International corporations flocked all the way to this geographical area and simply put leased these lands from Gulf States Governments, which generated external income and ultimately shaped what could be called a “rentier state”.<sup>546</sup>

Lama Abu-Odeh discusses rentierism and the distributional effects and points out:

Put differently, the non-laboring citizen of a rentier state demands distribution directly from the state, as a citizen, and the state, owner of wealth, giveth and taketh away without obligation towards its citizens as producers. Its bounty is therefore

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<sup>542</sup> Gray, *supra* note 352, at 12; AL-NAQEEB, *supra* note 537, at 15–16.

<sup>543</sup> ALTHABET WAL MUTAHAWEL 2014, *supra* note 499, at 178–79; Gray, *supra* note 352, at 1.

<sup>544</sup> Such as monopolistic practices by the East Indian Companies. AL-NAQEEB, *supra* note 537, at 17, 26, 41, 51.

<sup>545</sup> *Id.* at 58-59.

<sup>546</sup> The rentier state in turn generated opposition from certain sects of the societies like religious leaders and tribal groups whom suddenly lost most of the power they once possessed while ruling authorities were no longer being surrounded by them. *Id.* at 80–82, 91.



experienced by the citizens as both arbitrary and undeserved at the same time, i.e., almost mystical. Just as the source of the wealth itself (oil) seemed to fall from the sky (or rather flow from earth) like manna from heaven (or fountains of black liquid), so does the state in giving and withholding it acts as mysteriously and arbitrarily...<sup>547</sup>

This description may perhaps explain the strong government role in the Gulf to control about all aspects of life of citizens, which also would mean that other actors, i.e. the private sector, need not play a big role to provide for the countries' citizens. Matthew Gray claims that what the GCC States are rather lately witnessing is a period of "Late Rentierism" as he calls it.<sup>548</sup> This is where the concept of rentierism has progressed through different stages in these States due to the global economy and trade and investment liberalization in places like Dubai, which also diversified its economy.<sup>549</sup> This idea of late rentierism may seem like it is difficult to subject the whole GCC to, as perhaps the Dubai model is rather blatant in this regard.<sup>550</sup> The other Gulf States have been slower to recognize any urgent need to accelerate diversification of their economies, instead more comfortably sticking with instant generation of rents from oil until volatility alerts in commodity prices start kicking in.<sup>551</sup>

Al-Naqeeb ultimately poses the question as to what is left for the private sector and the role it could play in light of the abovementioned governance scheme, and he answers,

The answer to this question lies in the fact that the private sector plays an important role in rounding out the control of the ruling elite over the economy. Thus the ruling elite gets possession of the state resources, which it does not own, through the

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<sup>547</sup> Lama Abu-Odeh, *The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere*, 59 AM. J. COMP. L. 985, 1006 (2011).

<sup>548</sup> Gray, *supra* note 352, at 15, 23–35.

<sup>549</sup> *Id.*

<sup>550</sup> Gray acknowledges variances of the idea of late rentierism across GCC countries though and sets certain core characteristics that they meet to transition to such status. These aspects include: 1) a responsive but undemocratic state; 2) Opening up to Globalization, but with Some Protectionism Remaining; 3) An Active Economic and Development Policy; 4) An "Energy-Driven" vs. an "Energy-Centric" Economy; 5) An "Entrepreneurial State Capitalist" Structure; 6) A State that is Long-Term in its Thinking; and 7) An Active and Innovative Foreign Policy. *Id.*

<sup>551</sup> Tim Callen et al., *Economic Diversification in the GCC: Past, Present, and Future* 11–13 (IMF Publication SDN/14/12, 2014).

private sector, by nominally legal means- namely by entering government contracts and bidding competitions through the avenue of the companies which it establishes directly or indirectly by means of ‘front’, that is through other persons, or by entering companies as ‘silent partners’. Thus, what the ruling elite gives with one hand through the state budget as salaries and wages, and as capital to be invested in development or government compensation programmes, is regained with the other hand through the ownership of real or front companies, or as silent companies grabbing the commissions on government contracts, auctions and supplies.<sup>552</sup>

This illustration by Al-Naqeeb so meticulously describes how possessing a private sector in the Gulf does not necessarily mean that such sector has a significant role in the economy or a need to fill a gap. The illusion of private participation in the economy through what appears to be government allocations of resources to private actors perhaps questions whether public budgets are optimally used to achieve value for money.

#### Today’s GCC Private Sector

In an empirical study that examined the private sector in the Gulf Arab States and provided figures for namely Kuwait and Saudi Arabia, it found that in Kuwait, while the largest twenty-one corporations are 10% of the companies on the stock market, they own 45% of the value of capital in such market.<sup>553</sup> And the government itself owns 12% of the capital of these large corporations.<sup>554</sup> In the sample taken, the ruling family owns 8% of the capital in the stock market and possesses 14% of board memberships of such companies in the market.<sup>555</sup> In Saudi Arabia, the figures are even higher. The seventeen largest corporations on the stock market own

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<sup>552</sup> AL-NAQEEB, *supra* note 537, at 115. Al-Naqeeb terms the economic governance structure of the Gulf monarchies as “dependent state capitalism” rather than mere authoritarianism and goes on to elaborate that such expression entails such ruling structures monopolizing the means of production, political structure, substituting itself for existing social institutions, while preserving its share of capitalistic profit notions and class exploitation. *Id.* at 117.

<sup>553</sup> Such figures of corporations do not embody a very large segment of these states non-registered companies in the stock market, and for the period up to 2014. ALHABET WAL MUTAHAWEL 2014, *supra* note 499, at 179, 181.

<sup>554</sup> Gray, *supra* note 352, at 15, 32–33; ALHABET WAL MUTAHAWEL 2014, *supra* note 499, at 181.

<sup>555</sup> ALHABET WAL MUTAHAWEL 2014, *supra* note 499, at 181–83.

63% of the total capital in that market, and the Saudi Government strikingly owns 40% of such capital.<sup>556</sup> Moreover, one member of the ruling family alone owns up to 13% of the sample taken, at least from what's publicly known.<sup>557</sup> The UAE does share many of such corporate structures though Dubai poses certain specificities especially in terms of the size of foreign direct investment.<sup>558</sup> Nevertheless, in all such GCC corporations, there are equally mercantile families that either own a large share of such companies or its family members have a seat in these companies' boards.<sup>559</sup>

When it comes to the private sector's role in the labor market, while averages of public sector employment globally, whether in high-income or low income states, are at around 20% of the national force, public sector employment in the Gulf dwarfs this percentage.<sup>560</sup> In fact, the Gulf private sector only employs what roughly ranges from a third to less than half of the national human resources in the three GCC States.<sup>561</sup> Governments of these states are well aware that their future well-being and survival cannot be achieved with such labor balances.<sup>562</sup>

Private firms in the GCC have found reliance on cheap foreign low-skilled labor to rather provide domestic goods and services, often through contracting with governments, instead of creating more complex export industries that contribute to the economy as a safer and less risky bet.<sup>563</sup> This means that private firms are less inclined and incentivized to engage in more risk-

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<sup>556</sup> *Id.* at 181; Gray, *supra* note 352, at 15, 32–33.

<sup>557</sup> ALTHABET WAL MUTAHAWEL 2014, *supra* note 499, at 181.

<sup>558</sup> Foreign direct investment continues to rise in Dubai. *Dubai says Foreign Direct Investment Increased 41 Percent in 2018*, REUTERS (Apr. 7, 2019), <https://www.reuters.com/article/emirates-dubai-fdi-idUSD5N21601G>.

<sup>559</sup> ALTHABET WAL MUTAHAWEL 2014, *supra* note 499, at 186.

<sup>560</sup> Steffen Hertog, *Arab Gulf States: An Assessment of Nationalisation Policies* 4 (Gulf Labor Markets and Migration, Research Paper No. 1/2014).

<sup>561</sup> These figures include Kuwaiti, Saudi, and Emirati nationals only. *Id.* at 4.

<sup>562</sup> *Id.* at 7.

<sup>563</sup> Callen et al., *supra* note 551, at 23–24.

prone entrepreneurial activities and as a result attract more skilled private labor geared towards contributing to private industries.

Dubai private firms continue to see rapid rise in especially the tourism and wholesale and retail industries. Recent decreases though were witnessed in construction firms, which saw a decrease in comparison with the previous two-year period.<sup>564</sup> This thematical increase aligns with the arrival of global event EXPO in 2020.<sup>565</sup> The foreign direct investment account of business activity in Dubai is significant and continues to grow.<sup>566</sup> Tech industries and sectors are being nurtured and are of noticeable appeal in terms of the them attracting a majority of the foreign direct investment inflows to Dubai over the last years.<sup>567</sup> For instance, during the period from 2015-2018, about US \$21.7 Billion worth of capital flows into Dubai have resulted in projects that have created more than 54 thousand jobs.<sup>568</sup> This fits into this emirate's strategy to transform into a smart city that attracts high-skilled labor by allowing long-term residencies for foreigners and 100% ownership of businesses.<sup>569</sup>

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<sup>564</sup> Sam Bridge, *Dubai Private Sector Grows at Fastest Rate in Nearly a Year*, ARABIAN BUS. (Apr. 9, 2019, 2:20 PM), <https://www.arabianbusiness.com/politics-economics/417391-dubai-private-sector-grows-at-fastest-rate-in-nearly-year>.

<sup>565</sup> Babu Das Augustine, *Dubai's Private Sector Rebounds in March with Faster Growth in Output*, GULF NEWS (Apr. 9, 2019, 5:04 PM), <https://gulfnnews.com/business/banking/dubais-private-sector-rebounds-in-march-with-faster-growth-in-output-1.63216352>.

<sup>566</sup> *FDI increased 41%*, *supra* note 558.

<sup>567</sup> *High Technology Leads FDI Flows into Dubai*, DUBAI FDI (Aug. 9, 2018), <http://www.dubaifdi.gov.ae/English/MediaCenter/Pages/NewsDetails.aspx?ItemId=63>.

<sup>568</sup> *Id.*

<sup>569</sup> *Id.*

Figure 13: Images of Planned Construction for EXPO 2020 Dubai



Source: THE NAT'L, <https://www.thenational.ae/uae/dubai-expo-2020-all-you-need-to-know-1.617933#6>.

Dubai's private sector activity appears to be strategically focused and has already been targeting the creation of sectors of interest like the tech industry. This is an advantage in comparison with other GCC States still embarking on instigating larger business activities yet may struggle with comparatively benefiting from certain sectors over the other in response to a slower approach of shying away from oil dependence. Infrastructure projects should provide an opportunity for empowering sectors over the medium to long term but must be carefully assessed. While Saudi Arabia may have witnessed stronger foreign direct investment inflows, Kuwait seems to have lagged, and both countries in all cases have not yet seen strong industries created to attract such investments away from the oil sector especially when compared with Dubai.<sup>570</sup>

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<sup>570</sup> Courtney Fingar, *Kuwait Economy Needs Foreign Investment to Diversify*, FIN. TIMES (Sept. 10, 2018), <https://www.ft.com/content/960fc4c8-67fd-11e8-ae1-39f3459514fd>.

The idea of private sector activity in the country moreover leads to recapping on previous discussions on whether bringing in PPPs as a tool may potentially create more jobs for GCC nationals in the private sector.<sup>571</sup> Job creation as a direct outcome of PPP projects is not an easy conclusion to draw.<sup>572</sup> In a World Bank study on infrastructure investment and job creation in the MENA region, the study empirically concludes that there are short-term effects in terms of job creation that can induce more long-term growth to follow that is more stark in non-oil exporting MENA countries in comparison to oil exporters, because of the evident lack of infrastructure in the first category.<sup>573</sup> Yet this study makes an important point, “not all jobs are equal”, and the job market should be tailored to the infrastructure needs that meet the available skillset in these countries. So, where low-skill human resources exist, sectors like the construction industry may generate more efficient results in the job market.<sup>574</sup> The same can be said about information and communication technology (ICT) sectors that reflect high skilled national cadres, or even focus on creating such skills to meet future demands of certain infrastructure sectors, i.e. diversification away from oil dependent revenues. This does not come without mentioning the labor market composition in the GCC, which is also ultimately comprised of up to two-thirds of

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<sup>571</sup> See discussion *supra* Ch. II of this study.

<sup>572</sup> Throughout the literature review on resources cited in Chapter II of this study, the references rarely make conclusions or address the aspect of job creation as a direct result of PPPs. It is easier to claim a political agenda based on the promise that PPPs create or stimulate job creation in the economy but difficult to scientifically prove, examples of such are Florida Governor Rick Scott in 2013 promising such aspirations while signing a House bill in this regard and Egyptian PPP Unit official within the Ministry of Finance claiming that this is a core component of the Egyptian experience with PPPs in a presentation prepared in 2013. See *Florida Public-Private Partnerships Praised for Job Creation*, NAT'L COUNCIL FOR PUB.-PRIVATE PARTNERSHIPS (Aug. 21, 2013), <http://www.ncppp.org/florida-public-private-partnerships-praised-for-job-creation/>; Atter Ezzat Hannoura, Public Private Partnership: PPP and the Egyptian Experience, <http://www.mcit.gov.eg/Upcont/Documents/20134151031MoF-%2011%20Apr%202013.pdf> (last visited Sept. 2, 2017).

<sup>573</sup> ANTONIO ESTACHE, ELENA IANCHOVICHINA, ROBERT BACON & ILHEM SALAMON, *INFRASTRUCTURE AND EMPLOYMENT CREATION IN THE MIDDLE EAST AND NORTH AFRICA* 69 (2013). This is a follow up to a previous study: ELENA IANCHOVICHINA ET AL., *JOB CREATION THROUGH INFRASTRUCTURE INVESTMENT IN THE MIDDLE EAST AND NORTH AFRICA* (2012).

<sup>574</sup> *Id.* at 69.

an expat labor force of predominantly low-skilled workers that mostly work in the private sector.<sup>575</sup> Yet, Dubai as pointed out embodies a more balanced composition of higher and lower-skilled labor force and business activity has gotten more comfortable with anticipating the attraction of more of the high skilled labor.<sup>576</sup>

### GCC SMEs

In terms of small and medium enterprises (SMEs), these countries have emphasized that their inclusion in the states' GDPs is now critical and has always been necessary.<sup>577</sup> The previously mentioned GCC Development Strategy, after stating the benefits of establishing large-scale economy GCC projects, “principal ingredients of development”, emphasizes, “5. Establishing small-size projects based on appropriate foundations, which will fulfill the objectives of integration between the large–scales projects and reinforces the local economic network within each GCC state and between them.”<sup>578</sup>

Kuwait, for instance, adopts a policy that empowers the private sector and endorses its leading role in different infrastructure projects but marginally includes SMEs. SME growth and enablement are a crucial element of sustainable development, which is nurturing the role of SMEs in order to induce economic growth in different states. SME activity could generally

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<sup>575</sup> Hertog, *supra* note 560, at 4.

<sup>576</sup> *High Technology Leads*, *supra* note 567.

<sup>577</sup> See generally DE SOTO, *supra* note 163 (explaining the critical role of formalizing property rights through registration systems, which also applies to other economic activity and ultimately misleads GDP figures because of the informal market).

<sup>578</sup> This GCC Development Strategy addresses the means to achieving this aim through: “5. 1. Adopting appropriate mechanisms for financing. For example, instituting joint funds for financing the private institutions in the GCC states; 5.2. Imparting training to the GGC youth on entrepreneurship; 5. 3. Reliance on local production inputs in the small-size enterprises; 5. 4. Extending the bridges of cooperation with developed and friendly countries in order to benefit from their experience in managing such enterprises especially in terms of choosing production methods and devising appropriate marketing strategies.” GCC Development Strategy, *supra* note 420, at 22–23.

account for about 40% or 50% of the country's GDP within private sector activity, whereas in Kuwait, they surprisingly only account for 3% of its GDP in current condition.<sup>579</sup> This does not reflect reality where these SMEs actually comprise most of the Kuwait's retail and non-financial services.<sup>580</sup> Saudi Arabian SMEs seem to already have a bigger role in the economy where they attract 62% of employment, Saudi nationals and non-nationals considered in this percentage, and the country attempts to provide financing opportunities for these entities and other support services including familiarity with procurement systems.<sup>581</sup> Yet, the Saudi Government also acknowledges that SMEs' contribution to the countries' GDP is still low and that an estimated 30% operate in the informal sector.<sup>582</sup>

The SDGs for instance emphasize in Goal 9 on building resilient infrastructure, promoting sustainable industrialization and fostering innovation that "Small and medium-sized enterprises that engage in industrial processing and manufacturing are the most critical for the early stages of industrialization and are typically the largest job creators. They make up over 90 per cent of business worldwide and account for between 50-60 per cent of employment."<sup>583</sup>

When referring to policies in place that cultivate the countries' SMEs to contribute to tomorrow's infrastructure projects locally, regionally, and perhaps globally, certain provisions should be anticipated to ensure their progression. Kuwait has already taken initiatives to stimulate the growth of local SMEs through access to finance and by assisting them in overcoming red-tape obstacles. The Government of Kuwait has established the National Fund for Small and Medium Enterprise Development in 2013. One of the Fund's main services offered to

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<sup>579</sup> See *Building Kuwait's Future*, *supra* note 26.

<sup>580</sup> *Id.*

<sup>581</sup> GLOBAL COMPETITIVE FORUM, COMPETITIVE GOVERNMENTS: SMEs IN KSA 1-3 (2015).

<sup>582</sup> *Id.* at 4.

<sup>583</sup> See SUSTAINABLE DEVELOPMENT GOALS, *supra* note 66.



SMEs is to ensure the facilitation of market linkage through “working closely with the Central Tendering Committee (CTC) to ensure integration of its SME portfolio into the government procurement process.”<sup>584</sup> Dubai also has a “SME Vision 2021” that lies on 3 main goals, 1) increase entrepreneurial activity in the economy, 2) enhance the competitiveness of Dubai’s SMEs through innovation, productivity, and quality, and 3) integrate SMEs with high-growth opportunities in Dubai.<sup>585</sup>

The price to implement PPP infrastructure projects are often high compared to the capacity SMEs can bare, nevertheless their inclusion in supply chains and local content requirements in such contracts may be useful to these GCC States. Regulatory frameworks that are in place in the Gulf must thus understand the potential SMEs may bring to the table in PPP projects without compromising the efficiencies the private partner may offer by retaining the flexibility to choose its preferred contractors that may best implement the different project components. Strengthening SMEs is as a result perhaps amongst the most genuine starting point to significantly enable domestic private firms to properly grow and compete over time.

### Domestic Regulatory Frameworks and Enabling the Private Sector Through PPPs

GCC Regulatory Frameworks from Property Rights and Contract Enforcement to PPP Specific Contexts: Identifying Holistic Regulatory Approaches to Enable the Private Sector

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<sup>584</sup> See *Services*, *supra* note 26.

<sup>585</sup> *The Fund*, DUBAI SME, <https://www.thefund.ae/en/aboutus> (last visited Dec. 4, 2019). Additionally, in the U.A.E., there is the Khalifa Fund for Enterprise Development that provides funding, capacity building, counseling, and other services to Emirati SMEs, with a total capital of AED 2 Billion (\$545 Million). *Khalifa Fund for Enterprise Development: About Us*, KHALIFA FUND, <https://www.khalifafund.ae/SitePages/Home.aspx> (last visited Aug. 21, 2017).

Governance in relation to state governments is an often-used broad term that refers to the way aspects of a society are organized by the state to serve the public interest.<sup>586</sup> UN Economic Commission for Europe in the Guidebook on Promoting Good Governance in Public-Private Partnerships simply refers to governance as, “the processes in government actions and how things are done, not just what is done.”<sup>587</sup> The term may cover many elements that would fall under rules as constraints to government and private sector activity when discussing the context of this study and institutional arrangements to put these rules in place.<sup>588</sup> The first component pertaining to rules themselves are discussed in this study as the regulatory framework that governs PPPs and private sector engagement in infrastructure projects.

One fundamental (mis)conception must be spelled out before moving on to detailed discussions about regulatory frameworks governing PPPs in the Gulf. The use of terminology that includes terms like deregulation in contrast with regulation is perhaps a much-contested ground and serves little to allure accuracy in describing state’s legal approaches when it comes to governing their economies.<sup>589</sup> When putting GCC development plans in play through strengthening private participation in the economy, it does not follow that upholding market values through liberalization implicitly means minimal space for regulation.

Even in today’s largest proponents of economic liberalization and so-called deregulation, the US and UK, things are rather murky. While champions of Reagan-era economic reforms in the US sought to classify these policy approaches as deregulations of many different sectors

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<sup>586</sup> Chris Skelcher, *Governing Partnerships*, in INTERNATIONAL HANDBOOK ON PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 72, at 292.

<sup>587</sup> U.N. ECON. COMM’N FOR EUROPE, GUIDEBOOK ON PROMOTING GOOD GOVERNANCE IN PUBLIC-PRIVATE PARTNERSHIPS, at 13, U.N. Doc ECE/CECI/4, U.N. Sales No. 08.II.E.1 (2008).

<sup>588</sup> Skelcher, *supra* note 586, at 292–93.

<sup>589</sup> IAN AYRES & JOHN BRAITHWATE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 7 (1992).

including energy and financial sectors, empirical evidence equally classified President Carter's supposedly left-wing policy as entailing more of what may be deemed deregulation of sectors more than Reagan ever did.<sup>590</sup> The problem is with the perception about the absence of government in organizing economic activity within the state, which is not precise. Even UK's Thatcher proliferation of privatizations did not mean less regulation in sectors they targeted like telecommunication. To the contrary, such privatizations led to even more regulation in these sectors with the establishment of regulatory authorities to help monitor the enforcement of rules such that ensure a competitive market.<sup>591</sup>

The more informative approach is as some characterized it, is to acknowledge regulatory approaches as necessarily heterogenous, in which they vary in terms of government intervention depending on the economic activity subject to regulation.<sup>592</sup> This must be understood in the context of Gulf States' endeavor in private participation policies in infrastructure moving forward. Regulation, in its more specific undertones, remains crucial to shaping public-private interactions for the greater public benefit.

Definite empirical correlations between the presence of enabling regulatory frameworks and the attraction of private investments in infrastructure projects are not abundant.<sup>593</sup> And the focus on protecting certain elements that matter to private sector investors more than others is an arduous exercise. Michael Trebilcock asserts that prerequisites of a flourishing private sector

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<sup>590</sup> *Id.* at 7–11.

<sup>591</sup> *Id.* at 11.

<sup>592</sup> *Id.* at 7.

<sup>593</sup> Sheoli Pargal, *Regulation and Private Sector Investment in Infrastructure: Evidence from Latin America* 18–19 (World Bank Policy Research, Working Paper No. 3037, 2003). *But see* DOUGLAS GUSTAFSON ET AL., *DEVELOPING THE PRIVATE SECTOR: A CHALLENGE FOR THE WORLD BANK GROUP* 11 (1989) (asserting that a scheme of regulatory reforms to govern private sector activity starting from its core, property rights, and other business regulations concerning land tenure, commercial liability, and bankruptcy, among others, are key and in par with any macroeconomic reform and serves both domestic and foreign investors alike).

does not come down to narrowly protecting property rights and enforcing contracts.<sup>594</sup> In his perspective, rightly so, it goes beyond such elements. He cites the World Bank Doing Business Report and how it has expanded such components that matter to the private sector, which include, starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority shareholders, paying taxes, trading across borders, enforcing contracts, and resolving insolvency, in addition to labor market regulations and selling to governments in the form of procurement.<sup>595</sup> Yet, regulatory predictability on the side of the private sector remains decisively desirable, and such regulatory approaches can take many shapes and forms. These approaches consequently produce differing results in terms of efficiency and flexibility, as explained broadly in Chapter II of this study.

#### An Efficiently Responsive Legislative Process: A Probable or Problematic Case in the GCC

Briefly understanding the legislative process in the GCC is critical to comprehending the flexibility and malleability preserved for state organs and PPP contract parties to adapt to private sector participation from PPP projects to more expansive state business activity thereafter. Slow legislative processes may obstruct projects and burden a private sector furthermore creating a sort of red tape environment.<sup>596</sup> Constitutional legislative structures do differ to a certain degree amongst GCC States. These divergences reflect variances in flexibility, speed, and diligence in some of the states more than others.

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<sup>594</sup> TREBILCOCK & PRADO, *supra* note 280, at 77.

<sup>595</sup> *Id.* at 77. *Methodology*, WORLD BANK DOING BUS., <http://www.doingbusiness.org/methodology> (last visited Sept. 3, 2017).

<sup>596</sup> Red tape is a term that refers to excessive bureaucracy or adherence to rules and formalities. It includes, “excessive or meaningless paperwork, a high degree of formalization and constraint, unnecessary rules, procedures, and regulations, inefficiency, and unjustifiable delays.” Barry Bozeman, *A Theory of Government “Red Tape”*, 3 J. PUB. ADMIN. RES. & THEORY 273, 274–75 (1993).

In Kuwait, the legislative power is vested in the Amir, the ruler, and the National Assembly, the parliament.<sup>597</sup> No law may be promulgated unless passed by the National Assembly and ratified by the Amir.<sup>598</sup> The Amir exercises his authority through the Cabinet<sup>599</sup> and has the right to initiate, sanction, and promulgate laws according to Article 65 of the Kuwaiti Constitution, and may further reference a bill for reconsideration back to the National Assembly, i.e. veto the bill, in which case may only be overcome by a majority of two thirds of the total votes of parliament.<sup>600</sup>

Now, Article 71 of this Constitution is by far the most controversial, chiefly in recent times. This provision allows the Amir, “should necessity arise for urgent measures to be taken while the National Assembly is not in session or is dissolved, the Amir may issue decrees in respect thereof which have the force of law, provided that they are not contrary to the Constitution or to the appropriations included in the budget law.” The authority granted by this provision has namely been what the Amir has utilized to issue such “laws” within a decade’s period of political instability and the dissolution of parliament seven times in such time frame.<sup>601</sup> One justification for dissolving and afterwards issuing such laws on the part of the Amir were obstruction of the National Assembly to progressive policies and lack of collaboration. A very questionable authority, certainly when used extensively, but it was advocated as triumphing efficiency and speed in issuing critical laws for the country’s development at a point where parliament failed to undertake its legislative task with such quality.

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<sup>597</sup> KUWAIT CONSTITUTION, art. 51.

<sup>598</sup> *Id.* art. 79.

<sup>599</sup> *Id.* art. 55.

<sup>600</sup> KUWAITI CONSTITUTION, arts. 65, 66.

<sup>601</sup> *See Kuwait Parliament Dissolved*, *supra* note 497; Freer, *supra* note 497.

Additionally, the regulatory hierarchy furthermore includes the more executive nature taking place through the Amir as the Executive issuing by decree, “regulations for public order and health, and regulations necessary for the organization of public services and administration, not conflicting with any law.” The term “laws” are used as a supreme legislative instrument in relation with decrees, regulations, and resolutions, regularly. In that context, the Executive Branch under the Amir, which is the Council of Ministers, has control over the different departments of the State. It formulates the general policy of the Government, pursues its execution, and supervises the conduct of work in Government departments,<sup>602</sup> and in accordance with Article 130 of the Constitution, Ministers shall supervise their departments and issue directives or resolutions and monitor their implementation.

In Saudi Arabia, a country where for the last half century has been governed by a pact between the ruling family and religious leaders, *Ulama*, has only formally scripted what may be deemed its constitution in 1992, by means of royal decree, and in it, structured its state organs and afforded them specific functions.<sup>603</sup> With this Constitution, the King’s supreme and broad powers have not been restricted, rather documented, and so he retains both legislative and executive powers, and the idea of the separation of power become somewhat questionable.<sup>604</sup> Article 44 of the Saudi Basic Ordinance of Governance provides, “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.”<sup>605</sup>

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<sup>602</sup> KUWAIT CONSTITUTION, art. 123.

<sup>603</sup> Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT’L & COMP. L. Q. 295, 295, 304 (1993). See also discussion *supra* Chapter II of this study about components of the Saudi Constitution.

<sup>604</sup> Aba-Namay, *supra* note 603, at 304–05.

<sup>605</sup> SAUDI BASIC ORDINANCE OF GOVERNANCE, art. 44.

The Council of Ministers under the order of the King remains the functional legislature and executive even with the presence of the established Consultative Council, *Majlis Al-Shura*, that mainly advises the King on legislative matters.<sup>606</sup> A background to understand such legislative situation, or *tashria*, is the notion associated with Islam that only God is the supreme legislature and for mankind to rather interpret God's will and consequently "ordain" but ultimately never contradict *Sharia*.<sup>607</sup> Hence, legislation would be referred to as *Nitham*, in the form of ordinance or regulation.<sup>608</sup> And this also explains the meaning behind using "consultative" instead of "legislative" for the established consultative council that does assume minimal legislative input.<sup>609</sup> This broad legislative authority may be problematic in instances when knowing the nature of what is to be called law in Saudi Arabia. In the *Saudi Arabia v. Arabian American Oil Company (ARAMCO)* case (ARAMCO Case), the Arbitral Tribunal did not accept the Saudi Government claim that both Onassis and Aramco Oil Concession Agreements in 1933 and 1954 were considered Saudi law by mere fact that the King and his delegates issued a royal decree and ratified the two instruments as they, "have the character of ordinary and regular concessions under Saudi Arabian law, in which concessions, unknown to religious law, must always be approved by a Royal Decree."<sup>610</sup> The Tribunal though discussed the potential of such concessions acquiring the status of special laws, *sui generis*, but certainly not a general law that regulates maritime transport of oil and its derivatives, as the Government

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<sup>606</sup> Aba-Namay, *supra* note 603, at 308.

<sup>607</sup> *Id.* at 309–10.

<sup>608</sup> *Id.* at 310.

<sup>609</sup> *Id.*

<sup>610</sup> *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, 27 I.L.R. 117, 203 (1963).

claims.<sup>611</sup> The Tribunal consequently concluded that the two agreements are of a contractual nature, a *sui generis* one that is.<sup>612</sup>

The federal system of the UAE as previously explained, makes the legislative process more complex.<sup>613</sup> While the Federal Government is comprised of its legislative, National Council, and executive, Executive Council, all of which are under the Higher Federal Council, headed by the President of the UAE, and the existence of a federal judiciary, the federal government retains expansive legislative authorities as per Articles 120 and 121 of the UAE Constitution.<sup>614</sup> Each Emirate shall thus have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Union in accordance with Articles 120 and 121.<sup>615</sup> In the Emirate of Dubai, the Ruler of the Emirate is the supreme authority and the Dubai Executive Council shall approve draft laws and decrees, including those proposed by Dubai's different departments and committees before submission to the Ruler who shall ultimately issue laws, according to Law No. 3 of 2003 establishing such Council.<sup>616</sup> The Council may moreover establish government entities in the emirate and monitor the progress of their work amongst other core competencies.<sup>617</sup> Consequentially, the legislative process in Dubai lies in the hand of its Ruler and his Executive Council within federal restrictions.

UAE federal restraints nonetheless may also be viewed conversely in Dubai as a positive role of the Federal Government to include Dubai in its infrastructure spending. The Federal Government has a constitutional legislative and executive role in public loans, construction and

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<sup>611</sup> *Id.* at 203.

<sup>612</sup> *Id.* at 204.

<sup>613</sup> See Chapter II of this study.

<sup>614</sup> See U.A.E. CONSTITUTION arts. 120, 121.

<sup>615</sup> *Id.* art. 122.

<sup>616</sup> *The Executive Council*, GOVERNMENT OF DUBAI, <http://tec.gov.ae/ar/executive-council/the-executive-council/> (last visited May 12, 2017).

<sup>617</sup> *Id.*



maintenance of federal roads, air traffic, education, electricity, and health offered to the Emirate of Dubai and other Emirates of the Federation.<sup>618</sup> This is critical when understanding the fact that Federal Government of the UAE is still relevant when assessing PPPs in Dubai. Moreover, one practical matter to consider is that the Ruler of Dubai himself, HH Mohammed bin Rashid Al Maktoum, is currently also the Vice President and Prime Minister of the Federal Government of the UAE.<sup>619</sup> This could indicate the dual role this leader may envision towards both his specific Emirate, Dubai, and the whole Federation as well, which is rather unique.

While there seems to be variance amongst these GCC States in terms of exclusive powers *vis-a-vis* systems in place with clear checks and balances, Kuwait leaning more towards the latter and Saudi Arabia and perhaps Dubai to a lesser degree towards the former, it could be broken down to this: a speedy legislative system when the executive holds both legislative and executive authorities and enacts what it shall implement, plus flexibly interacting with the private sector in the meantime, or slower procedures in the name of safeguards. A populist struggle emerges from such situation when depending on a sole authority to have the peoples' best legislative interest in projects that essentially serve the public's interest with minimal role for their elected officials but a victory for a new political partner, the private sector.

#### Core Private Sector Rights Start from Property Rights and Contract Enforcement

Although PPP specific regulatory provisions are building blocks for the enablement of the private sector in GCC societies, core rights remain crucial to complete what innovation *sui*

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<sup>618</sup> U.A.E. CONSTITUTION art. 120.

<sup>619</sup> See *The Cabinet*, UNITED ARAB EMIRATES, <https://uaecabinet.ae/en/details/cabinet-members/his-highness-sheikh-mohammed-bin-rashid-al-maktoum> (last visited Nov. 30, 2019); HIS HIGHNESS SHEIKH MOHAMMED BIN RASHID AL MAKTOUM, <https://sheikhmohammed.ae/en-us/> (last visited Nov. 30, 2019).

*generis* PPP rules personify. Henceforth, constitutions of all three GCC States acknowledge private property; yet see a social function that this right should serve. The Constitution of Kuwait in Article 16 provides, “Property, capital and work are fundamental constituents of the social structure of the State and of the national wealth. They are all individual rights with a social function as regulated by law.” Article 17 of the same Constitution provides, “Public property is inviolable and its protection is the duty of every citizen.” And Article 18 provides, “Private property is inviolable. No one shall be prevented from disposing of his property except within the limits of law...” Ultimately, the Kuwaiti Constitution sets its economic identity as, “The national economy shall be based on social justice. It is founded on fair co-operation between public and private activities. Its aim shall be economic development, increase of productivity, improvement of the standard of living, and achievement of prosperity for citizens, all within the limits of law.”<sup>620</sup>

Article 17 of the Saudi Basic Ordinance of Governance identifies the significance of property rights where, “capital, and labor are essential elements in the Kingdom's economic and social being. They are personal rights, which perform a social function in accordance with Islamic Shari'ah;” and are equally protected and may not be stripped unless for the public interest and with fair compensation in return.<sup>621</sup> The Islamic Sharia basis of this right in the Saudi Constitution sees its implementation influenced by the teachings of Islamic scholar Ibn Taimiya from one of the Islamic *fiqh* schools of thought, the Hanbali School, in which there is clear

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<sup>620</sup> KUWAIT CONSTITUTION, art. 20.

<sup>621</sup> SAUDI BASIC ORDINANCE OF GOVERNANCE, art. 18 (“The state protects freedom of private property and its sanctity. No one is to be stripped of his property except when it serves the public interest, in which case fair compensation is due.”).

assertion that property rights are irrevocable and they are one of the “incontestable facts of social and economic life”, and thus should not be expropriated.<sup>622</sup>

The UAE embodies identical provisions where, “Private property shall be protected. Conditions relating thereto shall be prescribed by law. No person shall be deprived of his personal property except in circumstances dictated by the public interest in accordance with the provisions of the law, and on payment of fair compensation.”<sup>623</sup> And “Public property shall be inviolable. The protection of public property shall be a duty upon every citizen...”<sup>624</sup> The economic structure of the Union shall include, “The basis of the national economy shall be social justice. The support of the national economy shall be sincere co-operation between public and private activity. The aim of the national economy shall be the achievement of economic expansion, increased production, the raising of standards of living and the achievement of prosperity for citizens within the limits of the Law...”<sup>625</sup>

All these fundamental principles scripted in the Gulf States’ Constitutions exemplify the nature of their economic systems leaning towards the preservation of a social role where the state guarantees the right to private property, yet a social responsibility supersedes. These States explicitly stress their roles towards intervening in the economy to ensure welfare and the public interest is conserved. This, being a primary role of the state, not the private sector.

A relevant point to mention in correlation with property rights is foreign ownership. While nationals of these states certainly acquire the right to ownership within their own countries, GCC agreements allow nationals of each GCC State 100% ownership in its

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<sup>622</sup> Saba Habachy, *Property, Right, and Contract in Muslim Law*, 62 COLUM. L. REV. 450, 454 (1962).

<sup>623</sup> U.A.E. CONSTITUTION, art. 21.

<sup>624</sup> *Id.* art. 22.

<sup>625</sup> *Id.* art. 24.

neighboring Gulf States and free movement of capital.<sup>626</sup> When it comes to other non-GCC foreign nationals, ownership policies differed to a recent point but have all evolved to a very investment friendly environment. With regards to particularly ownership of corporations and their capital to function in GCC States, Law No. 116 of 2013 Regarding the Promotion of Foreign Direct Investment in the State of Kuwait (Kuwaiti Investment Law) and its Executive Regulation allow 100% ownership of companies and their capital permitted to engage in economic activity in Kuwait by foreigners and for such entities to acquire the necessary land for the execution of their projects.<sup>627</sup> Foreign ownership is similarly permitted by the same means in Saudi Arabia,<sup>628</sup> while in Dubai, recently issued Federal Foreign Direct Investment Law acknowledges ownership up to 100% shall be permitted and further regulated by resolutions.<sup>629</sup> Nonetheless, these countries impose restrictions on fully foreign owned corporations in terms of sectors they may operate in, one of which is petroleum, which complements a previous point stressed in this study about the sensitivity of natural resources.<sup>630</sup>

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<sup>626</sup> GCC Economic Agreement 2001, *supra* note 536, art. 8 (“The Member States shall agree on executive principles to ensure that each Member State shall grant the citizens of all other Member States the same treatment as is granted to its own citizens without any discrimination of differentiation in the following fields: 1. Freedom of movement, work and residence; 2. Right of ownership, inheritance and bequest; 3. Freedom of exercising economic activity; 4. Free movement of capital. The Member States shall encourage their respective private sectors to establish joint ventures in order to link their citizen's economic interests in various spheres of activity.”).

<sup>627</sup> Law No. 116 of 2013, arts. 11, 12, 27, Regarding the Promotion of Foreign Direct Investment in the State of Kuwait [hereinafter Kuwait Investment Law]; Executive Regulations Implementing Law No. 116 of 2013, Regarding the Promotion of Foreign Direct Investment in the State of Kuwait, art. 8 (Kuwait) [hereinafter Kuwait Investment Executive Regulations]. Article 34(2) of the Kuwait PPP Law embodies a similar provision and exempts foreign corporations from any nationality requirements that has been required according to the previous Commercial Code of Kuwait. Moreover, according to the Kuwaiti KDIPA Third Annual Report 2017/2018 all eight applications submitted by applicants in corporate entities with 100% foreign ownership to engage in business activities in Kuwait have all been granted such licenses to function in the country. KDIPA, THIRD ANNUAL REPORT FOR 2017/2018, at 32 (2018).

<sup>628</sup> Saudi Foreign Investment Law, arts. 1, 5.

<sup>629</sup> Federal Law No. 19 of 2018, art. 7(5), Regarding Foreign Direct Investment (U.A.E.) [hereinafter U.A.E. Foreign Direct Investment Law].

<sup>630</sup> *Id.* art. 7(5) (“The following Negative List, in which the sectors and activities are subject to the laws regulating them in the State, shall be excluded from the provisions of paragraph 1 of this Article: A. Exploration and production of petroleum materials; B. Investigations, security, military sectors, manufacturing of arms, explosives and military equipment, devices and clothing; C. Banking and financing activities, payment systems and dealing

The regulatory frameworks of all three GCC States also emphasize the sanctity of contracts, *pacta sunt servanda*, and their enforcement,<sup>631</sup> they may not be defaulted or unilaterally amended except otherwise provided in such contracts or by law.<sup>632</sup> Saudi Arabian Islamic Sharia principles are to be applied, and they are not indifferent to principles of *pacta sunt servanda*. In the ARAMCO case, the Arbitral Tribunal concluded, ““ In the Hanbali school of Islamic law, respect for previously acquired private rights, and especially for contractual rights, is a principle just as fundamental as it is in the other legal Systems of civilized States.”<sup>633</sup> It followed, “This follows from the fact that valid contracts bind both Parties and must be performed, for rights resulting from agreements concluded for due consideration are absolutely secure; when one party has granted certain rights to the other contracting party, it can no longer dispose of the same rights, totally or partially, in favour of another party.”<sup>634</sup>

Civil Codes of these States identify damages in cases of violations of contract provisions and while aforesaid informal enforcement mechanisms are acknowledged, formal institutions are in place to protect such rights. This shall be discoursed later when examining the role of the judiciary.

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with cash; D. Insurance services; E. Hajj (pilgrimage) and Umrah services, providing employment and recruitment services for staff and servants; F. Water and electricity services; G. Services related to fisheries; H. Postal services, telecommunications services and audio and video services; I. Land and air transport services; J. Printing and publishing services; K. Commercial agents’ services; L. Medical retail such as private pharmacies; M. Blood banks, venom and quarantine centres; The Council of Ministers may, by resolution it issues, add to or remove from the Negative List, specified in this paragraph, any sectors or activities.”). *See also* Council of Ministers Resolution No. 75 of 2015, Regarding the List of Excluded Direct Investments from the Provisions of Law No. 116 of 2013, Regarding the Promotion of Direct Investment in the State of Kuwait (Kuwait); General Investment Authority Services Manual: Appendix (2) Foreign Investments Negative List, Dec. 2017 (Kuwait).

<sup>631</sup> Law No. 67 of 1980, art. 196, Issuing the Civil Code (Kuwait) [hereinafter Kuwait Civil Code]. Also, similar provisions are found in Chapter II on the application of Islamic *fiqh* principles to contracts in Federal Law No. 5 of 1985, Issuing the Code of Civil Transactions (U.A.E.) [hereinafter U.A.E. Civil Transactions Code] and the same Islamic *fiqh* principles are upheld in Saudi Arabia with Islamic *fiqh* principles applied that read “*Almuslimoon inda shorootihim*” (Muslims are bound by their stipulations). Habachy, *supra* note 622, at 459.

<sup>632</sup> Kuwait Civil Code, art. 196. *See also* Habachy, *supra* note 622, at 459.

<sup>633</sup> *ARAMCO Case*, 27 I.L.R. at 205.

<sup>634</sup> *Id.* at 206.

## Sui Generis PPP Regulations

Firstly, and once again, *sui generis* PPP regulations are to be supplemented with other legal provisions and institutions capable of enforcement, a whole topic of discussion over the next chapter. However, acknowledging the existence of tailored rules for the private sector to engage in infrastructure projects through PPPs is crucial. This would allow for better apprehension of how efficient such established regulatory models are and their amplex in connection with private sector legitimate expectations. This is especially relevant considering that GCC development visions' invitees include foreign private investors that are less engrained in pre-existing legal cultures. This in what Max Weber, and Fredrick Hayek would join, views legal rules in their instrumental formal meaning as creating a predictable business environment for interactions to flourish in which Hayek further focuses on the extent to which government action is also limited by such rules.<sup>635</sup>

While PPPs have varied in their existence from one country to another, PPP global practice is really still in its infant years. Ongoing specific regulations are building on such practice and experience. To particularly push for sole statutes embodying all special PPP rules are neither a consensus nor has this proven to generate more positive results in terms of efficiency gains while preparing, procuring, and implementing PPP projects.<sup>636</sup> Specific PPP statutes embody terms that are perhaps new to what GCC States have known government contracts with private entities to legally entail. Judicial jurisprudence would reflect the existing local legal approach established for such government contracts.<sup>637</sup>

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<sup>635</sup> Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 143, at 260–65.

<sup>636</sup> See discussion *supra* Chapter II on PPPs "Legal Scope."

<sup>637</sup> This is displayed later in this study in more detail when discussing the role of the judiciary.

What may be clear with specific more globally uniform rules is that in states where institutional performance might not be standardized and more discretion could lead to negative consequences, tailored rules could be more impactful than they sound. Following Joseph Raz's annotation on legal rules, these rules should ultimately be generally clear in their authorization of government actions, and people should be able to plan their interactions according to these rules.<sup>638</sup> In the context of PPPs, relevant government entities should know what particular actions are required of them according to such specific regulations, and private parties should be capable of structuring their engagement with the public partner and other stakeholders, like lenders, following the legal framework. Moreover, in terms of their unique nature, PPPs themselves demand more tailored and advanced approaches including preparation of such long-lasting projects and the more iterative manner in which they are tendered in comparison with traditional government contracts.

Furthermore, and as pointed out previously in this study, the PPP contract offers a rather distinct opportunity for private sector participation in legislative functions within the GCC States. With extensive rules expected to be embodied in PPP agreements that bind both public and private parties to the PPP project, these contracts are what essentially regulate the three-decade relationship. And where these projects fundamentally impact users, as they serve the public interest, the private sector participates in governing how a certain sector provides its services to the public in a state. The power of private sector participation in GCC economies from the forefront of negotiating service outcomes must as a result not be undermined. The tug of war, i.e. bargaining dynamics, of PPP contractual provisions depending on the sector like health, housing, or water, may be broken down to attempting to balance private gains and returns

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<sup>638</sup> Santos, *supra* note 635, at 259–60.

on investment on the one side and juggling welfare provision in capped healthcare fees, road tariffs and tolls, and energy subsidies. The ability of relevant public entities to be skilled semi-legislatures in contract drafting will impact outcomes of such PPP projects on their users. While private participation in contract provisions is present, accountability and responsibility to public users is ultimately a responsibility of the government.

Conceivably, the most developed PPP rules amongst the three GCC States exist in Kuwait. This State has issued a PPP Law and its Executive Regulation (Kuwait PPP Executive Regulation), which has already replaced a 2008 Law regulating PPP projects.<sup>639</sup> The PPP Law stresses for PPP projects that provide “a public service of economic, social or service importance, or to improve an existing public service or to develop, reduce the costs or increase the efficiency of any such service...”<sup>640</sup> Kuwait has also past Law No. 49 of 2016 regulating the Public Tenders Law, which acknowledges the *sui generis* nature of the rules within the PPP Law and further applies as far as procurement or tendering methods and other relevant procedures such as publication of the procurement notices and contract awarding processes are concerned in as far as the PPP Executive Regulation does not identify special procedures according to Article 8 of the PPP Law.<sup>641</sup> The PPP Law thus reciprocates this approach and identifies the application of the Public Tenders Law as well.<sup>642</sup> Moreover, Kuwait has issued the Kuwait PPP Project

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<sup>639</sup> The previous law was Law No. 7 of 2008 regarding the Regulation of Build, Operate and Transfer (BOT) Operations. The Kuwaiti Partnerships Technical Bureau (now Kuwait Authority for Partnership Projects – KAPP) has also issued *PPP Projects: Project Guidebook*, which has been updated recently to replace the old one based on the 2008 Law. The Guidebook is, “intended to inform and orient public entities and private investors in undertaking PPP Projects.” The new PPP framework in Kuwait is based on: Law No. 116 of 2014, Regarding Public Private Partnerships (Kuwait); Decree No. 78 of 2015, Issuing the Executive Regulations of Law 116 of 2014 regarding Public Private Partnerships (Kuwait) [hereinafter Kuwait PPP Executive Regulation]; KUWAIT AUTHORITY FOR PARTNERSHIP PROJECTS (KAPP), KUWAIT PPP PROJECT GUIDEBOOK (2018) [hereinafter KUWAIT PPP MANUAL], [http://www.kapp.gov.kw/Library/Files/Uploaded%20Files/arabic/KuwaitPPPProjectGuidebook\\_PRINT%20english%20version.pdf](http://www.kapp.gov.kw/Library/Files/Uploaded%20Files/arabic/KuwaitPPPProjectGuidebook_PRINT%20english%20version.pdf).

<sup>640</sup> Kuwait PPP Law, art. 1(1).

<sup>641</sup> See Kuwait Public Tenders Law, arts. 1, 2.

<sup>642</sup> Kuwait PPP Law, arts. 38, 43.



Guidebook 2018 (PPP Manual), which addresses in detail the different elements of a PPP project in the country.<sup>643</sup> This very useful Guidebook helps guide public entities while preparing, tendering, and managing PPP projects.

In the UAE, on the federal level, the government has not yet issued a PPP law, but rather a Federal Cabinet Resolution No. 1/1 of 2017 on the Procedures Manual for Partnership between the Federal Entities and Private Sector (Federal PPP Manual) has been issued and provides in Section 1.2,<sup>644</sup>

The Ministry has prepared this Manual with a vision to inform the stakeholders with the basic concepts and issues related to joint projects in general, and to provide guidance to the Federal Entities that may implement the partnership projects and the private sector's investors in particular. Preparation of this Manual falls under the scope of the State's efforts to motivate the joint projects between the Federal Entities and the Private Sector.

Section 1.5 (c) of this Manual also provides,

In case conflicts arise between the provisions of this Manual, or the implementation of the PPP contract and any other law applicable in the State, the provisions of the Federal Law or the Federal Decree-Law shall prevail. The contraction may be completed only after obtaining a formal exception or removing the conflict.

The Federal Manual creates a supremacy condition especially for future federal laws to be issued in the near future in this regard and thus strongly guides state agencies in the meantime to follow its principles while procuring PPP projects. Nonetheless, Dubai has taken this a step further. The Government of Dubai has issued Law No. (22) of 2015 Regulating Public-Private Partnerships in the Emirate of Dubai (Dubai PPP Law), Article 4 of which provides,

This Law will apply to: 1. Government Entities that are subject to the general budget of the Government. The SFC (Supreme Fiscal Committee) may extend the application of this Law to any Government Entity which is not subject to the general budget of the Government; and

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<sup>643</sup> KUWAIT PPP MANUAL, *supra* note 639.

<sup>644</sup> Federal Cabinet Res. No. 1/1 of 2017, Procedures Manual for Partnership between the Federal Entities and Private Sector (U.A.E.) [hereinafter U.A.E. PPP Manual].

2. Any Project, regardless of its type, form, or activities, which is governed by a Partnership Contract between the Public Sector and the Private Sector in the Emirate concluded by any of the entities mentioned in paragraph (of this Article after the effective date of this Law.; and Guide to Public Private Partnership in Dubai (2016).

The Dubai PPP Law has been supplemented by the Guide to Public Private Partnership in Dubai (2016) (Dubai PPP Guide) prepared by the Dubai Department of Finance in accordance with Article 9(5) of the Dubai PPP Law ordering it to “develop a guide covering rules and regulations to be followed when a government entity wishes to enter into a partnership contract.” In defining justifications to resort to PPPs, the Dubai PPP Guide asserted that private sector expertise and characterization utilization is key.<sup>645</sup> And after identifying the different elements of such private sector desired characteristics,<sup>646</sup> the government stressed its focus more on, “preparing an appropriate legal framework that gives confidence to the private sector concerning conditions of PPP - and achieving services with protecting interests of beneficiaries.”<sup>647</sup> The

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<sup>645</sup> GUIDE TO PUBLIC PRIVATE PARTNERSHIP IN DUBAI (2016) [hereinafter DUBAI PPP GUIDE] at 21–23.

<sup>646</sup> *Id.* at 22–23. (“The private sector participation in providing social and economic services gives local economy an opportunity to utilize additional resources from the private sector to invest the same in infrastructure against each unit available (or rare) from the public sector resources, the participation of which enables making use of the financing and administrative expertise in the private sector and opens the door to new markets and technologies. At the end, PPP aims at reaching optimum utilization of available resources and achieving purposes of the public policy – in a practical and flexible manner – through best possible means and designs making use of the following characteristics: Making use of skills and administrative efficiency in the private sector to render public services, thus, increasing level of services and/or reducing costs thereof; The public private partnership reduces risks incurred by the government to execute projects through redistribution of the same between the public and private sector, particularly as the latter is more able to face risks; It will be able to make use of the private sector capital, thus, improving the public fund in both the short and long run; The private sector can maximize utilization of costs of assets and balance between capital and operating expenses in a manner that cannot be achieved by the public sector; The private sector can make investments using new technical means and it makes use of economies of scale; Surplus stock in infrastructure results in increasing economic growth, which will, lead in turn, to increasing levels of income and creating more job opportunities. Building on the above, PPP allows making use of miscellaneous expertise in both sectors. In addition, other international expertise will be brought to achieve tangible progress in value and quality of rendered services with least costs, enhance quality of services rendered to citizens, ease burden on the public budget (without affecting its ability to intervene to provide services at socially fair prices), to create new job opportunities and to encourage investment and consumption. Thus, growth rates can be increased and foreign investments can be attracted whilst government entities will control the level of rendered services according to the agreed upon standards. However, the government will have a vital role still concerning basic social services (such as education and healthcare).”).

<sup>647</sup> *Id.* at 23.

Guide further highlights the benefits ensued by PPPs to Dubai that include, “7. Business Opportunities: Partnership projects provide more business opportunities to private partners, thus, allowing the private sector to innovate, diversify activities, increase its business fields and gain expertise exceeding the traditional procurement system.”<sup>648</sup> Moreover, such benefits identified were the economic return of growing governmental income that incentivizes the private sector to lead to more job opportunities, where local private corporations become more capable of working with such partnerships and start exporting their expertise.<sup>649</sup> This Law thus supersedes any generalities contained in Law 6 of 1997 regarding Government Contracts in the Emirate of Dubai (Dubai Government Contracts Law) where Dubai Government entities choose to contract with the private sector in supply, public works, and services contracts, in a traditional manner.<sup>650</sup>

Now, in Saudi Arabia, conditions are currently different when it comes to PPP regulations. The country does not have a specific PPP law as of this moment although projects in the form of PPPs have commenced. To illustrate how distinct the Saudi regulatory framework on PPPs is in comparison with its GCC counterparts, let me list the different directly relevant regulations at stake when engaging the private sector in PPP projects in Saudi Arabia. These regulations at the current stage would include, 1) Cabinet Resolution No: (355) of 07/06/1438 Hijri (April 2, 2017) on the Organization of the National Center for Privatization (Saudi NCP Law), which provides in Article 3(2), "For the purpose of application of privatization, the projects related to the participation of private and public sector shall be included in the privatization."; 2) Royal Decree M/58 of 4/9/1427 Hijri (2006) Regulating Government Tenders and Procurement (الحكومية والمنافسات المشتريات نظام) (Saudi Government Procurement Law), which

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<sup>648</sup> *Id.* at 24–25.

<sup>649</sup> *Id.* at 25.

<sup>650</sup> Dubai Government Contracts Law, art. 3.

provides in Article 6 that "all government works and procurements shall be put up for public tender except those exempted under the provisions of this Law."; 3) Minister of Finance Implementing Resolution No. 362 of 2/20/1428 Hijri (2007) to the Government Tenders and Procurement Law (Saudi Implementing Procurement Regulation) issued according to Article 80 of the Government Procurement Law; 4) Royal Decree M/25 of 4/5/1425 Hijri (2004) on Competition Regulation; 5) Royal Decree M/18 of 20/3/1427 Hijri (2006) on the Classification of Contractors Regulation, 6) Resolution No. 510 of 23/11/1426 Hijri (2005) regulating the Saudi Authority for Contractors; and 7) Royal Decree No M/15 Muharram 1421/10 April 2000 on the Foreign Investment Law (Saudi Foreign Investment Law).

The Saudi Government is implementing PPP projects and using the aforementioned regulations and ensures that the PPP model shall be replicated within this present regulatory environment. It emphasizes in its National Transformation Program that multiple projects shall take place as PPPs in different sectors, including providing housing units through PPPs in the form of BOT projects and the previously mentioned pipeline of projects.<sup>651</sup> The means of applying such general provisions to the private sectors' engagement in PPP projects is more of an institutional matter, hence this regulatory description is particularly useful when contrasted with what institutional practice in GCC States reveals later in this study in connection with facilitating the role of the private sector through PPPs. The Saudi Privatization Program Report

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<sup>651</sup> *National Transformation Program, Appendix: Initiatives*, VISION2030 [hereinafter Saudi National Transformation Program: Initiatives], [https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20English%20Public%20Document\\_2810.pdf](https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20English%20Public%20Document_2810.pdf) (last visited Aug. 25, 2017) (Saudi Arabia).

vocalized its understanding of the frustration of potential private sector partners when the previously mentioned general provisions are used for PPPs.<sup>652</sup> The Report provided,

Insufficient general legislative frameworks that enable privatization processes and enhance its governance, vague procedures for obtaining approvals for the privatization process (in most sectors); and vague procedures for the preparation and project processes. This is a major challenge because insufficient preparation and execution of the privatization process will lead to reduced investor confidence and increase the failure rates of the privatization process or implements these processes in the wrong way. On the other hand, the privatization process intersects with many rules and regulations that may have obstacles or legislative gaps that could hinder the privatization process or hinder the optimization of the privatization process. These include corporate, bankruptcy, financing, competition and government procurement, commercial mortgage This is a challenging aspect as most of these systems were designed in light of the role of the current government and the weakness of the private sector. For example, the government competition and procurement system is the government's largest channel for contracting with the private sector. In view of the nature of this system, the contracts that this system deals with contradict with the essence of the privatization processes especially (public-private partnership).<sup>653</sup>

Nonetheless, the Kingdom has only later issued what it refers to as a Privatization Projects Manual issued by the National Center for Privatization (NCP), which defines its purpose in Article 3 as, “This Manual has been prepared to guide Entities and Supervisory Committees, and their Work Teams on how to prepare and implement Privatization projects and to provide all relevant information beginning at preparation stage until the signing of the Privatization contract.”<sup>654</sup> Yet, what adds a hard texture to this Manual is the consequence of non-compliance with its substance as per Article 4, which provides, “The Parties concerned shall comply with the provisions of this Manual. If the provisions of this Manual are not complied with, the proposed Privatization project shall not be accepted and shall be rejected by CEDA, the Supervisory

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<sup>652</sup> PRIVATIZATION PROGRAM (DELIVERY PLAN 2020): A SAUDI VISION 2030 REALIZATION PROGRAM 27 [hereinafter PRIVATIZATION PROGRAM REPORT].

<sup>653</sup> *Id.*

<sup>654</sup> NAT'L CENTER FOR PRIVATIZATION & PPP, PRIVATIZATION PROJECTS MANUAL (2018) (Saudi Arabia) [hereinafter SAUDI PRIVATIZATION MANUAL], <https://rlsd.co/p/jBo47Q>.

Committee or NCP, as the case may be.” Simply, procedures shall not be considered from non-compliant agencies to put it softly. But ultimately as well, the Manual “shall not prejudice the provisions of the applicable laws and regulations...” Clarity may be needed and investors seems to still await a pending PPP law to be issued by the Kingdom to confirm its application to the PPP framework.<sup>655</sup>

One important point remains. States may adopt regulatory framework to govern PPPs for many different objectives. In instances, these regulations may be designed to address a specific sector within the country, or this governance scheme can be multisectoral on a statewide level. PPP regulations in the GCC mentioned above have been designed to apply to cross-sectoral PPP programs in these states. However, their application has nonetheless been restricted in certain sectors as seen previously when discussing infrastructure project pipelines in the GCC. The Dubai PPP Law prevented its application to electricity and water projects.<sup>656</sup> The PPP Law of Kuwait adopted a similar approach in restricting its scope of application and primarily excluding water and electricity projects.<sup>657</sup> In Saudi Arabia, there are no clear prohibitions or restrictions on PPPs in specific sectors as per its present regulatory framework.

*Sui generis* application of PPP laws on these exempted sectors does not mean they do not fall under other regulations. They would fall under other laws, like those regulating independent water and power purchase regulations in order to incorporate more tailored rules to meet the needs of these distinct sectors.<sup>658</sup> They can still be PPPs, but they would fall under a specific

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<sup>655</sup> Angus Leslie Melville, *Saudi Publishes Privatisation and PPP Manual*, IJ GLOBAL (June 4, 2018), [https://ijglobal.com/articles/133678?utm\\_source=IJGlobal\\_Daily\\_05/06/2018\\_09%3A00&utm\\_medium=email%20editorial&utm\\_content=Editorial&utm\\_campaign=EN\\_230571&utm\\_term=Saudi%20publishes%20privatisation%20and%20PPP%20manual](https://ijglobal.com/articles/133678?utm_source=IJGlobal_Daily_05/06/2018_09%3A00&utm_medium=email%20editorial&utm_content=Editorial&utm_campaign=EN_230571&utm_term=Saudi%20publishes%20privatisation%20and%20PPP%20manual).

<sup>656</sup> See Dubai PPP Law, art. 4(2)(a).

<sup>657</sup> See *Legislation*, KUWAIT AUTHORITY PARTNERSHIP PROJECTS, [kapp.gov.kw/en/Legislation](http://kapp.gov.kw/en/Legislation) (last visited Nov. 30, 2019).

<sup>658</sup> *Id.*

regulatory regime. This legislative approach indicates the public interest approach of the countries to ensure certain criteria is met when it comes to water and electricity as a unique public asset in this region in relation to the public. This regulatory approach is not at all exceptional and is what reinforces the need for each state to tailor its PPP program rules to its local needs.

### Unsolicited Proposals Can Bring Out Private Sector Innovation to Complement Gulf Development Visions, When Properly Conducted

When it comes to the role the private sector can play via PPPs projects, the extent of this role also matters when enabled by regulatory provisions. One of the most noticeable means of private sector participation in shaping economic development policies of the country are through what are called “unsolicited proposals”. The World Bank PPP Reference Guide 3.0 defines an unsolicited proposal as, “a proposal made by a private party to undertake a PPP project, submitted at the initiative of the private firm, rather than in response to a request from the government.”<sup>659</sup> Usually, the government invites private parties to bid on ideas it presets. These unsolicited proposals though essentially mean that the solutions presented to the government are owned and displayed by the private sector. The state government should be capable of knowing and addressing its contextual needs, however, in some instances it may not contemplate at least the best means to address those needs. This is where private sector innovation steps in and may play a major role.

Unsolicited proposals may fill gaps that governments could have in serving sectoral needs. Innovative ideas in this regard are endless but could include projects that rely on

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<sup>659</sup> PPP REFERENCE GUIDE, *supra* note 103, at 190.

renewable energy such as wind or solar energy to desalinate salt water into drinkable and hence serve the society's water needs or use the same method to extract hydrocarbons from the ground and consequently cutting extraction costs on the long run. One of such unsolicited project proposal examples were the Al Abdaliyah Integrated Solar Combined Cycle (ISCC) in Kuwait.<sup>660</sup> The problem with this project was that it did not proceed, yet the Kuwaiti Government promised to retender the project.<sup>661</sup> The project was an initiative presented by the private sector consisting of a combined gas turbine unit and solar island. The intention of the power project is to ultimately conserve energy generation levels through the usage of a combined power cycle strategy in a more environmentally friendly manner.<sup>662</sup> Although this Kuwaiti gesture might not be all that clear, initiatives by the private sector in the form of unsolicited proposals are not obligatory to be follow through by the state. The government is the overall assessor of the proposed idea.

And while this method may introduce governments to innovative solutions, especially of technological nature, to its infrastructure facilities in different sectors, it does not come without pitfalls in terms of improperly vetted private sector involvement through unsolicited proposals.<sup>663</sup> To be more precise, while governments facilitate the whole development plan of the country and complement inter-sectoral coordination within a larger state scheme in response to direct economic and social needs, the motive of the private sector regularly goes in another direction by focusing on ultimately maximizing profits and its sustainability.<sup>664</sup>

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<sup>660</sup> *ISCC*, *supra* note 20; Barkatali & Kirton, *supra* note 20.

<sup>661</sup> Bintliffe, *supra* note 20.

<sup>662</sup> *ISCC*, *supra* note 20; *Kuwait: Project Awards Rise to KD 2.25 Billion in First Half of 2016*, KUNA NEWS (July 22, 2016), <https://www.kuna.net.kw/ArticleDetails.aspx?id=2513353&Language=en>.

<sup>663</sup> *A Primer to Public-Private Partnerships in Infrastructure Development: 6.2 Unsolicited Proposals*, UNESCAP, [http://www.unescap.org/ttdw/ppp/ppp\\_primer/62\\_unsolicited\\_projects.html](http://www.unescap.org/ttdw/ppp/ppp_primer/62_unsolicited_projects.html) (last visited Aug. 7, 2017); PPP REFERENCE GUIDE, *supra* note 103, at 190.

<sup>664</sup> PPP REFERENCE GUIDE, *supra* note 103, at 190.



Many policies allow governments to directly negotiate with the initiator of the proposal, and with no competitive vetting procedures in place to invite other potential private investors to match or even exceed such proposal, an environment premised on discretion on the part of the government can lead to evidently two things, corruption on the part of government, and a backdoor for the private sector to overcome any lengthy but competitive processes.<sup>665</sup>

John T. Hodges and Georgina Dellacha claim that the public's concern with incentives behind unsolicited proposals originating from the private sector as serving special interests should not be the focus; rather, governmental responses to such proposals in creating a transparent and competitive environment should be the center of attention.<sup>666</sup> The complexity of the situation when it comes to unsolicited proposals seems clear and may even explain why some countries do not accept or particularly regulate unsolicited proposals in the first place like Angola, Armenia, Egypt, Cambodia, Canada, both Congo Republic and the Democratic Republic of Congo, France, Guatemala, India, Iraq, Lebanon, Malaysia, Moldova, Myanmar, Nepal, Nicaragua, Panama, Poland, Portugal, Romania, Singapore, Thailand, Togo, Turkey, and the United Kingdom.<sup>667</sup>

When it comes to GCC States, unsolicited proposals were well acknowledged with difficulty concluding the stance of Saudi regulations. This nature of private sector proposals appears to fit in well with GCC visions empowering private sector contributions to the governments' development schemes. The Kuwaiti PPP Law provides in Article 20,

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<sup>665</sup> UNCITRAL PFIP, *supra* note 63, at 91–92.

<sup>666</sup> John T. Hodges & Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Transparency and Competition 1* (PPPIAF Working Paper No. 1, 2007).

<sup>667</sup> See WORLD BANK, BENCHMARKING PUBLIC-PRIVATE PARTNERSHIP PROCUREMENT REPORT 2017, at 52–139 [hereinafter BENCHMARKING PPPs], [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Benchmarking\\_PPPs\\_2017\\_ENpdf.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Benchmarking_PPPs_2017_ENpdf.pdf). This does not mean that other reasons do not exist to explain why unsolicited proposals are not accepted or not regulated dependent on the contextual justifications driven by specific state policies.

A Concept proposer shall submit a feasibility study to the Authority for its review in order to present recommendations to the Higher Committee, which shall take one of the following justified decisions:

- Approve the study and consider it an Initiative.
- Approve the study and consider it a Distinguished Project.
- Reject the study.

The Law further defined all three different terms used, “concept”, “proposal”, and “distinguished project”. As for concept, it comprises of “an initial feasibility study, in line with the State’s strategy and its development plan, proposed by a natural or a legal person, either Kuwaiti or non-Kuwaiti.”<sup>668</sup> This concept seems to be confined to two consequences when it comes to its description. It could be an initiative, which is defined as, “an innovative and creative Concept of a PPP Project, unprecedented in the State of Kuwait, approved by the Higher Committee, based on a comprehensive feasibility study and submitted by the Concept proposer to the Authority, providing an economic return or social benefits in line with the State’s strategy and development plan.”<sup>669</sup> And can ultimately be described as a distinguished project when it meets all the criteria of an initiative and is later approved by the by the established Higher Committee for PPPs.<sup>670</sup> The noticed criteria in the preceding provisions and definitions are certainly ambitious albeit remain very ambiguous and invite a whole lot of discretion. This might be a positive aspect on the condition of guaranteed institutional capacity of proposal recipient agencies.

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<sup>668</sup> Kuwait PPP Law, art. 1(3).

<sup>669</sup> *Id.* art. 1(4).

<sup>670</sup> *Id.* art. 1(5). More shall follow about this Higher Committee for PPPs in the ensuing chapter.

Dubai's approach was certainly more general. Article 12 of the Dubai PPP Law provided, "a Partnership Project may be proposed by a Government Entity or by the Private Sector."<sup>671</sup> The Dubai PPP Guide does set minimal conditions in terms of presenters of such proposals having to provide adequate information related to their capabilities and a preliminary feasibility study about the project, which would eventually be assessed by the relevant entity.<sup>672</sup>

As for Saudi Arabia, things are more complex. The current regulatory framework makes no mention of unsolicited proposals or initiatives presented by the private sector. Further data is needed with regards to whether Saudi provisions allow such proposals and if it could be interpreted as what has not been explicitly prohibited by law is thus accepted. This idea though may lead to a large degree of discretion when no set rules to outline expectations for both public and private parties and ensure transparency and competition are evident.

As a result, the distinct feature of private sector involvement in infrastructure projects may be valuable to the GCC, but unfettered, it may open floodgates of uncharted doors to

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<sup>671</sup> The Federal PPP Manual made no mention to unsolicited proposals.

<sup>672</sup> The Dubai PPP Guide provides, "Any natural or legal person can present an idea to the concerned Government Entity concerning requesting to execute a project according to partnership system. This request is to include the following: A) A preliminary feasibility study showing the elements of the project, preliminary estimates of its costs and benefits according to the provisions of the partnership law; B) Information concerning the presenter of the idea, their experience, administrative, technical and financial capabilities to execute the project or part of it. The Government Entity studies the proposed idea and communicates with any other Government Entity that the idea may suit their specialization to coordinate with them to complete the requirements of the feasibility study submitted by the owner of the idea. The concerned Government Entity is to make their decision within the timeframe they set and the decision is either one of the following: Accepting the idea and considering it an innovative project; Accepting the idea and listing it as one of the projects proposed for partnership; Declining the idea. The decision is to include the following: Determining the type of idea and approving it whether as an innovative or ordinary project; Name of the proposed project and the service it renders; Cost of the approved feasibility study; Concerned Government Entity(s); Estimated cost of the proposed project; Rights of the presenter of the idea that has been approved, especially if approved as an innovative project. Upon informing the presenter of the idea that their idea is accepted, they are to present a comprehensive feasibility study concerning the project in a period determined by the Government Entity and hence approving the proposed idea as one of the partnership projects according to the followed procedures. It is worth noting that in some cases, the Government Entities may give some rights and privileges to the presenter of the idea that has been accepted as a pay back of the feasibility study cost. They may also give them a preference in accepting their bid that meets all requirements in the RFP, in the form of a certain percentage of the bid." DUBAI PPP GUIDE, *supra* note 645, at 86–87.

corruption and further compromise achieving the best value for money in implementing certain infrastructure projects.

### Regulatory Provisions on including SMEs in PPPs<sup>673</sup>

Following up on the previous discussion about SMEs in the GCC and their growth through PPPs, GCC regulations in place must be explored. The principles that generally shape local provisions are the inclusion of SMEs in global value chains (GVCs). And so, local content requirements that are initially preserved for low income so-called developing countries to ensure local products and expertise are utilized in procured projects, are stressed. Yet, application of these principles has been so widespread amongst low-income developing and high-income developed countries alike, in what some may describe as protectionist measures.<sup>674</sup> The General Agreement on Tariffs and Trade (“GATT”), which preceded the WTO, provides in Article XX,

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

. . . (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving

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<sup>673</sup> The World Bank has created a database that attempts to address the role of SMEs in PPP projects and their regulatory enabling environment. *See Promotion of SME Participation in PPP Laws and Regulation*, WORLD BANK PPIRC, <https://ppp.worldbank.org/public-private-partnership/promotion-sme-participation-ppp-laws-and-regulation> (last visited Aug. 29, 2017).

<sup>674</sup> The United States for instance adopts set aside programs for its small or minority businesses in procurement processes of goods, services, and construction services in response to agreements like the WTO GPA to promote their economic development. *See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-727, INTERNATIONAL TRADE GOVERNMENT PROCUREMENT AGREEMENTS CONTAIN SIMILAR PROVISIONS, BUT MARKET ACCESS COMMITMENTS VARY*, at 17-18, 26 (2016).

rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.<sup>675</sup>

Article V of the GPA also addresses developing countries in the context of national content and preferential treatment and provides,

3. Based on its development needs, and with the agreement of the Parties, a developing country may adopt or maintain one or more of the following transitional measures, during a transition period and in accordance with a schedule, set out in its relevant annexes to Appendix I, and applied in a manner that does not discriminate among the other Parties:

a. a price preference programme, provided that the programme: provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement, provided that where the other developing country is a Party to this Agreement, such treatment would be subject to any conditions set by the Committee.

PPP Laws in the GCC ultimately interact with elements of these principles in favor of growing their SMEs. The Kuwaiti Public Tenders Law for instance allows government entities to contract by way of direct negotiation or limited practice without announcing the procurement to the public when goods to be procured are products of Kuwaiti SMEs.<sup>676</sup> Article 61 of the same Law also gives preference to bids on projects submitted by Kuwaiti SMEs and Article 62 confirms priority of national products when public authorities procure projects.<sup>677</sup>

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<sup>675</sup> See GATT, art. XX. There is a general exception under GATT that is broad enough that could be deemed regulated permitted protectionism, which is the “security exception”. Art. XXI of this Agreement provides, “(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.” Art. III of the GPA provides a similar article.

<sup>676</sup> Kuwait Public Tenders Law, art. 18(6).

<sup>677</sup> Although more recent Ministry of Commerce and Industry more recently issued its Resolution 235 of 2019 amending Resolution 623 of 2018 clarifying while preferential treatment is reserved for domestic products, this shall be restricted to conditions where Kuwaiti domestic products are reciprocally treated in the country of origin where

While no particular regulatory provisions are in place on the inclusion of SMEs in the PPP process, in its SME Vision 2021, Dubai envisions the integration of its SMEs in high growth opportunities that may be provided through PPPs. The Saudi Government Procurement Law explicitly provides general preference to its locally manufactured goods, services, and products, of which its SMEs may be involved in.<sup>678</sup> And amongst Saudi initiatives in its National Transformation Plan is to, “deploy initiatives led by the government to support the development of small and medium enterprises,”<sup>679</sup> and the, “launch of essential and value added applications and essential and electronic services to support Small and Medium Enterprises.”<sup>680</sup>

Policies are certainly echoed in these GCC countries about the role their private sector should play in their current and future economies by partnerships with government entities through PPPs. And while capital is certainly a key component of financing mega PPP infrastructure projects, it seems that size does not matter when it comes to involvement in the PPP project cycle. Large corporations and small enterprises alike may contribute through PPPs and grow from within.

Notwithstanding the incentive behind SME inclusion in projects, instant all-encompassing regulatory reforms to enable private sector participation in the economy may be rather challenging to collectively introduce at once. Some law and development scholars rightly

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the goods are being produced and with the requirement of meeting the standard specifications and that their proposed price does not exceed 15% of the lowest price of other proposals in the bids for similar products. The alternate preference to national Kuwaiti products would be products of which Kuwait is the country of origin. (*Altijara Tasdir Qararan Yoadil Thawabit Awlawiyat Almuntajat Alwataniya Fee Almushtarayat Alhukoomiya [(Commerce) Issues a Resolution Amending Procedures for the Prioritization Domestic Products in Government Purchases]*, ALAAN NEWS (May 8, 2019), <http://www.alwasat.com.kw/ArticleDetail.aspx?id=104662>.

<sup>678</sup> Saudi Government Procurement Law, art. 5.

<sup>679</sup> Saudi National Transformation Program: Initiatives, *supra* note 651.

<sup>679</sup> PPP REFERENCE GUIDE, *supra* note 103, at 192.

<sup>680</sup> Saudi National Transformation Program: Initiatives, *supra* note 651.

<sup>680</sup> PPP REFERENCE GUIDE, *supra* note 103, at 192.

so emphasize that incremental approaches to regulatory reforms may be useful and pose less political resistance when adopting milestone visions to change an economic structure within the state and empowering a new private actor.<sup>681</sup> Gulf States may need to learn as they reform to see whether existing legal arrangements like SME safeguards in particularly PPP project supply chains are easily adoptable. This must correspondingly consider at the same time the attempt to ensure that private partners retain a flexible amount of space to choose their designated contractors with no necessary regard to local goods or services. Local content may later be introduced when expertise in the delivery of public services through private parties is more established. Targeting GCC SME growth is a fundamental initiative, yet, it is rather the need to assess the implications of introducing contravening policies. Such policies may entail the need to send an initial message to investors that competition is upheld in infrastructure markets and local content is not a major impediment where such content may not yet be able to offer the best value in the market.

Regulations in place mentioned above have taken many shapes and forms in the GCC, and the list of different regulatory provisions in addition to *sui generis* rules are by no means exclusive. Nonetheless, what remains is whether regulatory frameworks are aligned with institutional capacity in this sub-region when it comes to PPPs and enabling the private sector through privately financed infrastructure projects.

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<sup>681</sup> Mariana Mota Prado, *The Paradox of Rule of Law Reforms: How Early Reforms Can Create Obstacles to Future Ones*, 60 UNIV. TORONTO L. J. 555, 557–58, 562, 566–69 (2010).

## CHAPTER IV

### THE ROLE OF PPP INSTITUTIONS IN THE GCC AND THE LOVE HATE RELATIONSHIP WITH THE PRIVATE SECTOR

#### Legal Building Blocks Set States' PPP Development Plans and Capable Institutions Lead the Way Through

Reaffirmation must be made about the focus of this study on a certain reference to institutions in the strict sense. Broad meanings of institutions could embody what Douglas North identifies as “the humanly devised constraints that structure political, social, and economic interaction.”<sup>682</sup> These also include informal constraints like sanctions, taboos, customs, traditions, and codes of conduct, or formal ones such as laws and property rights.<sup>683</sup> This study has already engaged in clarifying more of the regulatory structure, i.e. laws and formal policies that this broad definition of institutions embraces.

Institutions for purposes of this paper rather refer to what Mariana Mota Prado & Michael J. Trebilcock defined in “Path Dependence, Development, and the Dynamics of Institutional Reform” as, “those bodies (formal and informal) charged by a society with making, administering, enforcing, or adjudicating its laws or policies.”<sup>684</sup> Michael Trebilcock echoes what many lawyers may intuitively be concerned about when they hear institutions being used interchangeably with legal rules, such as a legal requirement for a private corporation to be structured in a certain manner for it to engage in any business activity in a country.<sup>685</sup> He rightly asserts that institutions could better be framed as the organizations that interact with such rules,

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<sup>682</sup> Douglas C. North, *Institutions*, 5 J. ECON. PERSPECTIVES 97, 97 (1991).

<sup>683</sup> *Id.*

<sup>684</sup> Mariana Mota Prado & Michael J. Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L. J. 341, 349 (2009). See also TREBILCOCK & PRADO, *supra* note 280, at 33.

<sup>685</sup> Prado & Trebilcock, *supra* note 684, at 349; TREBILCOCK & PRADO, *supra* note 280, at 34.



whether through legislating, adjudicating, or enforcing, in contrast with the legal rules themselves.<sup>686</sup> North distinguishes his use of terminology in the meaning of institutions in the following passage:

Before going further it is essential to distinguish clearly institutions from organizations. Institutions are the rules of the game of a society or more formally are the humanly devised constraints that structure human interaction. They are composed of formal rules (statute law, common law, regulations), informal constraints (conventions, norms of behavior, and self imposed codes of conduct), and the enforcement characteristics of both. Organizations are the players: groups of individuals bound by a common purpose to achieve objectives. They include political bodies (political parties, the senate, a city council, a regulatory agency); economic bodies (firms, trade unions, family farms, cooperatives); social bodies (churches, clubs, athletic associations); and educational bodies (schools, colleges, vocational training centers).<sup>687</sup>

Kevin Davis, and others, rightly identify the difficulties of settling with North's dichotomy of institutions as sets of rules as opposed to organizations, where both categories often syndicate both rules and enforcers of these rules, the individuals and the set of behavior they follow, which is very difficult to detach.<sup>688</sup> Additionally, North himself defines institutions as containing both rules of the game as constraints and their enforcement mechanisms, in which this second category seems to necessarily embody what he refers to as organizations, and in this study are rather considered institutions.<sup>689</sup> What North thus calls organizations as bodies that enforce legal rules are rather vigorously referred to as institutions in this study. These identified bodies would particularly illustrate how predetermined legal rights or obligations are both protected and enforced by public sector entities primarily or other evolving forms of institutions.

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<sup>686</sup> TREBILCOCK & PRADO, *supra* note 280, at 34.

<sup>687</sup> Douglas C. North, *The New Institutional Economics and Third World Development*, in THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 22–23 (John Harris, Janet Hunter & Colin M. Lewis eds., 1995).

<sup>688</sup> Kevin E. Davis, *Institutions and Economic Performance: An Introduction to the Literature*, in INSTITUTIONS AND ECONOMIC PERFORMANCE 6–7 (Kevin E. Davis ed., 2010). *See also* KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 22–23, 224 (2006).

<sup>689</sup> Davis, *supra* note 688, at 6–7.

Additionally, as well, institutions in Arabic are referred to as *moasasat* (مؤسسات). This term is defined in *Mujam Almaany Aljami* (Wholistic Dictionary of Meanings), an Arabic equivalent to Oxford or Webster Dictionaries, as, “an establishment created for a specific purpose or public benefit, in which it possesses the necessary resources to exercise this benefit.”<sup>690</sup> This meaning certainly brings us closer to the particular reference this study uses for institutions as furthermore contextually absorbable to the Gulf Arab States audience.

One of the most important questions arises as to why institutions are a significant component of any development plan and more broadly a state’s economy in the first place. North concedes that human behavior is fundamentally constrained by institutions generally.<sup>691</sup> And cooperation amongst individuals is achieved through institutions.<sup>692</sup> When societies grow and become more complex with levels of manufacturing, different institutions come into play to keep up with technological advances and more advanced governance structures ensure interagency cooperation and ultimate power distributions amongst agencies to serve the general population,<sup>693</sup> which in this case entails an enabling environment for a functioning private sector. Governments and private individuals would eventually be constrained by both legal rules and further necessary rule-enforcing state entities as well.

When discussing the particular institutions that are relevant to the state’s development schemes through PPPs, a narrow approach would not be sufficient. One of the ways of improving law and development studies encompasses focusing on broader public sector reform, i.e. institutional reform. This includes different agencies that could partake in protecting and

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<sup>690</sup> *Mujam Almaany Aljami* [Wholistic Dictionary of Meanings], ALMAANY, <https://www.almaany.com/ar/dict/ar-ar/%D9%85%D8%A4%D8%B3%D8%B3%D8%A9/> (last visited Nov. 30, 2019).

<sup>691</sup> North, *supra* note 682, at 97.

<sup>692</sup> *Id.*

<sup>693</sup> *Id.* at 101.

enforcing rights rather than a select category of institutions like state courts.<sup>694</sup> The important factor of focusing on state institutions in the Gulf that administer PPP regulations is to highlight the level of interaction private partners have with public institutions and legitimate expectations that may shape the role of these private actors against any arbitrariness.

The discussion should not particularly be one of whether the Gulf Arab States adopt a laissez-faire approach or state interventionist one. These states certainly have degrees of governmental intervention in the countries' economies. New Institutional Economics theorists point out that in countries like these and broader developing states, the focus should not be on the level of state intervention, but rather the quality of such intervention and its effect.<sup>695</sup> This ultimately means that intrinsically capable institutions overseeing such interventions are of a technically qualified nature and follow state policies and strategies in a consistent and uniform manner with no due regard to particular political influences, ambitiously put.

The further link between democracy when it comes to institutions and economic development is certainly one of deserved inquiry to chiefly showcase the autonomy of state institutions when it comes to interacting with both public and private partners to achieve sustainable development outcomes. There exists a pool of literature that has studied this connection, and whilst mixed results may have appeared, strong assertions with empirical evidence that democracy and economic development come hand in hand subsist.<sup>696</sup> These two structures together safeguard different societal and efficiency values that include the just

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<sup>694</sup> DAVIS & TREBILCOCK, *supra* note 33, at 9; TREBILCOCK & PRADO, *supra* note 280, at 31.

<sup>695</sup> DAVIS & TREBILCOCK, *supra* note 33, at 22–23.

<sup>696</sup> See, e.g., John F. Helliwel, *Empirical Linkages between Democracy and Economic Growth*, 24 BRIT. J. POL. SCI. 225 (1994) (collecting data in cross-jurisdictions trying to stress empirically the connection between income and democracy); Ross E. Burkhardt & Michael S. Lewis-Beck, *Comparative Democracy: The Economic Development Thesis*, 88 AM. POL. SCI. REV. 903–09 (1994); Larry Diamond, *Economic Development and Democracy Reconsidered*, 35 AM. BEHAVIORAL SCI. 450 (1992); Larry Sirowy & Alex Inkeles, *The Effects of Democracy on Economic Growth and Inequality: A Review*, 25 STUD. COMP. INT'L DEV. 126 (1990).

distribution of state resources and levels of checked authorities.<sup>697</sup> This ensures that no agency downplays the role of others and mitigates degrees of corruption with unchartered relationships with the private sector that could be exemplified by rent seeking behaviors and corrupt practices.<sup>698</sup> This aspect of governance begs a thorough investigation in the context of the Gulf States.

Informal constraints are not downplayed at all in this study, however, more focus on formal means of constraint is exceedingly relevant with the kind of complex societies the Gulf States aspire to evolve into in comparison with their current and antecedent nature. There has been literature for instance to support that while with regards to contract enforcement, some societies have succeeded with elements of self-enforcement of contracts constrained by the preservation of reputation and trust even with the existence of regulations, these have more likely been low-income societies.<sup>699</sup> The more complex the states become, the more effective formal constraints prove to be, which some refer to as “individualist” societies as opposed to simple “collectivist” societies.<sup>700</sup> It is in that understanding that formalism could be more suitable for complex societies in order to fulfill the expectations of a wider audience by providing clear rules and enforcement mechanisms.<sup>701</sup> Government contracts moreover only add a layer of complexity to this equation of enforcement and perhaps serve as an indicator of how formal constraints can

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<sup>697</sup> Diamond, *supra* note 696, at 486.

<sup>698</sup> *Id.*

<sup>699</sup> DAVIS & TREBILCOCK, *supra* note 33, at 52.

<sup>700</sup> *Id.* at 52–53.

<sup>701</sup> Scott Newton while displaying the outcry for formalism in development policies under the leadership of people like Ibrahim Shihata, he also displayed some of the criticisms when relying on formalism. Scott Newton, *The Dialectics of Law and Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 143, at 190–92, 197–99.

outplay informal ones.<sup>702</sup> Moreover, private ordering could also be preserved as a component of state institutions complementing formal rules.<sup>703</sup>

The chapter's aim is to first establish the interdependent links that regulatory and institutional frameworks have through law and development studies and emphasize the divergent experiences when either framework is neglected. This link is not pertinent to one specific model or regional system. It is rather contextual to the political, social, and economic identities of given states. The Gulf States' distinct identity plays a role in equally unique governmental institutions, which affect public-private interactions when the aim is to jointly achieve the countries' future development plans. A mission to excavate the distinct nature of Gulf institutions in relation to PPPs and economic plans would hence be pursued and allow conclusions to be drawn as to the success of such models if the dynamics of future forerunners of economic development policies were to shift towards a more cooperative mode. The Gulf models of institutional frameworks certainly need, in varying levels, better refinement to meet future collaborative demands and solutions to create a more enabling institutional environment for Gulf government agencies to work with private partners. This forward-looking inquiry shall be addressed after assessment of the existing institutional arrangement.

#### Law and Development Theoretical Emphasis on Institutional Frameworks

*“Government of laws and not of men.”* John Adams, 1780

Prominence towards institutional capacity to lead the country's development plans jointly coincides with ideals of good governance on the part of the state. This similarly entails

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<sup>702</sup> Rittich, *supra* note 143, at 224–25; DAVIS & TREBILCOCK, *supra* note 33, at 52.

<sup>703</sup> David Kennedy discusses private ordering in the context of the legal theory movement. Kennedy, *supra* note 340, at 132.

constraints on the state's part to ensure that political acclamations and democratic transitions do not affect consistent institutional practices.<sup>704</sup> Legitimate expectations of private partners must be met consistently in order to establish a reassuring business environment. And while on the surface, the Gulf States may appear to have long-lasting oligarchic systems, individuals within governance positions do change and their policies inevitably transform.

Nonetheless constraints to government may also be framed in the context of the all but necessarily contested concept of the "rule of law".<sup>705</sup> That is, that government is limited in its functions. This has been established in the writings of Aristotle, Montesquieu, and Locke in addition to other scholars who discussed in detail what this notion of the rule of law entails.<sup>706</sup> Jeremy Waldron further expounds on what he refers to as the "essentially contested" concept of the rule of law and points out that the discussion about this notion may be broken down into different nuances amongst which could include substantive rules that embody a basis for inherent specific rights and other procedural ones like due process and fairness guaranteed by different institutions based on interpretations of pioneers on this understanding like A.V. Dicey, H.L.A. Hart, F. A. Hayek, Lon Fuller, John Rawls, and Joseph Raz, in addition to W.B. Gallie's approach to contested concepts.<sup>707</sup> Waldron eventually concludes that the mission of understanding the reference of the rule of law is certainly an ongoing one.<sup>708</sup>

The importance of country institutional capacities is a given fact that even the world's largest international bodies approve are a precursor for any business activity. One example of

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<sup>704</sup> Rittich, *supra* note 143, at 220–21.

<sup>705</sup> Santos, *supra* note 635, at 256–59; Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)*, 21 L. & PHILOSOPHY 137, 153–59 (2002).

<sup>706</sup> Santos, *supra* note 635, at 256–59.

<sup>707</sup> Waldron, *supra* note 705, at 163–64. Alvaro Santos makes a similar conclusion as to the categorizations of the concept of the rule of law. Santos, *supra* note 635, at 260–66.

<sup>708</sup> Waldron, *supra* note 705, at 163–64.

such international entities is the World Bank. When it comes to the role of this international entity in correlation with loans and borrowing states, issues of governance have risen to the surface and Bank schemes to address such topics were emphasized and particularly led by Ibrahim Shihata, then General Counsel and Senior Vice President of the World Bank from 1983 to 1998.<sup>709</sup> And while legal reforms for the sake of “efficiency and economy” in borrowing state members were emphasized, equal institutional structures like civil service reform were sought due to their enabling role in a healthy business environment to organize the decision-making process and allocate administrative functions and nurture private sector development.<sup>710</sup> Shihata discussed necessary legal and institutional reforms in borrowing states in the context of inevitably addressing means of formulation and application of rules that are of utmost concern for any business environment conducive of attracting private enterprises.<sup>711</sup>

While the Bank’s role has undeniably been criticized in terms of, *inter alia*, conceptions of the rule of law and Washington Consensus liberal-like reforms that have been imposed on societies that could not have been further from such free market characteristics,<sup>712</sup> the indispensable presence of both regulatory and institutional reforms remains effective for economic development. Yet, a recipe of contextual twist could be added to these types of reforms from the concerned states themselves, an element that would improve the reform process and make it more tailored to country-specific needs.

When it comes to the institutions that play a role in state development spheres, they are numerous and can even extend to what has been referred to as the “third sector”, which includes

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<sup>709</sup> IBRAHIM SHIHATA, *THE WORLD BANK LEGAL PAPERS* 245, 268–82 (2000).

<sup>710</sup> *Id.* at 275.

<sup>711</sup> *Id.* at 273.

<sup>712</sup> Santos, *supra* note 635, at 269–300.

civil society associations and non-governmental organizations that offer checks and balances to both state governmental institutions and private partners.<sup>713</sup> Public Value theorists in public administration studies call for citizen demands from government to provide public services in the form of a “networked government” delivering “joined up services” in a collaborative manner instead of achieving thinly defined ad hoc mandates concerning each governmental agency.<sup>714</sup> And when such social constraints are created as a result of functioning government agencies on individuals of the society, citizens ought to be co-creators of their restraints by participatory governance within state institutions.<sup>715</sup> This element is one that PPP institutions in the Gulf Arab States must learn to consider when understanding the comprehensive sense of what captures necessary institutions leading governance of development projects while discussing law and development studies in this setting.

A broad view of relevant actors in the PPP process certainly adds a layer of complexity to these projects, nevertheless, it also ensures that development projects run smoothly because input of different factors of the society is preserved such as environmental civil societies that play a vital role in safeguarding the environment from adverse impacts that infrastructure projects may produce. The call is framed as public sector reform, but evolution in governance structures entails participatory control structures, particularly in the Gulf where multiplicity of actors has not been clearly evident. The World Bank’s Comprehensive Development Framework that was launched in January of 1999 is one tool that articulates a long-term vision of economic growth in

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<sup>713</sup> Rittich, *supra* note 143, at 223. The idea of a public administration is a concept that embodies different entities that include autonomous and quasi-autonomous governmental and non-governmental institutions like schools, hospitals, and SOEs, to name a few. TREBILCOCK & PRADO, *supra* note 280, at 133.

<sup>714</sup> John Benington & Mark H. Moore, *Public Value: Theory and Practice: Conclusions*, in CLASSICS OF PUBLIC ADMINISTRATION, *supra* note 46, at 596–98.

<sup>715</sup> *Id.* at 598–99.



client countries through different macroeconomic and fiscal policies in addition to governance structures and reforms with an emphasis on country ownership of such development policies.<sup>716</sup> More importantly too, this Framework acknowledges the critical engagement of a broader spectrum of actors in a participatory manner in countries' institutional governance structures to achieve economic development.<sup>717</sup> The Framework singles out the private sector as a particularly key partner to state governance structures and should be included in institutional practices. One means of such private presence that was mentioned as an example was through PPPs, in addition to the Framework not rewarding size with regards to the private sector as a reference to SME inclusion as well.<sup>718</sup>

#### Welfare v. Laissez-Faire State Institutions: What is the Difference? Arab Gulf States' Number One Lesson

Economic activity through investments in mega infrastructure projects certainly contribute to states' growth and counts towards its capital expenditure, yet, the number of institutions involved in development project cycles and their nature as public or private entities can equally ease or obstruct the smooth implementation of these projects. And while perhaps less is more in purely laissez-faire state economies identified with less public entities and fewer regulations, other more interventionist states have more complex institutional scenarios.<sup>719</sup>

The fundamental premise of so to say free market economies, or laissez-faire economies, is that the market leads.<sup>720</sup> It sets prices and allocates resources to their most optimal use

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<sup>716</sup> WORLD BANK, COMPREHENSIVE DEVELOPMENT FRAMEWORK: MEETING THE PROMISE? EARLY EXPERIENCE AND EMERGING ISSUES 1–11 (2001); Rittich, *supra* note 143, at 203–04.

<sup>717</sup> COMPREHENSIVE DEVELOPMENT FRAMEWORK, *supra* note 716, at 11–15.

<sup>718</sup> *Id.* at 15–16.

<sup>719</sup> Kennedy, *supra* note 340, at 135–37.

<sup>720</sup> TREBILCOCK & PRADO, *supra* note 280, at 19; Kennedy, *supra* note 340, at 128–30.

amongst its other core features.<sup>721</sup> What this consequently means is that there is no room for government to distort what the market naturally derives.<sup>722</sup> Instead of public administrations commanding within a universe of discretion, the neoliberal ideal aims to privatize state public entities and empower private enterprises, both local and foreign, to take lead in state business activities.<sup>723</sup>

Furthering state neoliberal economic structures and economic growth, some even went further to assert that a correlation between common law countries and economic growth exists and is justified by the nature of institutions and market dynamics. Paul G. Mahoney is one of such proponents and claims that when following Hayek's core ideals, limited government and as a result more developed financial markets as a major feature of predominately common law countries, or English legal tradition states, as opposed to French or civil law legal tradition countries, have proved to achieve more rapid rates of economic growth. The main reason that this conclusion was drawn based on the writings of Hayek was not juxtaposing substantive rules of both legal traditions, but rather the differences in the role of individuals and the state.<sup>724</sup> There is more emphasis on collective rather than individual rights in civil law country traditions and deference to state bureaucratic decisions in especially the sphere of public law as opposed to private law interactions, and issues such as red-tape and expropriation are at stake.<sup>725</sup> Public entities are supposedly more restricted in public law interactions in civil law systems whereas public and private parties see the application of similar rules whether in private transactions or

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<sup>721</sup> Kennedy, *supra* note 340, at 129.

<sup>722</sup> TREBILCOCK & PRADO, *supra* note 280, at 28; Kennedy, *supra* note 340, at 129–30.

<sup>723</sup> Kennedy, *supra* note 340, at 130.

<sup>724</sup> Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. L. STUD. 503, 504–05, 511–12 (2001).

<sup>725</sup> *Id.* at 504–05, 511–12, 520–21.

public alike.<sup>726</sup> This treatment between both systems is not a clear distinction though in terms of the evolution of private-public relations in common law systems when it particularly comes to public interest and public policy and requires further examination. And while Mahoney convincingly provides empirical evidence to his assertions, he may have gotten the picture from one dimension. The problem is perhaps with restraining a state's aspirations to merely economic growth, which conceivably less government may achieve. Development policies as mentioned previously in this study, go beyond this rigidity, and no blame is of the country when welfare policies are adopted, in moderation.

There are more institutional applications that interplay with economic systems though. Governance structures have been claimed to also ensure more consistency against the government through an active judiciary in common law states, whereas the judiciary has had a more limited role in civil law countries.<sup>727</sup> In these latter states, the government retains a large portion of its authority to restrict its courts with a secondary role through both its legislative powers and other enforcement institutions, which preserve a considerable amount of control.<sup>728</sup> More on the role of the judiciary as a fundamental state institution shall be presented later in this study, nonetheless, what can be inferred about the power of the judiciary whatever legal system is prevalent is to firstly necessarily retain technically capabilities able to adjudicate between the state and the private sector impartially, which is certainly in need of inquiry within the

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<sup>726</sup> *Id.* at 511–12. Common law systems have divergent approach with regards to whether government procurement falls under administrative law or what could be referred to as “civil” or “contracts” law. According to *Gestion Complexe Cousineau (1989) Inc. v. Canada* (Minister of Public Works and Government Services), [1995] 2 F.C.R. 694 (Can.), “The decisions of the government regarding a call for tenders have been taken out of the field of administrative law as such and placed in that of the law of contract, and what is more by a curious reversion the courts have subsequently imposed on the contracting party issuing the calls for tenders, and hence on the government, implicit duties of fairness which in the respondents' submission correspond to those defined in connection with applications for judicial review.”

<sup>727</sup> Roberto M. Unger, *Legal Analysis as Institutional Imagination*, 59 MODERN L. REV. 1, 5 (1996).

<sup>728</sup> Mahoney, *supra* note 724, at 507.

parameters of the Gulf Arab States that are closer to civil law legal traditions with Islamic law influences than that of common law.

Neoliberal champions perhaps paid less attention to how capable state public institutions could intervene to ensure that rules are enforced.<sup>729</sup> Where neoliberalism advocates aim to strengthen private law mechanisms that safeguard market transactions and limit public law interventions, some of the latter proves to be fundamental, such as antitrust and criminal law enforcement tools to fill the gap of imperfect markets.<sup>730</sup>

On the side of welfare-oriented economies, largely Gulf Arab States, attention is more on ensuring that a level of welfare policies or social spending and their enforcing public entities are secured. Literature on the correlation of economic growth and such interventionist policies is not all that negative when clear limits are set where the state only reserves the most essential public interest spheres in its welfare policies like in education and health in guaranteeing free access to both for instance.<sup>731</sup> Private attention to providing so to say human capital development and social support is probably not amongst the priorities of private actors, which is where state government intervention is welcome.<sup>732</sup>

The namely potential impediment in the context of welfare policies in the GCC is that when government accountability is rather largely illustrated in an unconventional manner, monitoring public infrastructure and services performance and their fiscal implications becomes problematic. To put this in clearer terms, when three branches of government offer checks and

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<sup>729</sup> Dani Rodrick, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's "Economic Growth in the 1990s: Learning from a Decade of Reform"*, 44 J. ECON. LITERATURE 973, 977–982, 985–96 (2006).

<sup>730</sup> Kennedy, *supra* note 340, at 132.

<sup>731</sup> DAVIS & TREBILCOCK, *supra* note 33, at 75–85.

<sup>732</sup> TREBILCOCK & PRADO, *supra* note 280, at 29.

balances to hold government entities accountable for the use of public funds to implement public interest projects exists in many countries, consensus in the GCC does not subsist on adopting this governance model. Where accountability of the executive is reserved for the elected parliament in Kuwait,<sup>733</sup> the Emirate of Dubai and Saudi Arabia do not particularly personify this governance scheme.<sup>734</sup> This does not at all mean that Kuwait outperforms its peers in efficient performance of government financed infrastructure projects. Rather, it may be largely to the contrary yet due to many circumstances not pertaining to the parliamentary check, which is healthy. And in this respect, introducing private actors to deliver public infrastructure may eventually offer the necessary accountability needed when government does not fall under conventional schemes of checks and balances. The private sector may rather fall under more unique risk and reward systems that could work more efficiently in the GCC context, where consumers can directly assess and impact the financial standing of the private party hence triggering a more competitive business environment, especially in more complex infrastructure projects.

Empirical evidence is available to support the notion that welfare programs in certain fields have still generated some positive results on economic growth for reasons based on human resource development.<sup>735</sup> A workforce provided with the right educational skillsets has led to more productive state institutions and a more physically and mentally healthy individuals due to

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<sup>733</sup> The Parliament in Kuwait for instance according to arts. 100 & 101 of the Constitution may question and interrogate the prime minister or any minister in any matter that falls under their competency, which may lead to a vote on confidence in their continuance. There is a long list of interrogations or interpellations in the history of the Kuwaiti Parliament to key government figures whether the Prime Minister or different ministers. *See Alistijwabat fee Tareekh Alhayat Alnyeabiyah Alkuwaitiyah [Interrogations in the History of the Life of the Parliament]*, NAT'L ASSEMBLY, <http://www.kna.kw/clt-html5/run.asp?id=1971> (last visited Nov. 30, 2019).

<sup>734</sup> *See* discussion *supra* Ch. III of this study, An Efficiently Responsive Legislative Process: A Probable or Problematic Case in the GCC, about the legislative process in the GCC.

<sup>735</sup> DAVIS & TREBILCOCK, *supra* note 33, at 79–85.

health policies that consequently have increased efficiency.<sup>736</sup> Now, routine public spending in different fields in the GCC could also be vindicated by its essential nature in light of the insufficient local and international private demand to provide different public services, yet this serves as an incentive to enhance business enticements to create such private demands with regulatory and institutional improvements amongst other fiscal reforms.<sup>737</sup>

Discussions on welfare v. laissez-faire state institutional structures do not naturally lead to cornering Gulf Arab States into choosing either option. Culture and history are at stake when it comes to institutional identities of these state entities and this certainly must be considered. Nonetheless, when Visions 2030 or 2035 as future state development policies scream identities that allude to a transformation of state economic institutional structures, further inquiry is necessary to understand the amount of reform required. Yes, these states surely need more private participation in providing public services, the question remains, how much is this already smoothly facilitated and how can more be further foreseen to transform aspirations into readily implemented state policies.

### Path Dependence and Institutional Restructuring

While a firmer conclusion is yet to be drawn on the level of efficiency of state institutions in the GCC States, the mega structural leap towards partnering with and enabling the private sector to provide public services and co-lead the countries' development plans necessarily requires some sort of reform of current institutions in these states. The question that rather begs an answer in this context is how and why particular state institutions are more prone to such

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<sup>736</sup> *Id.* at 79–85.

<sup>737</sup> STEFFEN HERTO, *THE PRIVATE SECTOR AND REFORM IN THE GULF COOPERATION COUNCIL* 7–8 (2013).

reform more so than others. One of the very influential theories that steps up to answer such question is the path dependence theory.<sup>738</sup> This theory illustrates the problems of reinvigorating a set of arrangements and the costs and difficulty of changing them within time when many interconnected interests in established institutions resist any change to the state's institutional structure with the introduction of other perhaps more qualified institutions to the country.<sup>739</sup>

In a perhaps fairly descriptive way that may be applied to and illustrate the complexity that faces the Gulf Arab States when it comes to the established culture of red tape and technical capacities of human resources in some more than the other within different public agencies while interacting with private actors, Trebilcock explains that path dependence in its particular economic connotation entails:

The key insight associated with path dependence theory is that, under certain conditions, economic and other activities may be subject to increasing returns, whereby the benefits of engaging in them increase, rather than decrease over time as more and more people invest in a given way of doing things. As these investments - of time, money, skills, and expectations - add up, the relative cost of exploring alternatives steadily rises.<sup>740</sup>

The importance of this description and danger at the same time is the inference of how powerful consistent culture that is built within state institutions could be onerously changed on the long run. When such culture is positive, perhaps preserving it may require less effort. It is

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<sup>738</sup> Douglas North introduced this concept and it was later adopted by many such as Michael Trebilcock and Mariana Prado. TREBILCOCK & PRADO, *supra* note 280, at 38–39.

<sup>739</sup> *Id.* at 38–39. Prado & Trebilcock, *supra* note 684, at 350–51. Douglas North describes his notion of path dependence in the following passage: “Path dependence is more than the incremental process of institutional evolution in which yesterday's institutional framework provides the opportunity set for today's organizations and individual entrepreneurs (political or economic). The institutional matrix consists of an interdependent web of institutions and consequent political and economic organizations that are characterized by massive increasing returns. That is, the organizations owe their existence to the opportunities provided by the institutional framework. Network externalities arise because of the initial setup costs (like the *de novo* creation of the U.S. Constitution in 1787), the learning effects described above, coordination effects via contracts with other organizations, and adaptive expectations arising from the prevalence of contracting based on the existing institutions.” North, *supra* note 682, at 109.

<sup>740</sup> Prado & Trebilcock, *supra* note 684, at 350–51.

when negative institutional behavior is sustained, and practices regularly adopted, that this starts to pose complexities towards private sector trust in such state institutions even with the presence of beautifully constructed legislations and legal rules, and as a result difficult to overturn. A culture of discretionary central powers held by individuals rather than institutions may be a select problem in the three states in this study, especially Kuwait and Saudi Arabia. The reality is alerting, but key to any structural reform. Maybe in the GCC at least, it is not structuring an institution that guides a culture of positive behavior based on fair application of legal rules and establishment of a healthy competitive environment, whether on a horizontal or vertical top-down levels within the state. This would include the highest state officials and most influential public bodies. Perhaps, it is ultimately behavior that leads to stable institutional structures of state entities.

Behavior  Institutional Structure

One example that has been drawn as to “self-reinforcing” mechanisms in institutions where it becomes the norm to follow certain behaviors was the dominance of certain ethnic groups in some state entities. Such groups would dwarf the presence of others in some institutions even if that were on economic terms for many reasons such as developed structural discriminatory beliefs, varying concepts of social capital, and differing individual interests.<sup>741</sup>

Amy Chua claims that marketization only nurtures economic dominance of certain ethnic groupings within the state if not create them in the first place as well.<sup>742</sup> The hazard of this is that

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<sup>741</sup> Amy Chua, *Markets and Ethnicity: A New Paradigm for Law and Development*, 108 YALE L.J. 1, 5–6, 23–25, 29, 32 (1998).

<sup>742</sup> *Id.* at 37.



it causes resentment amongst other ethnic groups within the country, an example of which are the Chinese in Southeast Asian countries like Malaysia, that instigated hatred amongst indigenous groups because of their prevalent economic presence, in addition to other domestic ethnic groupings in India and other countries.<sup>743</sup> In the meantime, when governments intervened to correct this economic ethnic imbalance with tools like nationalization and even ethnic requirements or restrictions for economic activities, it seemed to exacerbate the same problem with its core cause, ethnicity.<sup>744</sup> This may be connected to the previous discussion about SOEs and the GCC private sector in terms of further government officials and ruling and merchant family members' presence in corporate boards, and equal manifestation of state institutions. This eventually forms a type of path dependence in given state institutions.

Trebilcock further proposes the idea that institutional reform solves the resistance to path dependence by taking into account the following: 1) any reform is contextual and may benefit from experiences of similarly situated countries; 2) broader rule of law and democratic structural reforms may be too ambitious; 3) focus should be on empowering institutions that appear to be “free-standing”; 4) enabling willing participants in such free-standing institutions instead of spending time on attracting unwilling participants to existing central agencies; 5) emphasis on salient costs to reform existing state institutions; 6) introducing marginalized state groupings in countries' institutions to create space for innovation and new interests.<sup>745</sup>

Mariana Mota Prado follows up on the issue of institutional reform and identifies what she calls “institutional bypasses” that could prove effective when bureaucracies exist.<sup>746</sup> She

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<sup>743</sup> *Id.* at 37–39, 43, 45.

<sup>744</sup> *Id.* at 48–50.

<sup>745</sup> Prado & Trebilcock, *supra* note 684, at 377–78; TREBILCOCK & PRADO, *supra* note 280, at 40–41.

<sup>746</sup> TREBILCOCK & PRADO, *supra* note 280, at 142–43.

drew an example of a one-stop shop entity created in Sao Paolo, Brazil that overcame complexities in financial, human, and technological capacities within state agencies, social and cultural factors, in addition to other political economy challenges.<sup>747</sup> Such one-stop shop entities that monopolize the functions of different state public agencies are certainly relevant when addressing the context of the GCC where red tape is a central problem in some of the states more than others, that is, Saudi Arabia and to a larger degree Kuwait more than Dubai, the UAE.

Path dependence is a tool that will be utilized in this study to assess the level and approach of reform needed in Arab Gulf State institutions to achieve the outcry of sustainable economic development that enables a co-participant leader in GCC policy implementation. Culture, history, and politics are tough to beat, but there is always a place to start. The view would not be confined to ad hoc structural reform viewpoints, but outlooks are rather constructed on the premise of interdependent institutional reform to overcome piecemeal solutions.<sup>748</sup>

#### Specificities of GCC State Members' Institutions

Natural resources may appear to be the blessing and attribute of consequently resource rich countries; nonetheless, it can also be a curse.<sup>749</sup> Jeffrey Sachs and Andrew Warner assert what they believe, backed by empirical evidence, that natural resource dependence is misleading to resource hosting governments on the long run and could create a very unhealthy and unsustainable business environment, in addition to clear indicators of the causal relationship between resource dependent economies and lack of rapid economic growth.<sup>750</sup> Outcomes that

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<sup>747</sup> *Id.*

<sup>748</sup> Prado & Trebilcock, *supra* note 684, at 354.

<sup>749</sup> Jeffrey D. Sachs & Andrew M. Warner, *Natural Resources and Economic Development: The Curse of Natural Resources*, 45 *EURO. ECON. REV.* 827, 827–33 (2001).

<sup>750</sup> *Id.* at 828.

were presented by these authors alluded to the anti-entrepreneurial friendly environment that is created as a result of the state relying on resource rents and peoples' tendency to follow relevant resource sectors in which governmental employment becomes a rival to innovation.<sup>751</sup> Consequently, the quality and efficiency of government spending is often compromised because of reliance on debatably fortunate resources.<sup>752</sup> The numbers that were previously displayed about the size of GCC public sector employment and oil-rent generated income is certainly aligned with Sach and Warner's propositions.<sup>753</sup> This is also why calls for diversification are equally shared amongst the Gulf Arab States; yet introducing the culture of shying away from what have been seen as stable public sector jobs to more risk inclined entrepreneurial activities necessitates state supported policies and shifts in the compositions of state public entities, i.e. the number and quality of public sector employees, to start with.<sup>754</sup> This is especially relevant when oil sector employment is compensated with the highest salaries in the countries' public sector jobs.<sup>755</sup>

This is not the predominant theme all around the GCC. Dubai has chosen a different route. This city embraced more private sector activity which led to private employment being more attractive and thus dominant. This in return has led to more and more confidence in pursuing policies that shout for such knowledge-based economies as noticed in innovative schemes illustrated in Dubai's Vision 2021 roadmap. This is all realistically attainable in Dubai because the potential to innovate exists. The figures later displayed about how Dubai has consequently stood out amongst its Gulf peers when it comes to entrepreneurial-friendly

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<sup>751</sup> *Id.* See also JOBS AGENDA, *supra* note 275, at 1–6, 12, 36; Callen et al., *supra* note 551, at 23–28.

<sup>752</sup> Ossowski & Halland, *supra* note 493, at 102.

<sup>753</sup> See also JOBS AGENDA, *supra* note 275, at 4–6, 12, 36.

<sup>754</sup> Callen et al., *supra* note 551, at 23–27; JOBS AGENDA, *supra* note 275, at 4–6, 12, 36.

<sup>755</sup> Callen et al., *supra* note 551, at 25.

practices is only logical considering that reward corresponds with innovation rather than allocation of resources to constituents by the state through employment. Consequently, the presence and number of public entities may be understood in both Kuwait and Saudi Arabia compared with Dubai. Yet, ultimately, in the context of PPPs, the quality and number of relevant state PPP agencies matter for shaping the outcome of infrastructure projects and development programs. The optimal formula is by no means simple.

While institutional structures of state entities may be carefully devised, and state of the art public agencies designed and supplied with an abundant amount of personnel, behavioral patterns must also be observed. These patterns must be diligently considered as a major factor for the improvement and reform of present and new government institutions when especially tracing causes of an overwhelmed GCC public sector and whether performance of such sector is manifest. The somewhat overall poor performance of many public sector employees in the Gulf with minimal working hours, overstaffed agencies, and absent contributive roles nationals play in different government agencies they work in beg an initial probe to know how such citizens are to start innovating even before looking into designing such public institutions.<sup>756</sup> A distinct viewpoint in this context is offered by proponents of what is referred to as change-oriented organizational citizenship behavior (OCB), or “good soldier syndrome” in public administration studies.<sup>757</sup> This organizational behavior study is premised on public sector employees and what factors may be introduced to enhance efficiency and more importantly, motivation to innovate

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<sup>756</sup> Steffen Hertog, *The GCC's National Employment Challenge*, MID. E. CTR. BLOG (July 31, 2014), <http://blogs.lse.ac.uk/mec/2014/08/06/the-gccs-national-employment-challenge/>.

<sup>757</sup> Eran Vigoda-Gadot & Itai Beeri, *Change-Oriented Organizational Citizenship Behavior in Public Administration: The Power of Leadership and the Cost of Organizational Politics*, 22 J. PUB. ADMIN. RES. & THEORY 573, 574 (2012).

and progress, rather than red tape and strenuous procedures.<sup>758</sup> This study about OCB focuses on the “extra-role behavior exhibited by employees in which they perform beyond their formal job requirements without expecting recognition in terms of either explicit or implicit rewards from supervisors.”<sup>759</sup> What is very relevant about this study, to namely the Gulf States, is that the focus need not only and exclusively be on hard consequential rules struck for public employees to follow, or extravagant material rewards, rather, creating a motivational environment is of equal importance. Gulf public sector jobs, once again, host by far the largest share of citizen employment, and the salaries, very competitive and rewarding. The issue remains not the lack of rewards, but rather the incentive to provide contributive input supplemented by culpability for negligence and damage caused. This feature of work ethics in the Gulf may also be exhibited by “rentier state mentality”. Scholar Hazem Beblawi illustrates this as:

The basic assumption about the rentier mentality and that which distinguishes it from conventional economic behavior is that it embodies a break in the work-reward causation. Reward - income or wealth - is not related to work and risk bearing, rather to chance or situation. For a rentier, reward becomes a windfall gain, an isolated fact, situational or accidental as against the conventional outlook where reward is integrated in a process as the end result of a long, systematic and organized production circuit. The contradiction between production and rentier ethics.<sup>760</sup>

Furthermore, in relation with individual capacity, amongst the factors that could contribute to better public sector performance is ensuring that the right skills are aligned with each public agency. That is, the recruitment system in public entities must consider merit-based employment instead of free wealth distribution through citizens securing public sector job tasks they are not capable of performing.<sup>761</sup> The public sector cannot disappear even with the idea of

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<sup>758</sup> *Id.* at 574–75.

<sup>759</sup> *Id.* at 575.

<sup>760</sup> Hazem Beblawi, *The Rentier State in the Arab World*, 9 ARAB STUD. Q. 383, 385–86 (1987).

<sup>761</sup> JOBS AGENDA, *supra* note 275, at 48–49.

empowering the private sector as state operator and implementer of infrastructure projects.

Rather, the country's public sector should retain the highest-skilled job force out there, and that force must possess the applicable skillset with regards to the agency in question.<sup>762</sup>

Ultimately, yes, state citizens are primary consumers of public sector employee services, yet, the private sector is its long-lasting strategic partner, and mutual expertise and involvement is expected. Legal and Institutional reforms remain the core focus of creating an environment that enables the private sector through PPPs by the public entity, and behavioral sciences are not ex ante factors, but rather instrumental elements of institutional reform that entail a holistic approach to improving the public-private relationship on the part of the public sector.

Relevantly, self-enforcement in the context of private ordering is not to be taken for granted, and the transaction costs of resorting to formal enforcement mechanisms, such as courts, are not to be overlooked.<sup>763</sup> Nonetheless, government agencies should be inclined to build a perception of likelihood of commitment to certain set standards towards the private sector. The same applies to the private partner. For this latter partner to build a mutual platform of trust relationships, commitment is expected from the inception of the procurement process of development projects to their implementation in a duly smooth manner. Oliver E. Williamson describes the situation of necessarily incomplete contracts between parties as:

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<sup>762</sup> *Id.*

<sup>763</sup> Marc Galanter illustrates the effects, or costs, of formal adjudication on disputing parties, some of which include: "It follows that the effects of courts (or any forum) on dispute behavior cannot be equated with the dispositions of the cases that come before them. To appreciate the variety of radiating effects of judicial action (or inaction), it is helpful to distinguish between 'special effects' and 'general effects.' 'Special effects' are the effects produced by the impact of the forum's action on the behavior of the specific actors who are the subject (or target) of the application or enforcement of the law. They include not only the effects of sanctions imposed by the court (incapacitation, deterrence, reformation and so forth) but ancillary impacts of court proceedings such as effects on parties' credit rating, insurability, employment, licensing, business reputation and standing in other forums. And of course such effects are produced not only by the decision of the forum, but by the costs (including benefits foregone) and timing of that decision (or its absence)." Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 9–11 (1981).

Contractual incompleteness poses added problems when paired with the condition of opportunism, which manifests itself as adverse selection, moral hazard, shirking, subgoal pursuit, and other forms of strategic behavior. Because human actors will not reliably disclose true conditions upon request or self-fulfill all promises, contract as mere promise, unsupported by credible commitments, will not be self-enforcing.<sup>764</sup>

Mega infrastructure projects certainly offer more complex agreements and should be contemplated as such. The level of governance needed over an extended period of time should be reflected in the established monitorial structures within government agencies and their contractual relations with the private parties.<sup>765</sup> As a result, more regulations may be relevant depending on the sector and arrangement, such as that of a key energy sector within the state.<sup>766</sup> And in this same context of subsisting imperfections in contractual public- private relationships, Williamson provides an example about the difficulties facing not the privatization process in Russia itself, but the lack of clarity and anticipation of effective enforcement succeeding the privatization process, which affected particularly large privatized enterprises. While privatization does go its extremes with private engagement in state sectors, this should serve as an example that governmental agencies still have a regulatory and enforcement role with regards to privatized sectors and the nature of the role and capacity should be clear from the forefront.<sup>767</sup> Underestimating enforcement capacity could lead to loss of extensive resources administered into procuring large infrastructure projects.

Less is More: Bureaucracy 101 and the Proliferation of Relevant PPP GCC State Entities

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<sup>764</sup> Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 601 (2000).

<sup>765</sup> *Id.* at 603–04.

<sup>766</sup> *Id.*

<sup>767</sup> *Id.* at 610.

Irrefutable positive or negative conclusions pertaining to the relationship between the number of stakeholder PPP public institutions and the smooth procurement and implementation of infrastructure projects is questionable. Synchronized state policies are a positive aptitude, it is rather the lack of coordination and clear interagency goals that could enhance the complexity of infrastructure projects and shy away the private sector from smooth execution of infrastructure projects and further compromise the private-public relationship. The OECD emphasizes that such coordination is key and should take both a vertical form between the different levels of governments and horizontal collaboration across different jurisdictions.<sup>768</sup> And discussions about interagency collaboration do not disregard the importance of focusing on internal capacity building and expertise advancement within the public sector of the state, which falls under the quality of such entities and saves both time and costs instead of engaging myriads of agencies, i.e. quantity over quality.

The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects stresses that states undeniably differ in terms of their institutional structures when it comes to governance arrangements.<sup>769</sup> While certain countries focus on sectoral institutional structures, such as transport agencies or energy authorities that allow the country to develop significant expertise in given sectors, other economies with less regulatory capacity in infrastructure governance may need to adopt a broader cross-sectoral institutional support scheme.<sup>770</sup> This would mean that the latter approach would allow establishing economies of scale through cutting back on the number

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<sup>768</sup> OECD, GETTING INFRASTRUCTURE RIGHT: A FRAMEWORK FOR BETTER GOVERNANCE 27-30 (2017).

<sup>769</sup> UNCITRAL PFIP, *supra* note 63, at 31–32.

<sup>770</sup> *Id.*



of independent institutions.<sup>771</sup> GCC states could benefit from following the second approach in order to build more expertise while engaging in more and more projects, as Jeffrey Delmon put it, “there is no substitute for experience. Most countries with successful PPP programmes adopt a ‘learn-by-doing’ approach, using the experience with early projects to improve the PPP framework.”<sup>772</sup>

Focusing on quality public institutions means officials in relevant PPP entities should possess the right skills that include contract management, in addition to the precise technical capabilities dependent on the type of project, like energy, information technology, or other relevant skills as per the regulated sector.<sup>773</sup> This may necessitate acquiring external advisors that would offer their expertise when capacities are still being developed within the state, as would be the case in the GCC in different sectors, in addition to transaction advisors that assist in the procurement of complex large infrastructure projects.<sup>774</sup> Although these advisors come at an additional cost,<sup>775</sup> this would ultimately allow for skills transfer to GCC government entities where particularly needed. And the body of knowledge acquired by transaction advisors passed on to later established GCC in-house personnel should ensure that lessons are learned and documented about specific project history and traced across different projects for the future.<sup>776</sup> Project lengths necessarily entail that personnel, whether on the government side or private, that participated in early stages of the project are likely not the same twenty years down the road.<sup>777</sup>

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<sup>771</sup> JUMOKE JAGUN & ISABEL MARQUES DE SA, THE ROLE AND IMPORTANCE OF INDEPENDENT ADVISORS IN PPP TRANSACTIONS 1–3 (2016); EPEC, ROLE AND USE OF ADVISERS IN PREPARING AND IMPLEMENTING PPP PROJECTS 10–11 (2014); UNCITRAL PFIP, *supra* note 63, at 31–32.

<sup>772</sup> DELMON, *supra* note 60, at 171.

<sup>773</sup> GUIDEBOOK ON PROMOTING GOOD GOVERNANCE, *supra* note 587, at 23.

<sup>774</sup> *Id.* at 28.

<sup>775</sup> YESCOMBE, *supra* note 78, at 26.

<sup>776</sup> A GUIDE TO PROJECT MANAGEMENT BODY OF KNOWLEDGE (PMBOK GUIDE) 58–61, 100–10 (5th ed. 2013).

<sup>777</sup> *Id.*

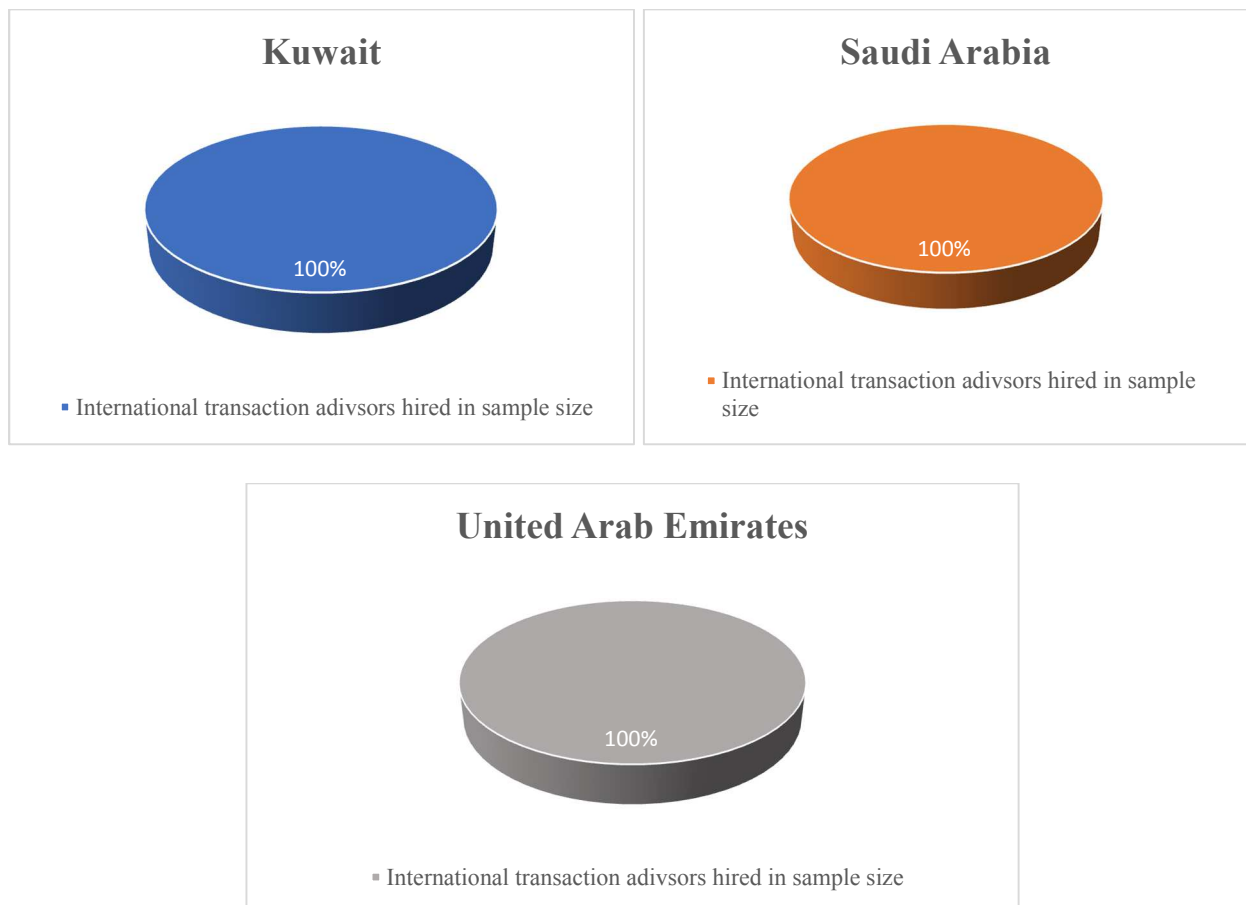
This demands the documentation of the different aspects of both project successes and challenges. Complex projects would require the right feasibility studies to help prepare the project and assure that implementing them as PPPs provides value for money and as a result serves as a better approach to cost-benefit effectiveness. *Figure X* below shows the significant current presence of international financial, legal, and technical advisors to PPP projects in project pipelines of Kuwait, Saudi Arabia, and the UAE.<sup>778</sup> Of the random sample of ten of the latest projects for the period 2010-2019 that fall under a PPP structure in *Figure X*, all three GCC states have hired international transaction advisors in each of the projects to help properly procure them. These advisors were technical, legal, and financial. And by referring to international, the sample size depended on those firms incorporated outside the three GCC states or of which are headquartered abroad. In-house advisors need time to be developed in such large-scale projects, and this will come with more experience procuring PPP structures. International expertise is important to certain projects, yet, GCC public officials will still retain a considerable amount of managerial responsibilities in the context of PPPs to ensure they operate successfully, which must not be confused with private sector exclusivity in the implementation of such

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<sup>778</sup> *Transaction Data*, IJ GLOBAL, <https://ijglobal.com/data/search-transactions> (last visited Dec. 4, 2019). The sample size of projects in Kuwait include: Al-Dibdibah Solar PV Plant (1500MW) PPP, Al-Khairan IWPP (1800MW) PPP, Az Zour North IWPP Phase II (1500MW), Umm Al Hayman Waste Water Treatment Plant, Al Abdaliyah ISCC Plant (280MW), Kabd Waste-to-Energy Facility, Kuwait Schools Development Program, Kuwait National Rail Road System (KNRR) (574KM), Kuwait Metropolitan Rapid Transit System (KMRT) Phase 1, Sulaibiya Wastewater Treatment Plant. In Saudi Arabia, the projects include: Jubail 3B Desalination Plant IWP, Rafha Solar PV Plant (20MW) IPP, Madinah Solar PV Plant (50MW) IPP, Jeddah Airport 1 and 2 Independent Sewage Treatment Plant, Al Faisaliyah Solar PV Plant (600MW) IPP, Rabigh Solar PV Plant (300MW) IPP, Jeddah Solar PV Plant (300MW) IPP, Qurayyat Solar PV Plant Phase I (200MW) IPP, Dumat Al Jandal Wind Farm (400MW) IPP, Yanbu 4 Water Desalination Plant IWP. In Emirate of Dubai, the projects comprised of: Hatta Hydroelectric Power Plant (250MW), Hassyan Sea Water Reverse Osmosis IWP, Mohammed bin Rashid Al Maktoum Solar PV Plant Phase V (900MW) IPP, Mohammed bin Rashid Al Maktoum CSP and Solar PV Plant Phase IV (950MW), Mohammed bin Rashid Al Maktoum Solar PV Phase III (800MW), Rashid Medical Complex Expansion, Hassyan Coal-Fired IPP Third Phase (1200MW), Mohammed bin Rashid Stadium PPP, Hassyan Coal-Fired Power Plant Phase 1 (2400MW) IPP, Jebel Ali Dubai Power Plant (1330MW).

infrastructure projects, because that is certainly not the case.<sup>779</sup> The private partner operates the project, but the relevant government must monitor this long operation stage to ensure observance of key performance indicators throughout the project's life.<sup>780</sup>

Figure 14: International Transaction Advisors Hired in GCC PPP Projects 2010-2019



\*(N=10)

Creating specific governmental institutions may take a variety of shapes and forms and depends largely on the sector that is to be regulated. While ministries are often established and designated with certain functions susceptible to mandate expansions, such institutions regularly

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<sup>779</sup> GUIDEBOOK ON PROMOTING GOOD GOVERNANCE, *supra* note 587, at 8–9, 23.

<sup>780</sup> These indicators are linked with the quality and quantity of service standards expected to be met by the private party in a PPP contract in exchange for receiving the necessary payments on the part of the government, in a typical situation. PPP REFERENCE GUIDE, *supra* note 103, at 149.

fall under a hierarchical governance scheme and decisions go through approval processes that engage multiple institutions. This is a great check on such institution, yet the process may be prone to political interference and corruption, especially with large-scale infrastructure projects.<sup>781</sup> Another approach would be to establish independent agencies with certain levels of autonomy that mitigate the chance of political interferences.<sup>782</sup> An important observation with such agencies though is that they may be costly and should consequently be preserved for the most necessary state needs and chosen diligently.<sup>783</sup>

Independent agencies are fairly common in the GCC. Sometimes, perhaps, even a political strategy to allocate leadership positions to certain individuals within the state, a product of rentierism as seen in the previous chapter discussing GCC economic structures. In many instances, leadership positions in these independent entities are equivalent to ministerial positions.<sup>784</sup> Counselor Majed Jamal Aldin, Director of the Economic Department at the Kuwaiti Chamber of Commerce and Industry, stressed during the “Governance in Kuwait” Conference held at the Kuwaiti Parliament involving prominent Kuwaiti figures that the instigation of independent agencies in Kuwait for instance, lacks in many occasions guarantees for the anticipated justification of establishing such entities, their impartiality and independence.<sup>785</sup> Directors of these entities are rather given an excessive amount of authority and their recruitment is out into question with the absence of clear standards for appointing leadership positions in

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<sup>781</sup> UNCITRAL PFIP, *supra* note 63, at 33.

<sup>782</sup> *Id.*

<sup>783</sup> *Id.*

<sup>784</sup> *See, e.g.*, Director General of the Kuwait Direct Investment Promotion Authority (KDIPA) in Kuwait, Director General of the Saudi Arabian General Investment Authority (SAGIA), and Director General and Chairman of the Board of Executive Directors of Dubai’s Road & Transport Authority (RTA).

<sup>785</sup> *Aljalsa Alrabiaa Limo’tamar (Alhawkama Fe Alkuwait) Tastaarith Dor Alhukooma Fe Tafaeaeel Adwar Alajhiza Alraqabiya [The Fourth Session of the “Governance in Kuwait” Conference Assesses the Role of the Government in Strengthening the Roles of the Monitory Agencies]*, ALDUSTOOR NEWS. (Oct. 11, 2017), <https://bit.ly/34UQxjV>.

Kuwait, which puts into play other political and social factors that contribute to such appointments.<sup>786</sup> UNICTRAL Legislative Guide on Privately Financed Infrastructure Projects rather emphasizes that while countries eventually adopt the most adequate government institutions that fit their local needs, regulatory commissions led by boards comprised of multiple members provide more safeguards than those headed by an individual, even though the latter may be more speedy and less bureaucratic in terms of decision making.<sup>787</sup> Multiple member regulatory commissions within different sectors or even multiple sectors related to infrastructure projects like PPP units, as will be explained shortly, would even mean that space for corruption and political influence is rather minimized due to the numerous stakes involved, which is why such regulatory commissions would benefit from pooling in members from different sectoral institutions in their work.<sup>788</sup>

In Kuwait, the following independent agencies can all come into play when it comes to infrastructure projects: Kuwait Municipality, Municipality Council, Ministry of Public Works (*Ashghal*), Environment Public Authority, Kuwait Direct Investment Promotion Authority, Public Authority for Manpower, Public Authority for Housing Welfare, Public Authority for Industry, Kuwait Ports Authority, Capital Markets Authority, Kuwait Authority For Partnership Projects, Kuwait General Administration of Customs, Central Agency for Public Tenders, State Audit Bureau of Kuwait, Kuwaiti Public Authority for Roads and Land Transportation, Civil Aviation Authority, and General Communications Authority.<sup>789</sup>

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<sup>786</sup> *Id.*

<sup>787</sup> This Guide defines the term “regulatory agencies” as institutional mechanisms required to implement and monitor the rules governing the activities of infrastructure operators. UNCTRAL PFIP, *supra* note 63, at 34.

<sup>788</sup> *Id.*

<sup>789</sup> *Kuwait Government Directory*, KUWAIT GOV'T ONLINE, <https://www.e.gov.kw/sites/kgoenglish/Pages/OtherTopics/KGD.aspx> (last visited July 20, 2018).

Relevant Dubai independent government agencies are comprised of the following amongst others: Dubai Export Development Corporation, Dubai Airports, Mohammed Bin Rashid Housing Establishment, Dubai Electricity and Water Authority, Dubai Airport Free Zone Authority, Dubai Civil Aviation Authority, and Roads and Transport Authority.<sup>790</sup>

Independent governmental agencies in the context of infrastructure projects in Saudi Arabia include: Council of Economic and Development Affairs, Public Investment Fund, Saudi Industrial Development Fund, Saudi Industrial Property Authority, Saudi Arabian General Investment Authority, Capital Market Authority, Human Resources Development Fund, General Authority of Meteorology and Environmental Protection, Saudi Standards, Metrology and Quality Organization, Saudi Ports Authority, Saudi Export Development Authority, Saudi Customs Authority, Saudi Development Bank, Saudi Commission for Tourism and National Heritage (SCTNH), Real Estate Development Fund, Public Transport Authority, General Real Estate Authority, General Entertainment Authority, General Commission for Survey, Electricity & Co-generation Regulatory Authority, Economic Cities Authority, and Communications and information Technology Commission, in addition to numerous regional and local independent agencies.<sup>791</sup>

This is all dependent on the sector concerned with the project, however, once again, Kuwait and Saudi Arabia take the lead in terms of what they perceive as the number of necessary relevant independent government agencies within the state, which particularly begs the question of whether this simplifies the procurement and implementation of infrastructure projects in the state or not. The facts are actually to the contrary, as the number of successful infrastructure

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<sup>790</sup> GOV'T OF DUBAI, <http://www.dubai.ae/en/government/Pages/default.aspx> (last visited July 20, 2018).

<sup>791</sup> *Government Agencies Directory*, SAUDI NAT'L PORTAL, <https://www.saudi.gov.sa/wps/portal/snp/pages/agencies/> (last visited July 20, 2018).

projects and their corresponding agencies in Dubai are supportive evidence of efficacy by focusing efforts on a select number of agencies. The legislatures and executive of the countries are both responsible for the proliferation of independent state agencies. Public entities come into play as a result of the opportunities regulations provide them with in order to function.<sup>792</sup>

One of the apprehended biggest concerns of the private partner that also remains with the presence of state institutions in the context of infrastructure projects is related to obtaining all the necessary permits and authorizations to initiate and implement such projects. This can prove to be laborious when many entities are engaged and operate in silos, and the processes are therefore not clear. The environment this would create is a red-tape dominant one and as a result could impede the implementation of development projects and frustrate the private sector in at least similar future projects. Studies have been conducted and have affirmed that government bureaucracy has been identified as a top challenge to infrastructure projects, especially those implemented as PPPs.<sup>793</sup>

### One-Stop-Shops and the Magic of Interagency Coordination

William Anderson, a leading scholar on intergovernmental relations, describes the term intergovernmental relations as, “to designate an important body of activities or interactions occurring between governmental units of all types and levels within the federal system.”<sup>794</sup> Anderson was referring to the US federal system, yet this may apply to other systems of government elsewhere. What is furthermore supportive of the emphasis on the role of personnel

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<sup>792</sup> Douglas C. North, *Economic Performance through Time*, 84 AM. ECON. REV. 359, 361 (1994).

<sup>793</sup> Robert Bain, PPP Construction Risk: International Evidence from the Roads Sector 5–7 (2007) (unpublished manuscript) (on file with author).

<sup>794</sup> Deil S. Wright, *Intergovernmental Relations: An Analytical Overview*, in CLASSICS OF PUBLIC ADMINISTRATION, *supra* note 46, at 344.

of these governmental entities is Anderson's further conclusion that, "it is human beings clothed with office who are the real determiners of what relations between units of government will be. Consequently, the concept of intergovernmental relations necessarily has to be formulated largely in terms of human relations and human behavior."<sup>795</sup>

Intergovernmental relations should be illustrated in a consistent predictable behavioral pattern. Intragovernmental agency behavior within state agencies themselves in their relationship with their potential private sector clients is to be well understood as a key factor to allow for intergovernmental relations to take place. Behavior is rather a vast field of study itself, nonetheless, within its apparatuses, exists studies on organizational behavior. Organizational behavior refers to the study of human behavior in an organizational setting. Hence, it combines interchangeable insight into individual behavior, the organization itself, and collectively, the group of people that this organization comprises of.<sup>796</sup> This is crucial in understanding Gulf public entities. Individuals in these entities, organizations, bear with them cultural backgrounds and interpersonal relations predicated in many instances on tribal connections and loyalty. In other instances, mercantile influences exist, all of which are factors that may affect the potential outcomes of project procurement.<sup>797</sup> Kevin Davis draws an example and raises the question about the influences on state institutions that may generally be traced back to social factors or behaviors more than legislature's initial abstract design.<sup>798</sup> Davis mentions, "Take for example the institution of 'French civil law'. Does this term encompass only the behavioral protocol set

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<sup>795</sup> *Id.*

<sup>796</sup> RICKY W. GRIFFIN & GREGORY MOORHEAD, ORGANIZATIONAL BEHAVIOR: MANAGING PEOPLE AND ORGANIZATIONS 4 (Ricky W. Griffin & Gregory Moorhead eds., 10th ed. 2013).

<sup>797</sup> Kevin Davis displays the literature supporting political and cultural influences on institutions in general and the importance of capturing such factors. Davis, *supra* note 688, at 18.

<sup>798</sup> *Id.* at 7.



out in the Napoleonic Code, or does it also encompass the distinctive characteristics of the judiciary that was designed to administer it?”<sup>799</sup> Gulf public entities are inevitably shaped by the prevalent social behavior in these countries at the time. Jamal Aldin, in the aforementioned “Governance in Kuwait” conference reiterated how these backgrounds are ultimate adversaries to any successful approach to efficiently introduce proper corporate governance to a public entity.<sup>800</sup> He was referring to Kuwait and many of the other Arabic and Islamic nations including the GCC states, elaborating that the problem in these countries is that there are what are called “mini identities” in citizens of the country working in public entities.<sup>801</sup> These mini identities are what citizens hold in addition to their national identity.<sup>802</sup> In the GCC, these mini identities are premised on ideas that do not serve ideals of a “Citizen State”, which is built on equality, justice, and democracy, all factors of a successful corporate governance program.<sup>803</sup> Mini identities, however, run in a very divergent direction, according to Jamal Aldin. These identities rather gravely protect familial, tribal, denominational, and same party ties, whether the concerned person is a tyrant or is oppressed.<sup>804</sup> And the problem eventually becomes the society’s concern with putting up a fight against all those who speak against these familial and denominational links, as if tradition and custom have been infringed.<sup>805</sup> The query hence remains, what happens when the private partner in any infrastructure project falls under such ties or on the contrary does not have the fortune of possessing these portrayed qualities.

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<sup>799</sup> *Id.* at 7.

<sup>800</sup> *Governance in Kuwait Conference, supra* note 785.

<sup>801</sup> *Id.*

<sup>802</sup> *Id.*

<sup>803</sup> *Id.*

<sup>804</sup> *Id.*

<sup>805</sup> *Id.*

One of the additionally perhaps destructive traits some individuals bring with them to these governmental entities, future public-private partners, are bureaucratic red-tape backgrounds, which may need to be adapted in both this individual and the structure of the organization itself. To put this in perspective, Kuwait has held the reputation of hosting some of the most obstructive entities to any state infrastructure project and being the center point of red-tape with regards to obtaining construction and similar permits related to such projects, especially when compared with its Gulf counterparts.<sup>806</sup> According to the World Bank Doing Business Report 2018, Kuwait ranked 129 globally with regards to issuing construction permits and 97 for getting electricity.<sup>807</sup> In comparison, Saudi Arabia ranked 38 globally for obtaining construction permits and 59 in getting electricity.<sup>808</sup> The UAE, however, leads the two where it exceeded almost all countries of the world and ranked 2<sup>nd</sup> in ease of obtaining construction permits and ranked 1<sup>st</sup> in getting electricity.<sup>809</sup> The UAE certainly sets an example for its counterparts in connection with the success its agencies have generated in potentially easing the implementation of infrastructure projects generally. These numbers are a starting point for the discussion in this study about the variances that exist amongst GCC state entities and the necessary cross-country acknowledgments each country must adhere to. More importantly though perhaps, achieving the idea of networks and interagency collaboration, i.e. more integrated state development project implementation policies should be the aim from such comparisons.

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<sup>806</sup> Biygautane et al., *supra* note 34, at 107.

<sup>807</sup> WORLD BANK, DOING BUSINESS REPORT 2018, at 172 [hereinafter DOING BUSINESS REPORT 2018].

<sup>808</sup> *Id.* at 190.

<sup>809</sup> *Id.* at 201.

In this regard, and as a direct result of Kuwait's declining rankings in the World Bank Doing Business Reports,<sup>810</sup> the country decided to establish another entity, yet again, although this time perhaps for a good reason. The new agency is called the Permanent Committee for Streamlining Business Environment & Enhancing Competitiveness (PCK), or in Arabic, *Tahseen*, which means improvement.<sup>811</sup> This Committee is headed by the Kuwait Direct Investment Promotion Authority (KDIPA) and has members from all major government agencies: Ministry of Commerce & Industry, Ministry of Electricity & Water, Ministry of Justice, Ministry of Finance, Central Bank of Kuwait, Kuwait Municipality, Kuwait General Administration of Customs, Public Authority for Manpower, General Secretariat for Planning & Development, Capital Market Authority, The Public Authority for Civil Information, Kuwait Chamber of Commerce & Industry, Kuwait Economic Society, and Kuwait National Competitiveness Committee.<sup>812</sup> This Committee has been evolving ever since its initiation back in 2013 by Council of Ministers Resolution 1551 of 2013 when its members were confined to the Ministries of Commerce & Industry, Electricity & Water, Justice, and Kuwait Municipality.<sup>813</sup>

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<sup>810</sup> Kuwait ranked 104th overall in the ease of doing business in the World Bank Doing Business Report 2014, 86th in 2015, 101st in 2016, 102nd in 2017, and 94th in 2018, out of a total of 190 economies. *See* WORLD BANK, DOING BUSINESS REPORT 2015, at 3, 4; WORLD BANK, DOING BUSINESS REPORT 2016, at 5; WORLD BANK, DOING BUSINESS REPORT 2017, at 7; DOING BUSINESS REPORT 2018, *supra* note 807, at 4. *See also About the Permanent Committee*, TAHSEEN, <https://tahseen.kdipa.gov.kw/en/about-2/> (last visited July 8, 2018).

<sup>811</sup> *See* Council of Ministers Resolutions 1551 of 2013 amended by Resolutions 2/177 of 2017 changing the name of the Committee and Resolution 1323 of 2017 adding entities to the composition of *Tahseen* (Kuwait). *Tahseen* has been particularly triggered by the World Bank Doing Business Report 2014 and has been evolving ever since. *About the Permanent Committee*, *supra* note 810.

<sup>812</sup> *About the Permanent Committee*, *supra* note 810. *See also* Council of Ministers Resolution No. 1551 of 2013, amended by Resolutions 100/Second of 2016, 2/177 of 2017, and 1323 of 2017 (Kuwait) [hereinafter Council of Ministers Resolution No. 1551 of 2013 as amended].

<sup>813</sup> *About the Permanent Committee*, *supra* note 810. *See also* Council of Ministers Resolution 1551 of 2013 as amended, *supra* note 812.

*Tahseen* has issued its reports about the status quo of current Kuwaiti public entities' performances, one of which was its 2017 version of the report,<sup>814</sup> and has clarified its commencement of coordinated efforts amongst all the country's relevant state authorities related to improving the business environment.<sup>815</sup> *Tahseen* identified necessary reforms to ease procedures related to issuing licenses and permits and conducting the required assessments, such as the development of online platforms to requesting permits and even a one-stop-shop by the name of Kuwait Business Center that is currently the destination to register and establish companies, but promises more services.<sup>816</sup> KDIPA Executive Regulations explicitly mention such one-stop-shop for what the Authority identifies as investors.<sup>817</sup> Article 4 of KDIPA Executive Regulations provides:

The Authority shall have an administrative unit called the "One-Stop Shop". Such unit shall be staffed with a sufficient number of government authorities' employees to be specified by the Board.

The One-Stop Shop shall be responsible for completing the transactions relating to the Investor's establishment of the Investment Entity and any expansions and any changes thereto, and shall issue and renew approvals, permits and licenses relevant thereto. The One-Stop Shop shall also undertake any further tasks assigned by the Director General.

The One-Stop Shop shall be responsible for preparing introductory guides, to be approved by the Director General, setting out the requirements for completion of

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<sup>814</sup> KUWAIT DIRECT INVESTMENT PROMOTION AUTHORITY (KDIPA), FOURTH NATIONAL REPORT ON NON-EXHAUSTIVE REFORMS IN DOING BUSINESS IN THE STATE OF KUWAIT (2017) [hereinafter KDIPA DOING BUSINESS REFORMS REPORT 2017] (identifying the different actions taken by *Tahseen* to coordinate amongst all relevant state entities and clarify the reforms they thus have introduced in order to address the observations the World Bank Doing Business Report has included in its consequent reports).

<sup>815</sup> *Id.*

<sup>816</sup> *Investors Service Center Online (BETA)*, KDIPA, <https://isc.kdipa.gov.kw/arform/> (last visited July 9, 2018); *Our Services*, KUWAIT BUS. CTR., <http://kbc.gov.kw/Default.aspx> (last visited July 9, 2018). Kuwait Business Center has even established two departments, one dedicated to services related to KDIPA, and the other dedicated to the National Fund for Small and Medium Enterprises services. *Organization Chart*, KUWAIT BUS. CTR., <http://kbc.gov.kw/Default.aspx> (last visited July 9, 2018); KDIPA DOING BUSINESS REFORMS REPORT 2017, *supra* note 814.

<sup>817</sup> Kuwait Investment Executive Regulations, art. 4.

transactions. The One-Stop Shop shall also be responsible for responding to any queries raised in respect of such guides.<sup>818</sup>

The idea at the end is not to abruptly eliminate all state entities, as workloads that fall under the competency of each entity are generally hefty and the specialties and expertise that have been developed in each should be considerable and difficult to instantly transfer. It is rather the need to facilitate knowledge retained by a single entity to offer clarity about the services each public institution provides and to further enable the resort of foreign and even local private corporations to the correct agency. *Tahseen*, in the voice of KDIPA, likewise states this point by asserting:

KDIPA hopes that launching Tahseen Portal will effectively support current efforts by serving as an interactive platform to document all laws, decisions, and measures taken and make them available to the general public, as well as using it to measure progress of the implementation of the National Agenda for Streamlining Business Environment (Tahseen Program) and display reforms' achievement rates. In doing so, Kuwait validates its resolve to improve business environment and place it at the core of its reform policy priorities, guided by successful cases in this regard elsewhere in the world.<sup>819</sup>

Now, Dubai has exceeded the GCC and many other countries in the overall ease of doing business rankings in the World Bank Doing Business reports, 22nd back in 2015, 31st in 2016, 26th in 2017, and 21st in 2018, amongst a total of 190 assessed other economies.<sup>820</sup> This fact does not come as a surprise. The success story is rationalized by accessibility to information and

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<sup>818</sup> Kuwait Investment Executive Regulations, art. 6 mentions the dynamics of interagency coordination and the role each stakeholder government agency nonetheless retains with regards to its membership representation in this one-stop-shop entity. *Id.* (“The Authority and the government authorities represented in the One-Stop Shop shall coordinate in respect of the administrative supervision of the employees who are representing them in the One-Stop Shop. Such employees shall be designated by the authorities they represent to perform the duties necessary for the completion of transactions without having to refer back to a higher authority in order to take the appropriate decision or action...”).

<sup>819</sup> Press Release, Kuwait Witnesses Reforms Improvements in Ease of Doing Business Index, KDIPA (Oct. 31, 2017), <https://e.kdipa.gov.kw/tahseen/Final-press-release-Kuwait-in-DB2018-English.pdf>.

<sup>820</sup> DOING BUSINESS REPORT 2015, *supra* note 810, at 3; DOING BUSINESS REPORT 2015, *supra* note 810, at 4; DOING BUSINESS REPORT 2016, *supra* note 810, at 5; DOING BUSINESS REPORT 2017, *supra* note 810, at 7; DOING BUSINESS REPORT 2018, *supra* note 810, at 4.

coordination of governmental agency competencies. The *Emara* has established an active e-portal, online database, dating back to 2009 and beyond with all necessary information related to establishing and maintaining businesses and all required components that fit under, are readily available.<sup>821</sup> This e-portal has been facilitating in some way a one-stop-shop approach to services provided by Dubai's public institutions.<sup>822</sup>

There is a very long list of services on Dubai's e-portal for government services. These services include: request for testing of structural and construction materials offered by the Dubai Municipality, applying for approval of engineering drawings of buildings offered by the Directorate General of Civil Defence, request to reserve trade name offered by the Department of Economic Development, request to issue a map (theory \ field survey) offered by the Land Department, request /track for getting electricity and water connection offered by the Electricity and Water Authority, and requesting a certificate of origin offered by the Chamber of Commerce & Industry, to name only a few of the listed services (Annex: Model Templates of Dubai Government's Specific Services).<sup>823</sup> All these services provide a summary of application forms, fees, a list of requirements, and an electronic link to the offering agencies.<sup>824</sup>

In Saudi Arabia, Dr. Afnan Al-Shuabi, former Secretary General of the Arab-British Chamber of Commerce (ABCC) in London mentioned during the panel on "Brand KSA: Tackling Investors Perception of the Kingdom of Saudi Arabia" in the 12th BMG Economic

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<sup>821</sup> *Dubai Government Services Directory*, DUBAI, <http://www.dubai.ae/en/ServiceDirectory/Pages/default.aspx> (last visited July 10, 2018); *Life Events for Businesses*, DUBAI, <http://www.dubai.ae/en/businesses/pages/default.aspx?category=Businesses> (last visited July, 10, 2018); DUBAI NOW, <https://dubainow.dubai.ae/en/Pages/default.aspx> (last visited July 10, 2018).

<sup>822</sup> A component of the e-portal service has been creatively referred to as Rashid, identifying the name of the ruler of Dubai who may instantly be asked about any question pertaining to business activity within the *Emara*. This e-service is known as DUBAI NOW. *Dubai Government Services Directory*, *supra* note 821.

<sup>823</sup> *Id.*

<sup>824</sup> *Id.*

Forum at the London Stock Exchange Group as a response to an overwhelming show of hands from the attendees about their lack of information with regards to investor knowledge about what is available in the public sphere, “I think there are good efforts, but not efforts combined,” and followed:

The problems with any investor or anyone wishing to do business in Saudi Arabia (is) they don't know where to start. Do they start with the commercial office or the embassy? Do they start with organizations dealing with business, whether it is the Chamber of Commerce, whether it is a business council? It is not really clear where to get the accurate information from...I think there has to be a one-stop shop that offers that.<sup>825</sup>

The insight from Al-Shuabi is enlightening, nevertheless, not completely accurate. The government of Saudi Arabia has undertaken some efforts that led to establishing a sort of one-stop-shop for different government services. Saudi Arabian General Investment Authority (SAGIA) has issued a manual that appears to be updated regularly called the Services Manual, that contains a compilation of useful information about the content and source of government services offered by public agencies.<sup>826</sup> What is additionally valuable as well in this context is that an electronic portal offering one-stop-shop services has actually been established. There are rather a number of initiatives that have been developed.<sup>827</sup> In addition to InvestSaudi, an electronic portal of SAGIA regarding general investment opportunities in the Kingdom,<sup>828</sup> *Meras* is an electronic portal developed by the *Tayseer* governmental committee as a portal that provides government and private sector services needed to start a business and maintain such.<sup>829</sup>

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<sup>825</sup> Jennifer Bell, ‘One-stop shop’ Needed to Lure Big Business to Saudi Arabia, ARABNEWS (July 11, 2018), <http://www.arabnews.com/node/1337256/business-economy>.

<sup>826</sup> SAUDI ARABIAN GEN. INV. AUTH., SERVICES MANUAL: SIXTH EDITION (2017).

<sup>827</sup> *Initiatives*, SAUDI ARABIAN GEN. INV. AUTH., <https://sagia.gov.sa/en/> (last visited July 11, 2018).

<sup>828</sup> *Id.*

<sup>829</sup> *Id.*; *About Tayseer*, TAYSEER, <http://www.tayseer.gov.sa/en/#about-tayseer> (last visited July 11, 2018); *About Meras*, MERAS, <http://ic.meras.gov.sa/en/about/> (last visited July 11, 2018).

This portal connects more than 20 government agency services.<sup>830</sup> And according to SAGIA, this ease of foreign investment business registrations has consequently led to a significant 70% jump in such licenses that were granted from the first quarter of 2018 to the first quarter of 2019.<sup>831</sup> The improvement was accompanied by a slash of previous license requirements by half.<sup>832</sup>

To reconcile what Al-Shuabi referred to in the panel and the information that has just been provided about Saudi government e-services, it appears that these services are fairly recent and the accelerated attempt to engage the private sector, local and foreign, in the Saudi economy and diversify is also relatively new. What Al-Shuaibi perhaps rightly alludes to is that these efforts must adequately be communicated to investors, especially foreign investors, and leadership clearly established in terms of the first point of contact with the international private sector, in this case, SAGIA through its different initiatives. Furthermore, time seems to reveal incremental changes like the increase in investment permits and will further expose the level of efficiency of these established services, but for now, they are certainly promising and in the right direction.

Ultimately, the antithesis of uniform predictable behavior, in many instances offered by one-stop-shop-like entities, would be replicated by individual agencies that create inordinate space for discretion. While flexibility might be useful to work with the private sector and accompany the needs of mega projects that live thirty or more years, this space equally allows inconsistency amongst decision makers and lack of predictability and healthy competition for investors. It may also be an open invitation for a major detriment of any public-private

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<sup>830</sup> *About Tayseer, supra* note 829; *About Meras, supra* note 829.

<sup>831</sup> Ibrahim Al-Omar, *Alislahat Aliqtisadiya Asaoodiya wa Nataijha Alkabeera* [Saudi Economic Reforms and their Positive Outcomes], INVEST SAUDI (May 22, 2019), <https://investsaudi.sa/ar/news/saudi-economic-reform-is-delivering-results/>.

<sup>832</sup> *Id.*



relationship, corruption. A study conducted by international law firm Norton Rose Fulbright found that a sheer majority of its 39 respondents to its study from the construction industry stressed this very point.<sup>833</sup> The study discovered that private sector parties engaged in construction projects in the Gulf underlined with a majority of 83% of the respondents their hope for Gulf governments not just to issue clear regulations, but consistently apply them as well.<sup>834</sup> Agencies in Kuwait, Saudi Arabia, and the UAE must be tested against consistent behavior that supplements legal provisions and foresees inviting the private sector as a current and future development partner. Dubai has been relatively doing so for a decade or to, it is time for the other Gulf States to jump on board and catch up.

Multiple Institutions are Fine, but Clear Mandates are Key: Paradigms from The Roads Sector

“Budgets [Committee]: Overlapping of Roads Authority Competencies Continues,” reads Kuwaiti newspaper headlines.<sup>835</sup> Kuwaiti legislatures themselves have been baffled by the status quo of the Kuwaiti Public Authority for Roads and Land Transportation (PARLT) since its initiation back in 2014. Four public agencies fight over similar competencies because of unclear transposition of mandates, they are: The Ministry of Public Works, Ministry of Interior, Ministry of Services Affairs, and the Municipality of Kuwait. Now, first of all, this is certainly a large amount of government agencies competing for the same mandate, and secondly, the Kuwaiti

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<sup>833</sup> NORTON ROSE FULBRIGHT, *BOOM AND RECOVERY: UNDERSTANDING THE MIDDLE EAST CONSTRUCTION MARKET* (2009).

<sup>834</sup> *Id.*

<sup>835</sup> “Almezanyat”: *Tashabok Ekhtisat Haya’at Alturuq Mustamir (“Budgets”: Overlapping of the Roads Authority Competencies Continues)*, ALQABAS NEWS. (Mar. 26, 2018), <https://bit.ly/2s3NhE3>. See also “Almezanyat Albarlamaniya”: *Fareeq Fany Maaa Almaliya Lenaql Aleatimadat min Mezanyat Haya’at Alturuq Ela Ala’ashghal [“Parliamentary Budgets”: Technical Team with Finance to Transfer Credit from Roads Authority Budget to Works]*, ALRAI NEWS. (Mar. 26, 2018), <https://www.alraimedia.com/Home/Details?id=6db8cf29-5353-46f4-83c6-b53a3b44228e>; “Almezanyat”: *Letafeel ((Hay’at Alturuq)) Wa Fak Atashabok [“Budgets”: To Enable Roads Authority and Dismount Overlapping]*, ALANBA NEWS. (Mar. 27, 2018), <https://bit.ly/2PhZywQ>.

legislature as the country's check on the executive is mind boggled, so what can be expected from the private sector? Amongst the observations raised by Kuwaiti monitoring authorities such as the Accounting Bureau is that neither a clear governance structure has been established in PARLT nor is there a fiscal framework in place.<sup>836</sup>

To be fair though, violating agency mandates is not exclusive to PARLT in Kuwait. The State Fiscal Audit Bureau points out that there have been 822 violations observed pertaining to Kuwaiti government agencies in the 2016-2017 fiscal year precisely for not adhering to their administrative governance structures, which includes deviating from competencies and illegitimate personnel designations.<sup>837</sup> The problem of overlapping governmental mandates and the lack of compliance of existing mandates has also been brought up during the Governance in Kuwait Conference.<sup>838</sup> The Deputy Governor of the Central Bank of Kuwait, Yousef Alobaid, said in this Conference that the dire demand for proper corporate governance of state entities finds its justifications in Kuwait in, "The weakness in governmental entities' level of performance and productivity, the overlapping of competencies and responsibilities between these entities, weaknesses in monitoring organizations and their functioning mechanisms, the absence of accountability, weaknesses in disclosure and transparency, and the emergence of incidents of administrative and financial corruption."<sup>839</sup>

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<sup>836</sup> *Competencies Continues*, *supra* note 835.

<sup>837</sup> *Aljareeda Tanshir Taqreer Mukhalafat Alwizarat Alhukoomiya Wal Hay'at Almulhaqa Wal Mu'asasat Almustaqilla Fee Asana Almaliya 2016-2017* [*Aljareeda Publishes Governmental Ministries, Supplementary Agencies, and Independent Authorities Violations Report of Fiscal Year 2016-2017*], ALJAREEDA NEWS. (Dec. 1, 2017), <https://www.aljarida.com/articles/1512056498957814000/>.

<sup>838</sup> Even the Advisory Committee to Study the Economic Progresses of the State of Kuwait formed by the ruler, the Emir, in 2012, for instance, came to the conclusion that overlapping governmental competencies and mandates were part of the Government's executive weakness, which was in turn detrimental to the local economy. *Governance in Kuwait Conference*, *supra* note 785.

<sup>839</sup> *Aljareeda Publishes*, *supra* note 837.

In specific relation to Kuwait's ongoing infrastructure development projects, the Kuwait General Secretariat of the Supreme Council for Planning and Development has recorded similar concerns to those raised above.<sup>840</sup> This entity documented what it has deemed as the major impediment to implementing infrastructure projects, administrative constraints. These constraints constituted 33% of the overall impediments. The administrative challenge, according to this agency, is that both the decision-making process across too many agencies and approval cycle of project components between such departments are slow and lack proper coordination.

To give some background, PARLT has been established by Law No. (115) of year 2014 on the Establishment of the Public Authority for Roads and Land Transportation (PARLT Law) with an independent legal personality according to Article 2 of this Law. Therefore, this is an independent government agency even though it is supervised by the State Cabinet, yet what is confusing is how the problem of overlapping of competencies as mentioned in the previous articles takes place when some sort of inter-agency cooperation is already preserved through Article 5 of PARLT Law, which reads:

The authority is managed by a Board of Directors, composed of eleven members, nominated by the minister in charge, under the approval of the Council of Ministers, in accordance with the following:

1. A representative of the Ministry of Public Works whose position is not less than Assistant Undersecretary.
2. A representative of the Ministry of Electricity and Water whose position is not less than Assistant Undersecretary.
3. A representative of the Ministry of Transportation whose position is not less than Assistant Undersecretary.
4. A representative of the Kuwait Municipality whose position is not less than Assistant Undersecretary.
5. A representative of the General Traffic Department whose position is not less than Assistant Undersecretary.

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<sup>840</sup> KUWAIT GEN. SEC. OF THE SUPREME COUNCIL FOR PLANNING & DEV., TAQREER MUTABAAT ALKHITA ASANAWIYA 2018/2019 HATA NEHAYAT ARUBA ATHALITH 1/4 – 31/12/2018 [FOLLOW-UP REPORT OF THE ANNUAL PLAN 2018/2019 UNTIL THE END OF THE THIRD QUARTER 1/4 - 31/12/2018] 70–73 (2019).

The rest shall be chosen from among those of national scientific and technical qualifications from the private sector or any other body as the Council deems fit, provided that there are four full-time members among them.

If the presence of all relevant Kuwaiti government agency representatives is preserved to ensure large road and public transportation infrastructure projects are smoothly executed to pave the way for a greater state developmental purpose to proceed, then this squabble simply makes no sense, and legitimate investor expectations are significantly minimized.

PARLT has in its project pipeline a significant amount of ongoing and potential projects, some of which include both the mega metro and railway network endeavors. Not including the metro and railway projects, 513 Million Kuwaiti Dinars (KWD) (about US \$1.7 Billion) have been appropriated for roads projects.<sup>841</sup> As for the metro and railway projects, 922,500,000 KWD (US \$3.05 Billion) are projected for the latter project and 3,460,000,000 KWD (US \$11.4 Billion) for metro.<sup>842</sup> A very ambitious plan that has been expected to proceed smoothly and feasibility studies have been undertaken in collaboration with the Kuwait Authority for Partnership Projects (KAPP).<sup>843</sup> One problem, although PARLT acknowledges metro feasibility studies have been undertaken albeit disputes some project details and demands more studies, it still expects the project to proceed smoothly in accordance with KAPP's plan. However, PARLT eventually decided to re-undertake all preparation procedures to procure the railway network project that have already been conducted by KAPP, once again, to start from square one.<sup>844</sup>

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<sup>841</sup> *Competencies Continues*, *supra* note 835.

<sup>842</sup> *Infrastructure: Key Projects*, NEW KUWAIT, <http://www.newkuwait.gov.kw/en/pillars-cpt/infrastructure-en/> (last visited June 1, 2018).

<sup>843</sup> *Id.*; *Projects: Transportation*, KAPP, <http://www.kapp.gov.kw/en/Projects> (last visited June 1, 2018). *See also Necessary Studies on the Metro Project Completed*, ARAB TIMES (May 1, 2018), <https://www.arabtimesonline.com/news/necessary-studies-on-the-metro-project-completed/>.

<sup>844</sup> Mahmoud Alzahi, *Almetro Wa Sikak Alhadeed Ela Nuqtat Al Sufur [Metro and Railway Network Back to Zero]*, ALQABAS NEWS. (May 30, 2018), <https://bit.ly/38arWtn>; *PARLT Repositions Railway, Metro Projects to Zero Again*, ARAB TIMES NEWS. (May 30, 2018), <https://www.arabtimesonline.com/news/parlt-re-positions-railway-metro-projects-to-zero-again/>.

PARLT believes it has not been adequately engaged by KAPP in this project according to its mandate.<sup>845</sup>

This same intricacy continues in a similar manner with stagnated communication between government entities as to their roles with regards to the rail project that should link the GCC state members in which each member state is dependent on the other to implement its part to achieve the overall success of the block's transport network.<sup>846</sup> And so, private bidders are left in awe awaiting an indefinite promise to initiate the project and know who to work with to obtain accurate and reliable knowledge. The message the aforementioned Kuwaiti roads and public transportation projects provides is simple:



The Dubai Roads and Transport Authority (RTA) in comparison is an independent authority, just like PARLT. And similar to PARLT as well, the RTA oversees many of the Emirate's infrastructure projects that include all transportation projects, public transportation being amongst those.<sup>847</sup> Moreover, the Law Establishing the Dubai Roads and Transportation Authority (RTA Law) addressed not only interagency coordination, but RTA's clear leadership in transportation-related projects, a point that rather lacked clarity with Kuwait's PARLT. When

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<sup>845</sup> *PARLT Repositions Railway*, *supra* note 844.

<sup>846</sup> Mohammed, *supra* note 461.

<sup>847</sup> Law No. 17 of 2005, art. 5, Establishing the Roads and Transportation Authority of the Emirate of Dubai (U.A.E.).

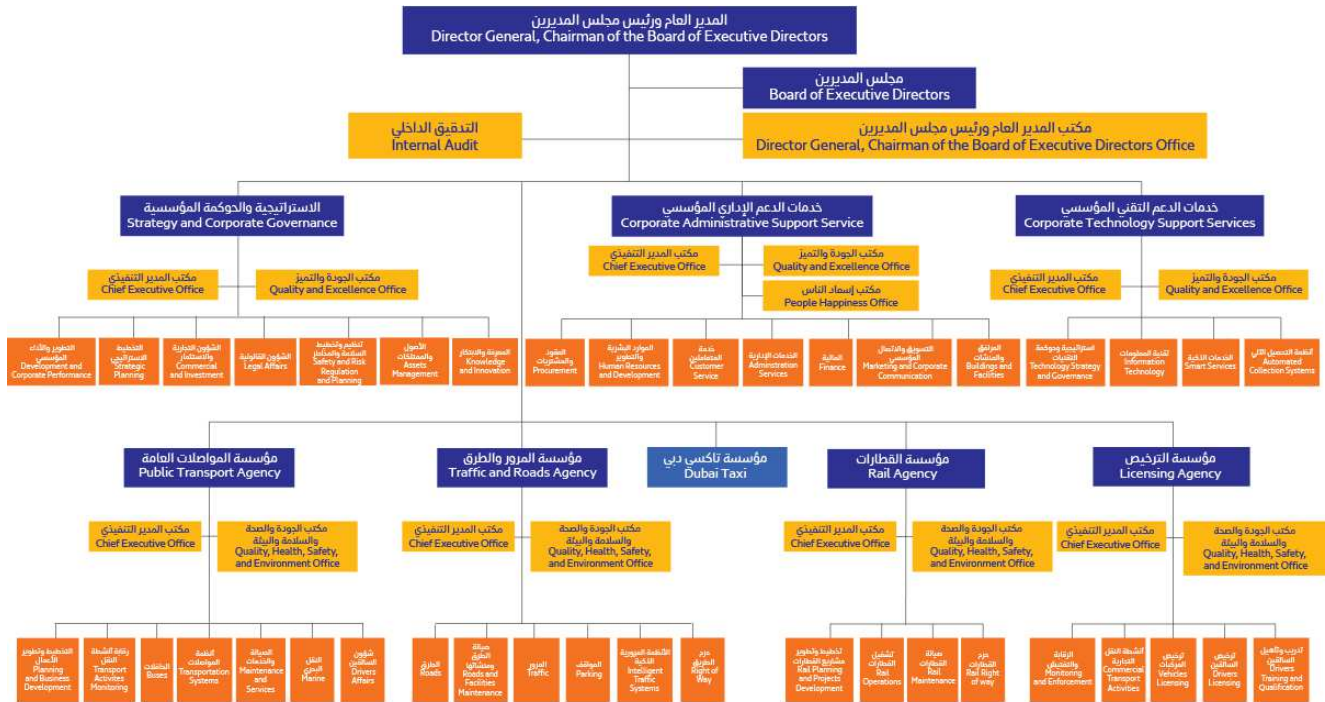
reading this Article, not only is this leadership noticeable, but also the large number of agency functions that now may be approached by one agency. Article 16 of the RTA Law provides:

There shall be transferred to the Authority in pursuance of this Law all the rights, obligations, liabilities and authorities of each of the Roads Department, the “Dubai Metro” Sector, the Department of Public Transport, the Roads Maintenance Section, the Roads Lighting Branch of the Department of General Maintenance of Dubai Municipality, as well as the Traffic Engineering Section, the Traffic Safety Section, the Vehicles Licensing Section, the Drivers Licensing Section, and the Plates Factory Section of the Traffic Directorate General of the General Headquarters of the Dubai Police.

The Authority shall have the right to transfer to as it deems appropriate any of the employees of the above mentioned administrative units as well as the right to appoint new employees according to the needs of work.

The organizational chart of the RTA in the figure below illustrates the competencies this authority possesses with regards to its transportation sector, and the different departments established within this one agency to accomplish all roads concerned projects. The role of other government agencies in Dubai thus remains minimal when it comes to transportation projects. The demonstrated governance structure is hence effective in delineating RTA’s competencies in transportation projects in comparison with other state entities. This is key to providing the smooth functioning environment the agency needs and guaranteeing minimal impediments from other entities.

Figure 15: The RTA's Organizational Chart



Source: RTA; <https://www.rta.ae/wps/portal/rta/ae/home/organization-chart>

When putting Dubai's RTA performance into perspective, the organization has consistently one excellency awards, not only locally, but internationally as well. In 2018, it won 12 awards in the international contest held by IdeasAmerica; an organization that rewards innovation by employees of both public and private sectors.<sup>848</sup> Similarly, in 2017, the RTA won numerous awards including: The Building Information Modelling (BIM) certification by the British Standards Institute (BSI), rendering it the first government entity in the world to obtain the (BIM Kite-Mark PAS 1192-2:2013, BS 1192-4:2014 and BS 1192:2007); and the

<sup>848</sup> RTA's Obtained Awards, RTA, <https://www.rta.ae/wps/portal/rta/ae/home/about-rta/our-awards/> (last visited July 19, 2018).

Government IT Infrastructure Project of The Year; to name a few.<sup>849</sup> The same applies to 2016, and the list goes on.<sup>850</sup>

In Saudi Arabia, the Saudi Ministry of Transport is competent with all types of the Kingdom's transportation means, land, sea, and air.<sup>851</sup> The dynamics of transportation infrastructure projects in terms of interagency cooperation and the primary role of the Ministry of Transport is unclear though. While the Transport Ministry serves as the umbrella organization regulating the transportation sector in Saudi Arabia, there are numerous governmental entities that were established to run the different types of transportation within the country under the Ministry's authority. The Public Transport Authority (PTA), oversees the public transport services and railway, the Saudi Ports Authority (SPA) regulates sea transportation and sea ports, and civil aviation is under the auspices of the General Authority of Civil Aviation (GACA).<sup>852</sup> The figure below shows the competencies that fall under the organizational structure of the Ministry.

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<sup>849</sup> *Id.*

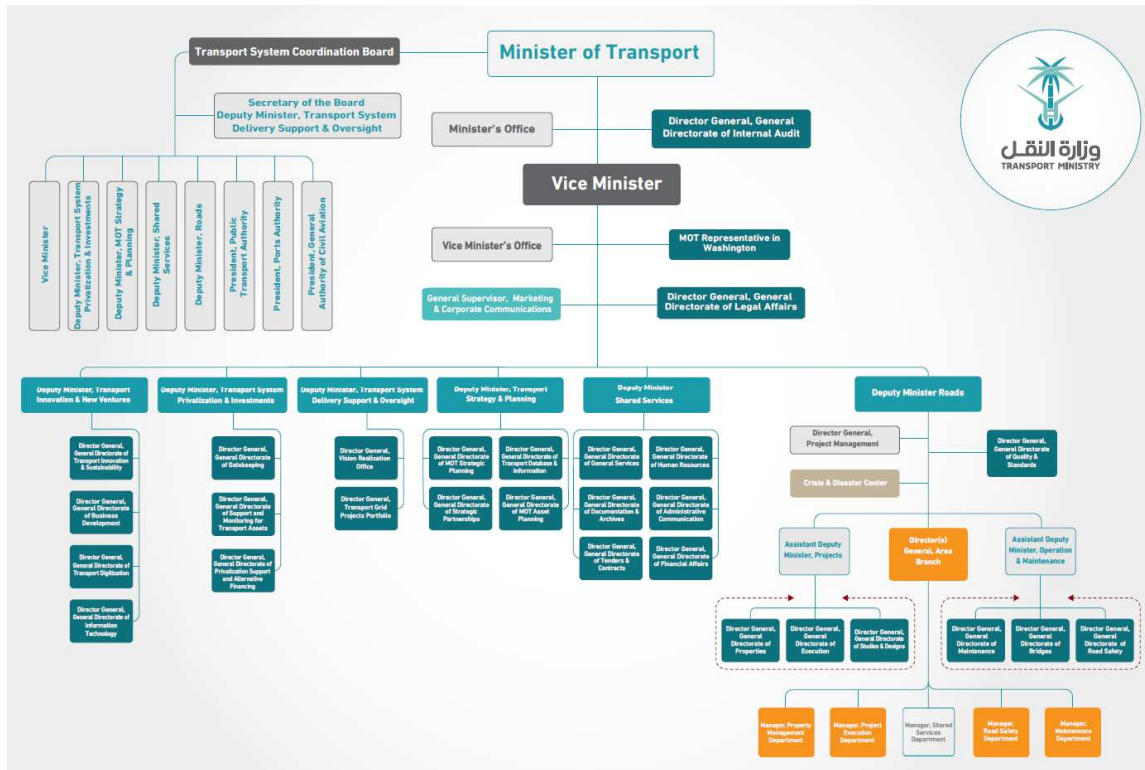
<sup>850</sup> *Id.*

<sup>851</sup> *Transport Sector Entities*, MIN. TRANSPORT, <https://mot.gov.sa/en/TransportSystem/Pages/default.aspx> (last visited July 16, 2018).

<sup>852</sup> *Large-scale Transport Projects Create Openings for Private Sector Investment in Saudi Arabia*, OXFORD BUS. GRP., <https://oxfordbusinessgroup.com/overview/opportunity-knocks-large-scale-projects-move-ahead-despite-budget-constraints-creating-openings> (last visited July 16, 2018).



Figure 16: Saudi Arabia Ministry of Transport Organizational Structure



Source: Saudi Transport Ministry, <https://mot.gov.sa/en-us/AboutUs/Pages/OrganizationalStructure.aspx>

The Saudi Government identifies amongst its six National Transportation Strategy strategic goals, “ensure the sector’s technical, economic and financial sustainability by improving overall performance of public and private transport service providers, by reducing governmental involvement in tasks which can be more efficiently executed by the private sector, and by rationalizing existing pricing and cost recovery schemes”.<sup>853</sup> Further, in its same National Transportation Strategy Report, it acknowledges that there have been 114 challenges raised pertaining to the transportation sector brought up by multiple state agencies in which only a coordinated approach may overcome such detriments.<sup>854</sup> This would start with enforcing the idea

<sup>853</sup> MIN. TRANSPORT, DEVELOPMENT OF THE NATIONAL TRANSPORTATION STRATEGY, FINAL REPORT 4, 12, 13 (2011) [hereinafter NATIONAL TRANSPORTATION PROGRAM FINAL REPORT].

<sup>854</sup> *Id.* at 4, 9, 19, 31.

of comprehensive integrated transport infrastructure planning for Saudi Arabia and follow up with a similarly comprehensive transport statistics system.<sup>855</sup> This national strategy emphasized the importance of all transport sector stakeholder agencies taking full ownership of their designated roles.<sup>856</sup> Public agencies are to be restructured as a result that pushes for greater transparency, participation, decentralization and local governance, and adequate regulatory frameworks would establish mechanisms to ensure agency project implementation compliance.<sup>857</sup> In a vast geographical landmass like Saudi Arabia, such decentralized yet coordinated institutional structures seem sound, but caution must be observed to prevent opportunism from occurring on the local decentralized levels when there is no genuine accountability in the hand of the local community, eventual direct beneficiaries.<sup>858</sup> Thus, decentralization in infrastructure projects may be able to provide direct engagement of beneficiaries of the provided services more so than on a centralized basis, but when such locals do not possess the capability to choose their representatives, nepotism and corrupt practices may emerge when groupings or business individuals are favored.<sup>859</sup>

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<sup>855</sup> *Id.* at 5, 20, 42.

<sup>856</sup> *Id.* at 7, 94. The Report lists agencies participating in the National Transportation Strategy as follows: “1. Ministry of Transport (MOT) 2. Saudi Ports Authority (SPA) 3. Saudi Railways Organization (SRO) 4. Saudi Arabian Public Transport Company (SAPTCO) 5. Ministry of Municipal and Rural Affairs (MOMRA) 6. Ar-Riyadh Development Authority (ADA) 7. Ministry for Commerce and Industry (MOCI) 8. Royal Commission for Jubail and Yanbu 9. Council of Commercial and Industrial Chambers 10. SASO 11. Supreme Commission for Tourism and Archeology (SCTA) 12. Ministry of Economy and Planning (MOEP) 13. Central Department of Statistics and Information 14. Ministry of Finance (MOF) 15. Saudi Customs 16. Saudi Arabia General Investment Agency (SAGIA) 17. King Abdulaziz City for Science and Technology (KACST) 18. National Committee for Traffic Safety 19. Ministry of Petroleum and Mineral Resources (MOPMR) 20. Saudi Aramco 21. MAADAN 22. Saline Water Conversion Corporation (SWCC) 23. Ministry of Interior (MOI) 24. Border Guards 25. Civil Defense 26. National Traffic Police 27. Riyadh Traffic Bureau 28. Highway Patrol 29. Motor Vehicle Periodic Inspection (MVPI) 30. Roads Special Forces 31. Ministry of Health (MOH) 32. Saudi Red Crescent Authority (RCA) 33. Ministry of Hajj (MOHajj) 34. Ministry of Agriculture (MOA) 35. Ministry of Defense and Aviation (MODA) 36. Saudi Arabian Airlines (SAUDIA) 37. General Authority for Civil Aviation (GACA) 38. Presidency of Meteorology and Environment (PME).”

<sup>857</sup> NATIONAL TRANSPORTATION PROGRAM FINAL REPORT, *supra* note 853, at 31–32.

<sup>858</sup> TREBILCOCK & PRADO, *supra* note 280, at 143–44.

<sup>859</sup> *Id.* at 143–44.

There is no surprise that in mega transport projects like building high speed rail networks, large bridges, or other such complex projects, multiple agency functions may be required. The idea of summarizing these functions in one agency is very useful yet not necessarily the only solution as long as there is a clear mandate for each agency with a defined leadership position for one of such agencies in order to lead a collaborative approach towards these infrastructure projects and offer clarity to the private partner. Lenders and private project contractors implementing different components alike expect both clarity in the administrative system and its consistency in order to diagnose the amount of risk at stake when entering certain infrastructure projects whether as financier or lender, or as project executor.<sup>860</sup>

#### Interagency Collaboration Brought to You by “PPP Units”

When it comes to PPP projects and the streamlining of project procurement and implementation processes, there is no better than PPP units to step in and assume this role, so ambitiously stated. First thing is first however, let this not be confused with what was displayed earlier about one-stop-shops and all services the countries provide in terms of different licenses and permits. These services remain absolutely relevant and must nonetheless be provided, yet reference here is more so to address the specific process of procuring infrastructure projects in the form of PPPs and what that entails. The World Bank PPP Reference Guide identifies PPP Units as “government teams concentrating skills in PPPs with the public administration.”<sup>861</sup> The OECD defines PPP units as “any organization set up with full or partial aid of the government to ensure the necessary capacity to create, support and evaluate multiple public-private partnerships

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<sup>860</sup> DELMON, *supra* note 60, at 89.

<sup>861</sup> PPP REFERENCE GUIDE, *supra* note 103, at 76.

agreements is made available and clustered together within government.”<sup>862</sup> There is no single model that such PPP unit follows in terms of its composition and location.<sup>863</sup> It may be an independent centralized agency, and in many instances also, it may be located in the ministry in charge of fiscal affairs within the state, i.e. ministry of finance or budgetary affairs.<sup>864</sup>

The functions of these PPP units do vary across different countries, yet they generally fall under the following scope:

- **PPP Policy Guidance:** A PPP unit may better prepare a PPP program for the country by preparing key standardized regulations that govern private sector transactions with the government through PPPs, in addition to the legislated general PPP regulations.<sup>865</sup> It thus acts as the specialized agency with key knowledge and expertise on PPPs that addresses the more detailed particular needs of private sector engagement. Documents that could be prepared may also be comprised of standard or model PPP contracts. Ultimately, the unit’s approach would exemplify an integrated PPP state policy.
- **PPP Promotion:** PPP units may lead the country’s desire to engage the private sector in its infrastructure projects through PPPs by attracting the private sector, nationally and internationally, to its PPP program.<sup>866</sup> This may involve workshops, benefits to agencies resorting to PPP models and private partners that engage in these projects through clarifying market conditions, tax breaks, and other remunerations.

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<sup>862</sup> OECD, DEDICATED PUBLIC-PRIVATE PARTNERSHIP UNITS: A SURVEY OF INSTITUTIONAL AND GOVERNANCE STRUCTURES 28 (2010) [hereinafter OECD DEDICATED PPP UNITS].

<sup>863</sup> *Id.* at 28.

<sup>864</sup> PPP REFERENCE GUIDE, *supra* note 103, at 76; OECD DEDICATED PPP UNITS, *supra* note 862, at 28.

<sup>865</sup> DELMON, *supra* note 60, at 166; PPP REFERENCE GUIDE, *supra* note 103, at 76–77; OECD DEDICATED PPP UNITS, *supra* note 862, at 32.

<sup>866</sup> DELMON, *supra* note 60, at 166; PPP REFERENCE GUIDE, *supra* note 103, at 77; OECD DEDICATED PPP UNITS, *supra* note 862, at 32.

- **Technical Support:** When a PPP unit is expected to be made up of the most experienced PPP transaction officials, their technical expertise in supporting the different government agencies and private partners throughout the PPP procurement and implementation processes would be key in driving the prospects of successful PPP projects that follow certain pre-set standards yet are flexible enough for specific project needs.<sup>867</sup> For instance, while some state governmental agencies may not be wary about how crucial conducting socio-economic and environmental assessments are while preparing PPP projects, the PPP unit would ensure such studies are conducted as part of the project feasibility reports.<sup>868</sup>
- **Capacity building:** In relation to the previous function, the PPP unit with all its expertise in PPP transactions may better prepare other government agency representatives in engaging with the private sector in similar infrastructure projects in the future and the necessary components to look out for while preparing and procuring PPP projects.<sup>869</sup> The end result would be a more cost-efficient PPP process that has eventually built technical capabilities in the different state agencies hence more inept government agencies are aligned with a future where the government and the private sector co-lead the state's development.
- **Gatekeeping:** This function would allow the PPP unit to be the ultimate decision maker on whether a project is to proceed as a PPP project or is better implemented through other more traditional means.<sup>870</sup> No project is completely exempt from having any political

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<sup>867</sup> DELMON, *supra* note 60, at 166; PPP REFERENCE GUIDE, *supra* note 103, at 77; OECD DEDICATED PPP UNITS, *supra* note 862, at 32.

<sup>868</sup> DELMON, *supra* note 60, at 166, 168.

<sup>869</sup> PPP REFERENCE GUIDE, *supra* note 103, at 76–77; OECD DEDICATED PPP UNITS, *supra* note 862, at 32.

<sup>870</sup> PPP REFERENCE GUIDE, *supra* note 103, at 77–78; OECD DEDICATED PPP UNITS, *supra* note 862, at 32.

interferences at this stage with this function, but this is part of any government's concern about fighting corruption generally and should be addressed on a wider scale basis.

Gatekeeping could allow the project to go through multiple screening processes and ensure it meets the desired state integrated policy goals.

- **PPP project identification and selection:** A PPP unit may have a role in identifying a set of PPP projects that serve the country's infrastructure development needs to be pursued by the state's different line ministries or agencies depending on the relevant sector.<sup>871</sup>
- **PPP procurement:** In some countries, a PPP unit may be engaged in the procurement process of a PPP project, whether by exclusively procuring certain projects or co-engaging in this process with the relevant line ministry.<sup>872</sup> This function is perhaps the most controversial in terms of the perceived independent role the unit should have and the prevention of overlapping specializations when it comes to other state agencies with more technical expertise in the project within its given sector.

Once again, functions of PPP units vary and are tailored to the needs of different states based on their existing institutional arrangements. Albeit, these functions ultimately reveal how effective of a role such PPP units have in infrastructure projects within the state. It has been observed that PPP units with more enforcement roles, such as compulsory project approvals or pre-feasibility assessments, are more effective than those assigned with merely advisory responsibilities.<sup>873</sup>

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<sup>871</sup> PPP REFERENCE GUIDE, *supra* note 103, at 77–78.

<sup>872</sup> PPIAF & East Asia & Pac. Sustainable Dev., *Public-Private Partnership Units: Lessons for their Design and Use in Infrastructure* 27–28 (World Bank, Working Paper No. 43139, 2007) [hereinafter *PPP Units: Lessons*].

<sup>873</sup> *Id.* at 71. Such conclusion has been observed in the study in the aforementioned report, amongst other sources, conducted jointly by the World Bank (East Asia and Pacific Sustainable Development Department) and the Public Private Infrastructure Advisory Facility (PPIAF) including case studies that represented eight PPP units: Partnerships Victoria (Victoria, Australia), the Parpublica Ministry of Finance PPP Unit (Portugal), the Infrastructure Investment Facilitation Center (Bangladesh), the Built Operate Transfer (BOT) Center (Philippines,

In the context of the role PPP units may play in ensuring value for money and efficient project outcomes, recent projects in the health sector in Kuwait, although traditionally procured, provide an example of just how improper preparation may lead to unwarranted results. When it is left to different agencies like ministers of health to prepare their infrastructure needs, their capacity to properly plan for the whole life cycle of projects that also includes their operation stage, may lead to ad hoc results that largely depend on their level of capacity. Sizeable hospitals have been recently built in Kuwait advertising their magnitude and capacity as topping regional and global charts and meeting high standards of construction in their facilities.<sup>874</sup> One of these flagship hospitals for instance is Jaber Al-Ahmad Al Jaber Al Sabah Hospital of Kuwait (*Figure 17*).

The major problem once the ecstatic announcement of construction completion of these hospitals was declared was soon followed by an inquiry about who and where these doctors that will work at the hospitals will come from. As it turns out, there is not nearly as close a number of doctors and other necessary medical staff present to run and provide the full medical services these newly built hospitals so ambitiously promise.<sup>875</sup> These projects have followed a traditional

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the National Treasury PPP Unit (South Africa), the Private Infrastructure Management Center and Private Infrastructure Investment Center (Korea), the National Investment Bank of Jamaica, and Partnerships UK and the UK Treasury PPP taskforce. *Id.* at 1, 11–12.

<sup>874</sup> *Amir Opens State-of-the-Art Jaber Al-Ahmad Hospital*, KUWAIT TIMES (Nov. 28, 2018), <https://news.kuwaittimes.net/website/amir-opens-state-of-the-art-jaber-al-ahmad-hospital/>; *Mustashfa Jaber...Khadamat Alamiyah bi Lamsa Kuwaytia [Jaber Hospital... Global Services with Kuwaiti Touches]*, ALRAIMEDIA NEWS (Mar. 3, 2019), <https://www.alraimedia.com/Home/Details?id=baaf5066-ed30-45d5-a41e-04a6cb221e9e>.

<sup>875</sup> Waleed Al Abdulla, *Mustashfaya Jaber Wa Aljahraa Yahtajan 3900 Mumarith [The Hospitals of Jaber and Jahra Need 3900 Nurses]*, ALQABAS NEWS (Apr 18, 2019), <https://bit.ly/33OUDe1>; *Alsu Alsuha Tatlub 5 Alaf Daraja Watheefiyah Letashgheel Mustashfa Jaber [Health Requests 5 Thousand Employment Grades to Operate Jaber Hospital]*, ALJARIDA NEWS (July 20, 2018), <https://www.aljarida.com/articles/1532021408082854000/>; *Alqinae: Inkhifadh Nisbat Alatiba' Alkuwayteen min 30% Ela 17% Khelal Alkhams Sanawat Almuqbila [Alqinae: A Decrease in the Percentage of Kuwaiti Doctors from 30% to 17% during the Next Five Years]*, ALKUWAITYAH NEWS, (July 8, 2017), <http://alkuwaityah.com/Article.aspx?id=426806>; Shayia Alnabhan, *Aljamea Altubiya: 43 Malyon Khata' Tuby Sanawyan Ala Mustawa Alalam [Medical Association: 43 Million Medical Negligences*

approach in their delivery, i.e. not the PPP route, yet one can only imagine how centralized standardized screening processes that agencies like PPP Units may establish and help enforce would be useful in ensuring that constructed infrastructure achieves its anticipated outcomes. These screening processes would ensure proper financial, economic, commercial, socio-economic, and environmental feasibility studies are all conducted from the forefront to prevent examples like the challenges to operating hospitals in Kuwait from happening again.

*Figure 17: Image of Jaber Al-Ahmad Al Jaber Al Sabah Hospital in Kuwait*



Source: gckuwait.com

### PPP Unit Structures

An important feature of PPP units is that they often pool in different agency representatives and embody strong political leadership with the most effective state agency

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*Worldwide*], ANNAHAR NEWS (Sept 17, 2018),  
<http://www.annaharkw.com/annahar/Article.aspx?id=810478&date=26092018>.



presence, such as the council of ministers or prime minister headship. First and foremost, perhaps, the location of the PPP unit and whether it is its own independent entity must be well understood in the context of the institutional scheme of the country in relation to PPPs. This enables a firmer grip on the significance of its composition. There are different models a PPP unit may implement when it comes to its placement. The unit can be its own independent entity within the state.<sup>876</sup> Another common trend is the unit's location within the ministry of finance or treasury, as the government department responsible for fiscal affairs and allocation of state resources.<sup>877</sup> An additional model could be establishing the PPP unit within one of the line ministries that is principally concerned with infrastructure development such as the ministry of infrastructure or public works.<sup>878</sup> Furthermore, the country may create a public corporation that assumes the functions of such a unit,<sup>879</sup> like PPP Canada, which is a Crown corporation created in February 2008.<sup>880</sup> Also, and not particularly coinciding with the idea discussed here about a centralized entity with PPP knowledge capacity, some countries may establish different so-called PPP units within different line ministries that oversee that ministry's set of PPP projects and advise accordingly.

As for the most successful model, it is hard to say. However, it has been observed that PPP units housed within the ministry of finance have been more integrated and aligned with the

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<sup>876</sup> PPP REFERENCE GUIDE, *supra* note 103, at 78; OECD DEDICATED PPP UNITS, *supra* note 862, at 37; DELMON, *supra* note 60, at 167.

<sup>877</sup> PPP REFERENCE GUIDE, *supra* note 103, at 78; OECD DEDICATED PPP UNITS, *supra* note 862, at 37; DELMON, *supra* note 60, at 167.

<sup>878</sup> PPP REFERENCE GUIDE, *supra* note 103, at 78; OECD DEDICATED PPP UNITS, *supra* note 862, at 37; DELMON, *supra* note 60, at 166.

<sup>879</sup> PPP REFERENCE GUIDE, *supra* note 103, at 78.

<sup>880</sup> According to the 2013 Spring Report of the Auditor General of Canada, Chapter 10—Advance Funding—P3 Canada Fund, “The Corporation is wholly funded by the government and reports to Parliament through the Minister of Finance. It manages the \$1.2 billion P3 Canada Fund on behalf of the federal government. The Fund provides funding to infrastructure projects procured by other levels of governments through public-private partnerships (P3).” AUDITOR GENERAL OF CANADA, 2013 SPRING REPORT (2013), [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201304\\_10\\_e\\_38195.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201304_10_e_38195.html).

country's broader fiscal policies.<sup>881</sup> OECD *Dedicated Public-Private Partnership Units: A Survey of Institutional and Governance Structures* Report observed the location of a number of its member states' established PPP units as follows.<sup>882</sup>

Figure 18: Distribution of PPP Units in OECD States

Country	Placement of PPP Unit
Australia (Victoria)	Ministry of Finance
Australia (New South Wales)	Ministry of Finance
Belgium (Flanders)	Ministry of Finance
Czech Republic	Independent Agency
Denmark	Line Ministry
France	Ministry of Finance
Germany	Independent Agency
Greece	Ministry of Finance
Hungary	Ministry of Finance
Ireland	Ministry of Finance
Italy	Ministry of Finance
Japan	Ministry of Finance
Korea	Independent Agency
Netherlands	Ministry of Finance
Poland	Ministry of Finance
Portugal	Independent Agency

<sup>881</sup> PPP REFERENCE GUIDE, *supra* note 103, at 78–79; DELMON, *supra* note 60, at 167.

<sup>882</sup> OECD DEDICATED PPP UNITS, *supra* note 862, at 35.

South Africa

Ministry of Finance

United Kingdom

Ministry of Finance

Source: *Dedicated Public-Private Partnership Units: A Survey of Institutional and Governance Structures*, OECD (2010).

The table above shows that amongst the countries surveyed within the OECD, the conspicuous trend is housing the PPP unit within the ministry of finance. This fact has considerably legitimized justifications for allotting PPP units in such ministry to reveal a more integrated fiscal policy through diligent infrastructure spending. It is furthermore not surprising for investors to consequently expect ministries of finance to have proactive roles in infrastructure spending and as a result raising the prospects of them housing such PPP units within their structures. Nonetheless, and with these substantially valid facts and justifications, the institutional structure of each state should guide the location of this entity and establish an independent agency if necessary, to combat existing adverse features within the current state institutional structure.<sup>883</sup> The ministry of finance can nevertheless retain an active role in PPPs and infrastructure projects through necessary project approvals it must undertake for such projects to proceed. Reemphasizing a previous point made about multiple member regulatory commissions with different affiliated institutions, again, autonomous independent PPP units in the UNCITRAL Legislative Guide meaning of regulatory commissions may ultimately prove to be more productive than such ministry of finance established units.

Whatever shape or form these PPP units replicate, their staffing requires a fusion of different necessary skillsets. This would mean sector specific insight depending on the country's development ambitions, in addition to many other critical expertise in procurement transactions,

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<sup>883</sup> *PPP Units: Lessons*, *supra* note 872, at 25.

legal, engineering, finance, and communications skills, amongst other qualifications like environmental specialties that enable adequate social and environmental assessments to take place.<sup>884</sup> A key consideration to keep in mind in the context of regularly large and complex infrastructure projects that are performed as PPPs, is that skillsets in these units must at least attempt to be in par with what expertise exists in private sector partners out there, which is why private sector specialists and experts may also be recruited to be part of these PPP units when they possess the necessary capacity.<sup>885</sup> There would ultimately certainly be some room for mutual learning curves from qualifications that exist in both the governmental or private sector side. Yet, building local capacity sustainably able to work in these PPP units will remain an ongoing process and foreign transactions advisers and specialist may fill in the gap in the meantime, as mentioned earlier.<sup>886</sup>

With every benefit comes a disadvantage. PPP units must serve specific mandates that do not circumvent other agency specializations and more importantly do not cause some sort of conflict of interest. When an institution is designated with promoting the use of private finance through PPPs in infrastructure projects there is an almost inherent bias that the same institution would fight for such projects to succeed as PPPs through the procurement phase even if such projects provide better value for money if they were conducted in another manner like using public finance through more traditional procurement schemes.<sup>887</sup> Hence, PPP project promotion combined with a significant role in project identification and procurement may not particularly

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<sup>884</sup> OECD DEDICATED PPP UNITS, *supra* note 862, at 40.

<sup>885</sup> *PPP Units: Lessons*, *supra* note 872, at 33; PPP REFERENCE GUIDE, *supra* note 103, at 78; OECD DEDICATED PPP UNITS, *supra* note 862, at 28.

<sup>886</sup> GUIDEBOOK ON PROMOTING GOOD GOVERNANCE, *supra* note 587, at 23; *PPP Units: Lessons*, *supra* note 872, at 34.

<sup>887</sup> DELMON, *supra* note 60, at 168.

be the most efficient policy in order to ensure projects and state budgets are put to their most optimal use.

The OECD additionally identifies some cons of PPP units summarized as requiring extensive resources whereas other state ministries or agencies with expertise in the given sector may offer the same functions that PPP units do, in addition to the possibility of hiring transaction advisors with the necessary knowledge for infrastructure projects to be procured.<sup>888</sup> The political influence on PPP units is also perceived as a possible event when the country's leadership obtains a strong grip on such units.<sup>889</sup> What nonetheless may be realized about these criticisms pertaining to the presence of PPP units is that they offer no structural solutions, rather, they remain ad hoc approaches that offer no streamlining of the PPP procurement processes even though projects differ. Moreover, multiple ad hoc solutions do not appear to be more cost efficient as well. The OECD acknowledges the benefits of a structural more programmatic approach that a PPP unit may offer. And while PPP units appear to be of a centralized nature, which they regularly are, they may also have a decentralized character depending on the nature of the economy within the country such that justifies local, regional, and federal PPP units.<sup>890</sup>

KAPP,<sup>891</sup> serves as the PPP Unit in Kuwait under the authority of the ultimate policy maker, the Higher Committee for PPP Projects (Kuwait Higher Committee).<sup>892</sup> The Kuwait Higher Committee although the supreme decision maker, possesses competencies that are confined to high level approvals and policy setting for the country's PPP program, while KAPP

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<sup>888</sup> OECD DEDICATED PPP UNITS, *supra* note 862, at 29.

<sup>889</sup> *Id.*

<sup>890</sup> *Id.* at 33–34.

<sup>891</sup> This Authority superseded the previously so-called Partnerships Technical Bureau. *See Who We Are*, KUWAIT AUTH. PARTNERSHIP PROJECTS (KAPP), <http://www.kapp.gov.kw/en/Who-We-Are> (last visited Dec. 4, 2019). This Authority has its independent budget and even has the competency to subscribe citizens in the joint stock companies that are to be established.

<sup>892</sup> Kuwait PPP Law, arts. 3, 5.

retains the technical and executive side of PPP projects and works more closely with the state's different procuring public entities.<sup>893</sup> Nevertheless, the Kuwait Higher Committee is comprised of Ministers of the country's key ministries and directors of relevant public authorities to ensure a collaborative approach to PPP projects. Yet to be final, this Committee's decisions must be approved by the Minister of Finance, a fact that puts into perspective the role and power that the Ministry of Finance possesses within the state's institutional structure given the high profile of PPPs.<sup>894</sup> KAPP collaborates with line ministries in terms of setting priorities and strategies while preserving the initial plan of the line ministry, but ultimately, KAPP has been established and is attached to the Minister of Finance.<sup>895</sup> Hence, KAPP is its own independent public entity under the Kuwait Higher Committee authority, and in the scheme of the country's ministerial hierarchy, the Minister of Finance while on the apparently possessing a limited technical role, is politically responsible for KAPP's performance. KAPP's institutional structure eludes to basically centralized PPP activity within the State. The PPP Law is established to preserve institutional behavior where a change in PPP officials would not ultimately affect the status quo of existing projects and others to be procured.

As for KAPP's competencies, they are extensive, even to the degree that this entity through the Higher Committee has a significant role in the procurement process of infrastructure

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<sup>893</sup> *Id.* arts. 2, 3.

<sup>894</sup> Kuwait PPP Law, art. 2 ("In accordance with this Law, a Higher Committee called the "Higher Committee for Public-Private Partnership Projects" shall be established by a decree (and shall replace the Higher Committee for projects built on state-owned property established by Decree No. 145 of 2008), and shall assume the powers and authorities of the Authority's board of directors provided for under this Law. The Higher Committee shall be chaired by the Minister of Finance and shall consist of the following members: 1. Ministers holding the following ministerial portfolios: a. Public works; b. Commerce and industry; c. Electricity and water; d. Municipality; 2. The Director General of the Environment Public Authority; 3. The Director General of the Authority, as member and rapporteur; 4. Three experienced specialists appointed by the Council of Ministers from among State's employees. The Higher Committee shall develop bylaws organizing its meetings and decision making process. A representative of the relevant Public Entity relating to the PPP Project shall be invited to meetings without having a voting right. The decisions of the Higher Committee shall only be effective upon their approval by the Minister of Finance.").

<sup>895</sup> *Id.* art. 4.

projects itself, by proposing such projects, a role regularly preserved for the sector related public entity, such as PARLT for roads projects.<sup>896</sup> The PPP Law lists the competencies of KAPP as:

1. Conduct surveys and preliminary studies to identify projects that may be procured under this Law and submit reports regarding the same to the Higher Committee.
2. Review and study projects and Initiatives prepared by the Public Entities or Concept proposer and submit appropriate recommendations regarding the same to the Higher Committee.
3. Assess the comprehensive feasibility studies of PPP Projects and proposed Concepts, prepare and complete these studies as needed, submit appropriate recommendations in relation to the same to the Higher Committee in preparation for the procurement of the project.
4. Prepare a guidebook for PPP Projects.
5. Set the mechanism for the submission of Initiatives as well as their methods of evaluation and procurement, in accordance with the provisions of this Law.
6. Set out approaches to follow up and evaluate the performance of approved PPP Projects.
7. Develop contract templates, including required terms and provisions, to be submitted to the Higher Committee for approval.
8. Prepare the legal drafting of PPP Agreements and the Terms of Reference thereof.
9. Submit recommendations to the Higher Committee for the approval of the Successful Investor after a successful negotiation.
10. Incorporate public joint-stock companies for the implementation of PPP Projects and determine the capital thereof in accordance with the provisions of this Law.
11. Develop PPP Projects programs and follow up on their completion and issue necessary decisions in relation thereto.
12. Compile and submit a semi-annual report on PPP Projects to the Higher Committee for its approval, prior to the Minister of Finance presenting the same to the Council of Ministers.
13. Follow up on the implementation of PPP Agreements and work on overcoming implementation obstacles in collaboration with the entity under which the project is subjected.
14. Propose the exemption of the project from taxes and custom duties and raise such recommendation to the Higher Committee.

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<sup>896</sup> KAPP's procurement competencies is understood from the Kuwait PPP Executive Regulation, art. 2, which provides: "The proposal for the procurement and implementation of a PPP Project may be submitted by the following entities: 1. Public Entities: a Public Entity wishing to propose a project that falls within its competences in accordance with the PPP Law shall submit a request to the Authority along with the comprehensive feasibility studies of the project in accordance with the Law, its Executive Regulations and the Guidebook; 2. The Higher Committee: the Higher Committee approves the request of the relevant Public Entity for the procurement of a PPP Project in accordance with a PPP Model, and it may propose PPP Projects to Public Entities."

And it shall also exercise all other competences stipulated in this Law.

As a result, PPP project functions in relation to KAPP are two-fold, a relationship this unit has with both the public entity procuring the relevant PPP project and private partner working with both these entities, and KAPP's relationship with the Kuwait Higher Committee as the supreme approving authority of PPP projects. In the first of these relationships especially, the centralized nature of the unit is evident from its engagement with the country's public entities depending on the sector the infrastructure project falls under. This relationship is of an active executive one and of a technical nature. To further clarify this point, KAPP jointly establishes with procuring entities what are known as "Competition Committees" to better evaluate each proposed project.<sup>897</sup> This ensures KAPP is engaged in the procurement process to help guarantee the project provides value for money. Yet, this engagement also would mean more time to prepare and procure these infrastructure projects hence more resources needed for the process of which hiring transaction advisers in many instances are one of.

To delineate state entity roles when it comes to coordinating the procurement of infrastructure projects, should a PPP model be chosen to implement a project, KAPP, the Higher Authority, in conjunction with the relevant public line entity shall, once again, be the stakeholder public institutions to procure the project. This is not to be confused with the established role preserved for the Central Agency for Public Tenders in Kuwait. This latter Agency shall play a critical collaborative role, only that such role shall be confined to traditional procurement of infrastructure projects. This entity shall not be the entity designated with procuring PPP projects.

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<sup>897</sup> Kuwait PPP Executive Regulation, art. 3(2) ("The committee shall review, complete and prepare project related studies, instruments and procurement documents and shall approve the same. The committee shall also evaluate the technical and financial offers and shall supervise the public session set for opening the financial envelopes of the technically accepted offers.").



Confusion may arise due to the role mentioned as per Article 2 the Kuwait Public Tenders Law that explicitly provides, as a general rule, for the Central Agency for Public Tenders being the focal point to procure any of the Country's public entity purchases, contracting, and services, exclusively, with some explicit exceptions such as those associated with defense contracts and the oil sector.<sup>898</sup>

While KAPP is at its infant stage, and expectations of efficiency and reasonable timeframes to co-prepare and procure PPP projects are not set to a high threshold, this is particularly a capacity KAPP must work on acquiring within due time and focus on progressing. The State Audit Bureau in Kuwait, the country's government audit agency issued its report about KAPP's exercise of its competencies and pointed out that KAPP showed evidence that it still lacked the necessary technical capabilities in its different departments, such as the legal department, and has in many instances fell short of properly coordinating with other state entities.<sup>899</sup> And with regards to KAPP's role with its superior entity, the Higher Committee ensures that final approvals are not undertaken by this Committee unless studies are conducted, and recommendations are made by KAPP.

In the UAE, Dubai takes a completely different track and believes that a centralized PPP unit is not an indispensable component of a successful PPP program. Mattar Al Tayer, chairman and executive director of the RTA in Dubai says, "I agree that risks must be shared by both parties, I agree that the Government, to allow growth, must allow more private sector participation in their projects," yet continues " "But I don't see how a centralised unit can have

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<sup>898</sup> Kuwait Public Tenders Law, art. 2.

<sup>899</sup> *Report on the Assessment of KAPPs Competencies and Effectiveness*, *supra* note 465, at 6-16.

the experience to address all the different projects.”<sup>900</sup> In fact, the Dubai PPP Law directs the different government agencies in the *Emara* to establish a partnership committee, or PPP unit, to oversee PPP projects that it is concerned with, a different approach from the one the Kuwaiti PPP unit takes. Article 11 of this Law provides:

a. An internal committee named the “Partnership Committee” will be formed at each Government Entity. Members of this committee will be nominated pursuant to a resolution of the Director General. These committees will be responsible for performing all the duties stipulated in this Law and the resolutions issued in pursuance hereof. The resolutions forming such committees will determine their terms of reference and the procedures for holding their meetings.

Ultimately though, the stakeholder government counterparts that are identified as making up the core machinery of the PPP project process in Dubai, at least from a centralized standpoint, are the Supreme Fiscal Committee of the *Emara*, the Department of Finance, the Government Entity Concerned with the Partnership Project, and the Financial Audit Department.<sup>901</sup> Thus, a Partnership Committee is not in and of itself the relevant stakeholder, it is rather the public entity that houses such a committee within its structure in a sort of decentralized manner, that is relevant.

This is a strong assertion by Dubai authorities proving that each economy must test what it perceives as the most adequate institutional solution to engage private partners in infrastructure projects. Where centralized PPP units seemed to have been providing the desired benefits of streamlining the PPP process in the context of existing weak state institutions in Kuwait, the case is perhaps distinct with productive Dubai government agencies. The function of existing institutions, role of PPPs in different sectors, and political will of the state government are all

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<sup>900</sup> Mohammed N. Al Khan, *UAE Roads Chief Wants New Laws to Govern Public-Private Partnerships*, THE NATIONAL UAE (Apr. 16, 2013), <http://www.thenational.ae/news/uae-news/transport/uae-roads-chief-wants-new-laws-to-govern-public-private-partnerships>.

<sup>901</sup> DUBAI PPP GUIDE, *supra* note 645, at 74–79.

factors to be considered when deciding what type of PPP unit should be established, if even any of such units are necessary in the concurrent business environment.<sup>902</sup>

Notwithstanding the viewpoints of the Dubai governmental representatives about the minimal contribution that PPP units may bring to its private sector engagement in infrastructure, the presence of a central unit with a knowledge database and standardized resources accompanied by institutional approaches remains a simplified model to say the least. This institutionalizes the private sector's engagement in such PPP infrastructure projects within the PPP units' domain, where this unit is consequently expected to take lead, just like central banks are looked upon as monetary policy hubs of any country. This is where convenience and expectations outplay what may be perceived as expediency and efficiency in the context of multiple agency solutions. The moreover benefit is obtained by other state entities in a sort of cross learning exposure type of way. If the RTA in Dubai is outstanding in terms of its performance, other government agencies in Dubai may be less efficient and PPP projects relatively a new concept to them. Ultimately, the presence of a PPP unit need not to be associated with an agency that monopolizes all functions and competencies related to PPP projects, rather this is what an economy may control if it were to tailor such units to the economy's needs by choosing the right functions it entrusts a PPP unit with.

In Saudi Arabia, the NCP is the current designated PPP Unit. This unit is of a centralized nature and only very recently established in comparison with Kuwait's KAPP. Article 2 of the NCP Law provides:

1. A center called "The National Center for Privatization" shall be established under the organization which is organizationally linked to the Economic and Development Affairs Council. The Organization shall have an independent legal

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<sup>902</sup> OECD DEDICATED PPP UNITS, *supra* note 862, at 28.

body corporate in addition to its independent financial and administrative position. The Head Office of the Organization shall be located in the city of Riyadh.

2. The Center shall operate in accordance with the commercial standards and principles. The Center has flexibility and powers which enable it to carry out its function in accordance with the financial and administrative regulations set forth in the Organization.

The governmental representatives that make up the NCP add an interagency collaboration character to this entity. According to NCP Law Article 5, the NCP governing board shall be comprised of:

- a) Representative of the Ministry of Finance (Director)
- b) Representative of the Ministry of Trade and Investment (Director)
- c) Manager of Center (Director)
- d) Not more than three government authorities related to the work of Center (Directors)
- e) Three from private sectors (Directors).

It is important to point out that linking the NCP to the Economic and Development Affairs Council particularly, leverages the political will necessary to accomplish Saudi Vision 2030 related to all infrastructure projects that fall under the auspices of the NCP. What is especially empowering to the NCP's association with the Council is the role Crown Prince, Minister of Defense and Vice President of the Council of Ministers of the Kingdom, Prince Mohammad bin Salman, also the King's son, has had by chairing the Council since its initiation in 2015 and is still doing so and overseeing its progress directly.<sup>903</sup> The very high-level leadership infused into the Council and as a result the NCP are worthy enough to exemplify the

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<sup>903</sup> *HRH the Crown Prince Chairs Meeting of Economic and Development Affairs Council, Launches Privatization Program*, VISION 2030 (Apr. 24, 2018), <http://vision2030.gov.sa/en/node/344>; *Council of Economic, Development Affairs Adopts Governance Framework related to Realizing Vision 2030*, SAUDI PRESS AGENCY (June 1, 2016), <https://www.spa.gov.sa/viewstory.php?lang=en&newsid=1506806>; *Council for Economic Affairs and Development Holds Meeting*, SAUDI PRESS AGENCY (Nov. 7, 2016), <https://www.spa.gov.sa/viewstory.php?lang=en&newsid=1556543>.

Kingdom's sincerity towards its privatization and PPP programs from an investors' standpoint. What nonetheless remains is that this high-level support also must maintain a level of accountability when these large infrastructure projects are not properly procured, and corruption has been detected, which are both detriments to any business environment.<sup>904</sup>

As clarified earlier, the NCP is designated with a role in both the privatization of state public entities and PPP projects themselves. This is undoubtedly a large undertaking, especially given the Kingdom's size. Other countries have instead developed different governmental agencies for both, such as the Supreme Council for Privatization as opposed to KAPP in Kuwait.<sup>905</sup> To supplement the complexity of this single entity undertaking, the pipeline of PPP projects in Saudi Arabia is of a considerable magnitude as seen previously, and privatization programs are upcoming rapidly as well.<sup>906</sup> Therefore, it is critical that the country is cautious

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<sup>904</sup> An additional element worth mentioning here is the danger of politically charged decisions that interfere in the business environment. The Saudi government responded with all its might to Canadian Minister of Foreign Affairs' criticism of the Kingdom's human rights record and detainment of human rights activists. The Saudi government declared the Canadian ambassador to the Kingdom persona non grata and called back its ambassador to Canada, cut all educational scholarship funding of its students in Canadian schools, stopped medical treatments of its citizens sought in Canada, and moreover reconsidered all business ties with between Saudi Arabia and Canada. Some sources even pointed out to news outlets that there were direct commands from Saudi governmental institutions like to its asset managers sell off its stakes in Canadian corporations and divert future assets away from Canadian sources, yet this was denied by Saudi sources. The Saudi minister of foreign affairs has not referred to these as sanctions, as he promised assessing more measures to come until the Canadian government acknowledges its actions, as "Canada knows what it needs to do." The problem with these Saudi actions are that they particularly scare away a healthy predictable business environment when political incidents like these may spiral a whole array of reactions and perhaps leave months and years of negotiations of infrastructure projects and their management at a vulnerable position always, captive to any actions both the host government or company nationality government take. Safeguards pertaining to change of law and/or government and material adverse government actions shall be displayed furthermore in this study. Simeon Kerr, *Saudi Arabia Sells Canadian Assets as Dispute Escalates*, FIN. TIMES (Aug. 8, 2018), <https://www.ft.com/content/b33505ba-9aff-11e8-9702-5946bae86e6d>; *Saudi Minister: Aramco Canada Customers won't be Impacted by Diplomatic Crisis*, AL ARABIYA ENGLISH (Aug. 9, 2018), <http://english.alarabiya.net/en/business/energy/2018/08/09/Al-Falih-Saudi-oil-policy-not-impacted-by-political-considerations.html>; Aziz El Yaakoubi & David Ljunggren, *Canada Defiant after Saudi Arabia Freezes new Trade over Human Rights Call*, REUTERS (Aug. 5, 2018), <https://www.reuters.com/article/us-saudi-canada-diplomacy/canada-defiant-after-saudi-arabia-freezes-new-trade-over-human-rights-call-idUSKBN1KQ0QI>.

<sup>905</sup> See Law No. 37 of 2010, Regarding Privatization (Kuwait).

<sup>906</sup> The Privatization Program Document outlines the anticipated privatization plans as per the different sectors during the upcoming decade to achieve Saudi Vision 2030. See PRIVATIZATION PROGRAM REPORT, *supra* note 652, at 45–58. Needless to say, though, one of the biggest hurdles so far to investors' perception of the sincerity of the Saudi privatization program has been the complexities and ambiguity around Saudi oil giant SOE, ARAMCO,

while focusing on establishing expertise in a single centralized entity for both privatization and PPPs. As of this moment, the confusion like creating Supervisory Committees, of which the Chairman of the NCP is member, for what is referred to as privatization in target sectors does not clarify whether even PPPs are under the scope of these decentralized Supervisory Committees.<sup>907</sup>

### PPP Units Swim in Yet an Ocean Filled with Other Stakeholder Entities

After displaying the critical role PPP units play in infrastructure projects which follow the PPP model, a key message remains: these projects are not typically owned and led by PPP Units, rather, procuring or contracting entities are the overall stakeholder agencies concerned with the relevant project.<sup>908</sup> The World Bank PPP Reference Guide considers this entity by default to be, “ the ministry, department, or agency responsible for ensuring the relevant asset or service is provided” and is regularly responsible for implementing PPP projects.<sup>909</sup> And to reconcile the previous discussion about PPP units and their primary role, these units are nonetheless the overall coordinator of the country’s PPP program. Putting this in perspective, a highway project structured as a PPP is under the ultimate auspices of PARLT in Kuwait, the RTA in Dubai, and the Ministry of Transportation in Saudi Arabia. If there is any subject matter expertise to be found pertaining to the sector attracting the PPP project, it is certainly to be found within the sector procuring entity, even if this meant some transaction advisors in the given field

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which has not undertaken the promised IPO and privatization the government has pledged. There may be an alternative more desirable business case to better serve ARAMCO instead of its privatization, and in this case perhaps, the promise to investors of its privatization may have been rushed. And with an obstacle like this, the pace of the Saudi privatization program as a whole and private sector engagement remains to be seen. Anjali Raval, Arash Massoudi & Simeon Kerr, *Saudi Sovereign Wealth Fund Scrambles for Resources*, FIN. TIMES (Aug. 9, 2018), <https://www.ft.com/content/ca35d8fa-9bba-11e8-9702-5946bae86e6d>.

<sup>907</sup> See Council of Ministers Resolution No. 655, 8/11/38H (2016), ch. III, Amending Royal Decree No. 355 approving the Rules of Conduct of the Supervisory Committees of Privatization Targeted Sectors (Saudi Arabia).

<sup>908</sup> GETTING INFRASTRUCTURE RIGHT, *supra* note 768, at 43; OECD DEDICATED PPP UNITS, *supra* note 862, at 49.

<sup>909</sup> PPP REFERENCE GUIDE, *supra* note 103, at 72.

of expertise are engaged in the process from the line ministry. This is reemphasizing a point previously made that creating PPP units and single entity one-stop-shops are not meant to completely deprive line ministries of their role in the country's development in its different sectors.

The Kuwait PPP Law asserts the primary role a contracting agency maintains over the project in comparison with any other public agency, including KAPP as the PPP unit. Article 39 of the PPP Law provides, "Each Public Entity shall be competent to conclude and enter into the PPP Agreements that fall within the scope of its jurisdiction with the Project Company, subject to the provisions of this Law and its executive regulations." So, as long as the public entity is competent and has the authority to enter into a contract with the private sector in the form of a PPP, it will be the lead line entity and prevent any costly *ultra vires* activities from occurring.<sup>910</sup> And when KAPP announces a PPP project to be procured in the official local gazette, *Kuwait Alyom*, and media outlets, it shall also, "include the Public Entity identified as responsible for the project" in such announcement.<sup>911</sup> The Kuwait PPP Law ultimately identifies KAPP's eventual role as a coordinator with the contracting agency, in which Article 6 of this Law stresses, "The Authority shall collaborate and cooperate with the Public Entities for the implementation of PPP Projects in compliance with the provisions of this Law."<sup>912</sup>

It is perhaps more evident that the Dubai PPP Law in the UAE considers the relevant public entity depending on the sector, such as the RTA, to be the primary concerned

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<sup>910</sup> DELMON, *supra* note 60, at 62.

<sup>911</sup> Kuwait PPP Law, art. 8.

<sup>912</sup> "Public Sector" or "Public Entities" "include any government, Ministry or Department, or any public entity with a supplementary or an independent budget, that enters into an agreement with a private investor to carry out a project in pursuance of the PPP Model and in compliance with the provisions of this Law or that participates in the investment through a portion of the shares of the public joint stock company established for the implementation of the PPP Project." Kuwait PPP Law, art. 1(8).

governmental party to the PPP contract alongside the private sector partner based on previous discussions about the decentralized nature of PPP units in the *Emara* within each government entity. The government entity would thus propose the PPP project that fits its needs and later negotiate its contractual terms with the private partner when all necessary approvals are obtained.<sup>913</sup>

The Saudi procuring entities appear to lead their sectoral contribution with the help of the NCP. The NCP functions “Without prejudice to the specializations and responsibilities of other entities” and furthermore coordinates with procuring authorities in its mandates.<sup>914</sup> The NCP’s role in privatization certainly differs from and exceeds its role in PPP projects.<sup>915</sup> More clarity is needed as to the level of contribution the NCP has in privatization projects as this study has identified as opposed to PPP projects.<sup>916</sup> The NCP in its guiding policy documents like the Privatization Manual and Privatization Program Report illustrate the extensive role the NCP has with regards to what it terms privatization projects yet with a hint of the role the sectoral entity would take.<sup>917</sup> It is pertinent that caution is taken to ensure no one single entity like the NCP

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<sup>913</sup> Dubai PPP Law, art. 12 (“A Partnership Project may be proposed by a Government Entity or by the Private Sector.”); *id.* art. 27 (“a. The term of a Partnership Contract will be agreed upon by the Government Entity and the Project Company.”).

<sup>914</sup> Saudi NCP Law, art. 4.

<sup>915</sup> See SAUDI PRIVATIZATION MANUAL, *supra* note 654, § 2.

<sup>916</sup> The SAUDI PRIVATIZATION MANUAL provides — in § 4 in connection with its binding nature — “The Parties concerned shall comply with the provisions of this Manual. If the provisions of this Manual are not complied with, the proposed Privatization project shall not be accepted and shall be rejected by CEDA, the Supervisory Committee or NCP, as the case may be.” What nonetheless remains unclear when establishing the extent to which the NCP plays a role in privatization projects as opposed to PPP projects is the Manual’s approach in using the term privatization to what appears to be the change of structure of SOEs and PPPs alike. Section 1 of the Manual provides, “Privatization: A term used to refer to SOA and PPP collectively, as defined in the Privatization Strategy for the Kingdom of Saudi Arabia promulgated by the Supreme Economic Council (Dissolved) Decision No. 1/23 dated 23/3/1423 AH corresponded to 4/6/2002.” And the *Privatization Program Report* at 8 defines privatization as, “the transfer of ownership of specified assets or services from the government to the private sector. The transfer of ownership can be done in several forms, e.g. (not exhaustive) full/partial assets sale, IPO, management buy-out, PPP (BOT), concessions or outsourcing.”

<sup>917</sup> See SAUDI PRIVATIZATION MANUAL, *supra* note 654, § 2; PRIVATIZATION PROGRAM REPORT, *supra* note 652, at 9–11.



ultimately controls and takes primary lead in details of certain sector related PPP projects with minimal role for the procuring entity in that given sector.<sup>918</sup>

Needless to say, technical capacity in each of these line agencies is key if these entities were to steer their sectoral infrastructure development. Steven Schooner and Christopher Yukins emphasize the importance of building technical capacity within government procurement officials “consistent with sound, business-based, transparent practices.”<sup>919</sup> Line ministers cannot be completely dependent on what technical capacity PPP units may offer.

While procuring line agencies retain a leading role in PPP projects and work closely with centralized PPP units, when such units exist, there are other key stakeholders that ensure mega projects worth billions of dollars provide all anticipated development goals, whether economic, social, or environmental. The leveraged multi-engagement in a single PPP project means more buy-in of state entities, which consequently also means more prospects for success.<sup>920</sup> Another key advantage is that multi stakeholder engagement means that different queries and concerns are brought up at early stages to avert their implications and escalations.<sup>921</sup> And although presenting such stakeholder institutions are not to be glimmered and confuse the process as to the relevant entities a private partner may have to engage with, it is rather more so governmental checks that the procuring agency must involve. Key agencies in PPP projects are to be covered in

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<sup>918</sup> PRIVATIZATION PROGRAM REPORT, *supra* note 652, at 11 provides the areas where the privatization program and NCPs function do not explicitly reach, which include: “Development and regulation of traditional private sector projects with the public sector –this includes legal and statutory regulations and procedures for working with the private sector outside the umbrella of ‘privatization’ and ‘private sector participation projects’; Creating overall privatization strategies for industries and sectors as well as privatization models, as this is done by the PSCs and ETs; Dealing with assets which are owned by the Public Investment Fund, as they are covered by the Public Investment Fund Program; Dealing with residential real estate assets which are unlocked for private sector usage by contractors and real estate developers, as they are covered by the Housing Program.”

<sup>919</sup> Steven L. Schooner & Christopher R. Yukins, *Public Procurement: Focus on People, Value for Money and Systemic Integrity, not Protectionism*, in THE COLLAPSE OF GLOBAL TRADE, MURKY PROTECTIONISM, AND THE CRISIS: RECOMMENDATIONS FOR THE G20 87–92 (Richard Baldwin & Simon J. Evenett eds., 2009).

<sup>920</sup> DELMON, *supra* note 60, at 174.

<sup>921</sup> *Id.* at 174.

a certainly non-exhaustive manner.<sup>922</sup> Ultimately, after discussing the different stakeholder entities involved in the PPP process, if the process appears to be significantly complex, that is exactly the message this study is trying to convey, and why a wholistic business environment input of regulations and institutions alike in the Gulf are indispensable.

### Ministries of Finance

Perhaps the most significant state entity to a PPP program other than the line agency and PPP unit is the ministry of finance or budgetary agency. And as previously conveyed, a combo of PPP unit/ministry of finance could be offered to provide a joint role of PPP policy coordination and fiscal diligence when this unit is housed within the budgetary authority. The large fiscal commitments resulting from mega infrastructure projects are to be screened carefully in preparation for a decision of whether such project is better conducted in a more traditional manner that provides more value for money and saves costs yet still preserves efficiency. What better than the state's designated budgetary authority to provide the service of fiscal assessment.

This state entity should retain a leadership role with regards to PPPs and be engaged in all gatekeeping or approval stages that PPPs undergo.<sup>923</sup> This would ensure that PPPs are fiscally well prepared, procured, and ultimately managed.<sup>924</sup> The responsibility is burdensome when considering the importance of long-term budgetary planning in accordance with the implications

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<sup>922</sup> Many stakeholder entities may be identified in connection with the different stages a PPP may go through, whether in the preparation stage, the procurement stage, or even execution and contract management stage, of which all are important. The focus in the display here pertains more closely to what the World Bank PPP Reference guide as reviewing and approving authorities, which are regularly more active in the preparation and procurement parts of a PPP process. See PPP REFERENCE GUIDE, *supra* note 103, at 75–76.

<sup>923</sup> Ana Corbacho & Gerd Schwartz, *PPPs and Fiscal Risks: Should Governments Worry?*, in PUBLIC INVESTMENT AND PUBLIC-PRIVATE PARTNERSHIPS: ADDRESSING INFRASTRUCTURE CHALLENGES AND MANAGING FISCAL RISKS 94, 113 (Ana Corbacho, Gerd Schwartz & Katja Funke eds., 2008).

<sup>924</sup> Some describe the extent of the power ministries of finance should possess as being capable of vetoing any decisions throughout the different PPP project stages. *Id.* at 7, 113–14.

of off-balance sheet budgeting, which when not properly accounted for may lead to debt that future incoming governments may not be able to pay.<sup>925</sup> This is particularly what the GCC States emphasized. Ministries of Finance in these countries all have an extended role in reviewing and approving line ministry studies through the execution of a PPP project.<sup>926</sup> Kuwaiti and Dubai PPP laws both explicitly designate their ministries of finance with specific roles pertaining to PPP projects. In Saudi Arabia, CEDA partakes in the fiscal assessment role through its Finance Committee, albeit the Ministry of Finance still retains a general role implicitly.<sup>927</sup> This Ministry's Debt Management Office for instance undertakes multiple roles linked to the Government's fiscal liabilities and public debt.<sup>928</sup> These elements are closely tied with the country's infrastructure projects.

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<sup>925</sup> Funke, Irwin & Rial, *supra* note 109, at 73, 85.

<sup>926</sup> Dubai PPP Law, art. 9 (“For the purposes of this Law, the DOF will have the duties and powers to: 1. develop the general policy regulating Partnership Projects between the Public Sector and the Private Sector, and submit the same to the SFC for approval; 2. propose updates and developments to the legislation regulating Partnerships based on the relevant best practices, the outcomes of Partnership Projects previously implemented by Government Entities, and the comments and proposals of these entities, taking into consideration the interests of the Public Sector and the Private Sector; 3. provide support and assistance to Government Entities in the preparation and development of Partnership initiatives; 4. contribute to creating a favourable environment to invest in Partnership Projects, and promote these Projects within and outside of the Emirate in coordination with competent entities in the Emirate; 5. prepare a general manual containing the rules and procedures that must be followed where a Government Entity wishes to conclude a Partnership Contract; 6. in coordination with concerned Government Entities, overcome all the difficulties that a Project Company may face; 7. propose necessary measures for developing Partnerships as a method of managing Projects and providing Government services; and 8. perform any other duties that are required for the achievement of the objectives of this Law.”). Kuwait PPP Law, art. 33 (“The Minister of Finance shall present to the Council of Ministers an annual report on all the projects that have been executed or implemented in accordance with the provisions of this Law, and shall send a copy of such report to the National Assembly. A drawing showing the location, the surface and borders of the contracted land shall be attached to the report of each of the aforementioned projects in the previous paragraph, whenever the project is implemented on State-owned land. The Minister shall also indicate in his report the extent to which the Contracting Investor (Project Company) is committed to the agreement's terms and the breaches it committed if any and the actions taken by the government in this regard. The relevant ministers shall provide the Minister of Finance with all the data, documents, files and information he requires in connection with PPP Projects that have been executed with their ministries for the preparation of the report.”).

<sup>927</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, at 11–14. *See also Governance Model for Achieving Saudi Arabia's Vision 2030*, VISION2030, <http://vision2030.gov.sa/en/node/259> (last visited Sept. 29, 2018).

<sup>928</sup> The Saudi Debt Management Office of the Ministry of Finance necessarily oversees the Kingdom's fiscal commitments through PPP projects as it is responsible for: “Managing Government Direct and Contingent liabilities and all of its related operations; Developing a strategy for the public debt (‘Medium Term Debt Strategy’ or ‘MTDS’) and an Annual Debt Borrowing Plan (‘ABP’); Arranging, leading and issuing public debt in all forms

## Supreme Audit Agencies

Independent oversight could be very useful to ensure the PPP process is fair and that administrative roles within the state are properly functioning. In Kuwaiti, the State Audit Bureau performs both an ex ante and ex post of PPP projects according to Article 31 of the Kuwait PPP Law.<sup>929</sup> The State Audit Bureau is an independent authority established by Law No. 34 of 1964.<sup>930</sup> What affirms the independent role of this entity and wholesome societal engagement is that the director of this Bureau is appointed by the parliament itself.<sup>931</sup> The Bureau also reports directly to the parliament.<sup>932</sup> This ensures that elected officials are engaged in the PPP process and thrive to achieve what is in the best public interest. This societal check stands out in Kuwait due to its elected parliament feature.

The problematic part of the aforementioned auditing role in Kuwait is the Government's subsequent decision to establish yet another fiscal auditing entity. This time, it is by the name of

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(both local and international borrowing), refinancing, restructuring, and managing the Ministry of Finance's guarantees to support the Kingdom's public financing efficiently; Developing legal frameworks, governance and risk management policies related to the public debt management; Developing internal policies of the DMO and its management structure. *About Debt Management Office*, MIN. FIN., <https://www.mof.gov.sa/en/DebtManagementOffice/AboutDebtManagementOffice/Pages/default.aspx> (last visited Sept. 29, 2018).

<sup>929</sup> The Kuwait PPP Executive Regulation also illustrates the continuous role of the State Audit Bureau by providing. *See* Kuwait PPP Executive Regulation, art. 44 ("The award of the competition is in all cases subject to the approval of the State Audit Bureau in accordance with Article (31) of the Law. The procurement documents and the offer of the Preferred Investor shall all be presented to the State Audit Bureau, as well as any the minutes of any negotiations undertaken with it and the final terms agreed upon, taking into consideration the duration of validity of the bid bond."). The consequences of the Bureau's ex ante audit particularly with regards to the public entity's decisions to proceed without due regard to the conclusions the Bureau has drawn were discussed by DLAL. In a situation where the Ministry of Electricity in Kuwait insisted on proceeding with concluding a tender with a bid that was not the lowest bid with no clear justification in contravention with the State Audit Bureau's ex ante objection, DLAL affirmed that such dispute must be furnished to the Council of Ministers to further decide on the matter. Advice No. 2/131/2000-2439, Aug. 12, 2000, at 563–66 (Kuwait).

<sup>930</sup> Law No. 30 of 1964, Establishing the State Audit Bureau (Kuwait).

<sup>931</sup> *Id.* art. 34. This director has been chosen from amongst the most prominent figures of the society, and not surprisingly, since chosen by the parliament, this figure is not from the ruling family. The current director, Faisal Al-Shaya and the assistant Adel Al-Saraawi, have both been members of parliament for a number of consecutive terms and at least publicly, were independent of any political party.

<sup>932</sup> *Id.* arts. 20–23.

the Agency of Fiscal Auditors that was established in 2015.<sup>933</sup> The establishing law acknowledges the presence of the State Audit Bureau, nonetheless, believes this Agency of Fiscal Auditors may perform an additional auditing role.<sup>934</sup> It is certainly not clear how the mandates between these two public entities would not ultimately clash. Once again though, the PPP Law acknowledged the explicit role of the State Audit Bureau, which is likely more so due to the Law's preexistence to the establishment of the Agency of Fiscal Auditors.

The State Audit Bureau in this regard has lately issued its report assessing KAPP's exercise of its competencies and this Authority's effectiveness in implementing the country's development plans through emphasizing the role of partnership projects.<sup>935</sup> The Bureau eluded to many different aspects where KAPP must improve its administrative functions in particular, including cutting lengthy delays in delivering projects, and better coordination with other public agencies.<sup>936</sup> This report is ultimately furnished to both the Council of Ministers and Parliament and may have fiscal implications pertaining to appropriation of funds that impact KAPP's functions due to the areas of ineffectiveness that the Bureau has raised.

The Financial Audit Department, now Financial Audit Authority in Dubai, assumes this independent supervisory role according to Article 13 of the Dubai PPP Law, which continues throughout the life of the PPP project.<sup>937</sup> The empowerment of this institution does come from its

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<sup>933</sup> Law No. 23 of 2015, art. 2, Establishing the Agency of Fiscal Auditors (Kuwait) (providing for the creation of this Agency which reports to the Minister of Finance).

<sup>934</sup> See *id.* art. 12 (providing for the competencies of this Agency notwithstanding the role of the State Audit Bureau).

<sup>935</sup> *Report on the Assessment of KAPPs Competencies and Effectiveness*, *supra* note 465, at 19-32.

<sup>936</sup> *Id.* at 33-36, 41-45.

<sup>937</sup> Law No. 4 of 2018, Regarding the Establishment of the Financial Audit Authority in Emirate of Dubai (FAA) (U.A.E.). Dubai PPP Manual provides for Financial Audit Department oversight over entities as it "aim[s] to validate their legality, suitability, correct calculations, as well as uncovering financial violations and taking necessary actions towards rectifying them." The Department monitors performance as an "independent, objective, reliable scrutiny to ensure that the commitments, systems, processes, programs, activities and organizations in the Government of Dubai are working according to the principles of economics, efficiency and effectiveness and that there is room for improvement." This also involves specific project scrutinization in their different stages, as to:

independent nature. Yet, furthermore, this Authority is headed by Deputy Ruler of Dubai His Highness Sheikh Maktoum bin Mohammed bin Rashid Al Maktoum as President of the Authority, which is by far a clear added layer of political will and support.<sup>938</sup>

In Saudi Arabia, there exists a General Audit Bureau. Its role in PPP projects is not explicit but falls under its general supervisory responsibility overseeing the Kingdom's public spending.<sup>939</sup> It, like its other GCC audit agencies, is independent and its director is appointed by a royal decree and may only be recused or isolated by royal decree as well.<sup>940</sup> This high-level status of this entity hence preserves its ability to effectively carry out its duties. This entity's monitoring role though is only *ex post*.<sup>941</sup> Hence, it retains a limited function in comparison with the other GCC states, where all stages of a PPP project remain under the auspices of these audit institutions. The benefit of audit bureaus with *ex ante* supervisory roles in addition to *ex post*, is the proactive role to prevent what may be very costly to remedy in PPP projects when decisions are taken and projects are initiated.

These entities are to provide an additional independent check on these infrastructure projects. Nonetheless, this check must consider the delays it could impose on projects and how to better overcome these adjournments. Perhaps, striking certain standardized timelines to begin and end certain monitoring tasks would be useful.

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“Evaluate the quality and efficiency of tendering, executing and managing projects; Evaluate the project achieved outputs against the planned outputs and the project objective; Evaluate the quality, type and criteria of the project documents; Evaluate the efficiency of the tools used in managing projects.” Dubai PPP Manual at 78-79.

<sup>938</sup> Decree No. 4 of 2018, Regarding the Establishment of the *Financial Audit Authority* (FAA) (U.A.E.). See also Establishment of the Financial Audit Authority (FAA) in Dubai, News Center, FAA.GOV.AE, <http://www.faa.gov.ae/en/AboutDepartment/News/Lists/NewsCentre/DispForm.aspx?ID=126> (last visited Oct. 2, 2018).

<sup>939</sup> Royal Decree No. M/9, 11/2/1391H (1971), art. 7, Netham Diwan Alraqaba Alama [General Audit Bureau Law] (Saudi Arabia).

<sup>940</sup> *Id.* arts. 1, 3.

<sup>941</sup> *Id.* art. 7.

## State Development Planning Agencies

A harmonized state PPP program is important, and so is a coordinated state development plan. Countries devise five, ten, or more multi-year plans aiming to achieve certain goals.<sup>942</sup> Development plans are not summarized in infrastructure projects solely. Rather, long-term plans entail many interconnected aspects of the society that are addressed in a harmonized manner. Building certain infrastructure could lead to job creation and diversification of the economy, which is and of itself one of the main objectives of the GCC States. Fighting corruption and public sector reform are equally ambitions these Gulf States pursue and are part of their development strategies. As a result, the GCC States have created state institutions to oversee the countries' development plans.

Kuwait established the Supreme Council for Planning and Development in 2008.<sup>943</sup> This entity in addition to overseeing the general development planning rubric of the country, also participates in following up on different development projects.<sup>944</sup> The Council's members are prominent Kuwaiti figures.<sup>945</sup> Dubai does not particular have a planning department like the one that exists in Kuwait. Nonetheless, on the UAE federal level, there exists the Ministry of Infrastructure Development. This Ministry may play a more focused role in comparison with the Kuwaiti Supreme Council. The Federal Ministry of Infrastructure Development especially steps in when federal funds are allocated to Dubai. This federal ministry would oversee all relative

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<sup>942</sup> See GEN. SEC. SUPREME COUNCIL PLANNING & DEV., <http://scpd.gov.kw/scpdpage.aspx> (last visited Oct. 2, 2018) (regarding Sustainable Economic Development in the GCC).

<sup>943</sup> About, GEN. SEC. SUPREME COUNCIL PLANNING & DEV., <http://scpd.gov.kw/scpdpage.aspx> (last visited Oct. 2, 2018).

<sup>944</sup> *Id.*

<sup>945</sup> *SCPD Members*, GEN. SEC. SUPREME COUNCIL PLANNING & DEV., <http://scpd.gov.kw/scpdpage.aspx> (last visited Oct. 2, 2018).

policies pertaining to public infrastructure.<sup>946</sup> The Ministry of Economy and Planning in Saudi Arabia undertakes a role closer to that of the Supreme Council for Planning and Development of Kuwait. This Saudi ministry focuses on the general socio-economic development of the Kingdom.<sup>947</sup> It adopts the more general development goals integration, which addresses PPP projects.<sup>948</sup>

The role of these development entities is important for PPP projects in order to ensure harmonization within different sectors and the optimal use of the State's resources to achieve its future aspirations. This would balance economic needs with societal public interests. This may include, for instance, the preservation of citizen human resource representation in future projects, even where the private partner is of a foreign character. An assumption is that development agencies have started working on devising integrated cross-sectoral plans and may continue to refine such before PPP project pipelines have been advertised to bidders. This would allow for sector ministries to work within a predetermined strategy when detailing their specific needs to fit in the broader state development plan objectives. State planning agencies see big picture cross-sectoral links and may better assess how multi-agency engagement in certain projects may be necessary, like establishing smart cities by linking housing departments to roads ministries in the state's multi-year plan.

### Anti-Corruption Agencies

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<sup>946</sup> *About Us*, U.A.E. MIN. INFRASTRUCTURE DEV., <https://www.moid.gov.ae/en-us/AboutMinistry/Pages/AboutUs.aspx> (last visited Oct. 4, 2018).

<sup>947</sup> *About Ministry*, MIN. ECON. & DEV., <https://www.mep.gov.sa/en/About-Ministry/our-goals> (last visited Oct. 3, 2018).

<sup>948</sup> *Id.*



When it comes to large projects worth billions of dollars, where the government is party, the arrangement is highly susceptible to corrupt practices.<sup>949</sup> This feature perhaps exists regardless of wherever such projects geographically originate from.<sup>950</sup> The cost of these infrastructure projects could exceed figures reached by economic and financial feasibility studies due to transaction costs associated with corruption.<sup>951</sup> This causes more damage to the economy and society than its aspired benefit from capital spending for such development projects. Michael Trebilcock and Mariana Prado define corruption as, “the use of public office for private gain.”<sup>952</sup> Supersized assessments of project valuations or uncollected government revenue are ways in which corruption is put into play and damage is caused.<sup>953</sup> Yet, modes to enable corrupt practices vary in many shapes and forms. For instance, request for proposals for infrastructure projects may be tailored to very specific characteristics that apply to namely one private sector candidate.<sup>954</sup> High officials may also steer state funds towards infrastructure projects in certain areas of the country to raise the value of properties there.<sup>955</sup> These corrupt features that creep into government contracts may strongly be attributed to weak monetary institutions.

In a relatively recent manner or trend, the Gulf States have embarked on establishing ad hoc agencies to specifically combat corruption in these countries. Kuwait has established and more recently reformed the Kuwait Anti-Corruption Authority (*Nazaha*), or Integrity, in Arabic.<sup>956</sup> This agency has the authority to order government entities to annul any contract or

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<sup>949</sup> Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth* 4 (IMF Working Paper No. WP/97/139, 1997).

<sup>950</sup> TREBILCOCK & PRADO, *supra* note 280, at 147.

<sup>951</sup> Tanzi & Davoodi, *supra* note 949, at 7.

<sup>952</sup> TREBILCOCK & PRADO, *supra* note 280, at 147.

<sup>953</sup> Tanzi & Davoodi, *supra* note 949, at 13.

<sup>954</sup> *Id.* at 6–7.

<sup>955</sup> *Id.*

<sup>956</sup> Law No. 2 of 2016, art. 3 Regarding the Establishment of the Kuwait Anti-Corruption Authority and the Rules for Financial Disclosure (Kuwait) [hereinafter Kuwait Anti-Corruption Law].

rights within where the government is party if it has been signed or is being implemented in violation of the existing laws of the state.<sup>957</sup> Furthermore, and to help address the cultural and societal dynamics described previously in this study that pertain to familial, tribal, and mercantilism public-private relationships in the Gulf, the scope of competency of *Nazaha* has been expanded. *Nazaha* may now address issues of conflict of interest, alternatively known in the Gulf as *wasta*, or favor, in Arabic.<sup>958</sup> While the concept of conflict of interest may have been well established in the West thus far, it is a rather recent concept in the Gulf, not to be taken for granted. In the UAE, there is no specific anti-corruption agency on either the federal level or Dubai. Corruption is addressed by the general criminal justice and enforcement authorities in Dubai.<sup>959</sup> The Saudi anti-corruption is similar to that of Kuwait, where also an agency called *Nazaha*, or National Anti-Corruption Commission, leads the country's anti-corruption efforts.<sup>960</sup> Once again, what is particularly significant about these institutions is the political will to fight corruption in PPP contracts that is conveyed to investors.

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<sup>957</sup> *Id.* art. 5(5).

<sup>958</sup> Based on the Kuwait Anti-Corruption Law, Law No. 13 of 2018, Regarding the Prohibition of Conflict of Interest (Kuwait) [hereinafter Kuwait Conflict of Interest Law] was issued on Apr. 10, 2018, and its Executive Regulation in Decree No. 296 of 2018, Issuing the Executive Regulation to Law No. 13 of 2018 regarding the Prohibition of Conflict of Interest (Kuwait) [hereinafter Kuwait Conflict of Interest Regulation] issued on Oct. 2, 2018. Moreover, Article 82 of the Kuwait Public Tenders Law contains similar provisions on conflicts of interest in connection with the procurement process.

<sup>959</sup> This includes the Dubai Public Prosecution and Dubai Police specialized departments. *See About Public Prosecution*, GOV. OF DUBAI PUB. PROSECUTION, [https://www.dxbpp.gov.ae/Extra.aspx?Page\\_ID=2](https://www.dxbpp.gov.ae/Extra.aspx?Page_ID=2) (last visited Oct. 7, 2018); *Organizational Structure*, DUBAI POLICE, [https://www.dubaipolice.gov.ae/wps/portal/home/aboutus/organizational-hierarchy!/ut/p/z1/04\\_Sj9CPykssy0xPLMnMz0vMAfljo8zi\\_T29HQ2NvA18\\_UN8LQ0cjU0twyzNLA0NnEz1w9EUmAWbGDiaGpu5WBiZGxp4mutHEaPfAAdwNCCsPwpNCaoLHM0IKAA5EawAjxuCE4v0C3JDIwwyA9IBJZ-nEw!!/dz/d5/L0IHSkovd0RNQUZrQUVnQSEhLzROVkuvZW4!/](https://www.dubaipolice.gov.ae/wps/portal/home/aboutus/organizational-hierarchy!/ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8zi_T29HQ2NvA18_UN8LQ0cjU0twyzNLA0NnEz1w9EUmAWbGDiaGpu5WBiZGxp4mutHEaPfAAdwNCCsPwpNCaoLHM0IKAA5EawAjxuCE4v0C3JDIwwyA9IBJZ-nEw!!/dz/d5/L0IHSkovd0RNQUZrQUVnQSEhLzROVkuvZW4!/) (last visited Oct. 7, 2018).

<sup>960</sup> *Nazaha* has been established according to Royal Decree A/65, 13/4/1432H (2011), Establishment of National Anti-Corruption Commission (Saudi Arabia) [hereinafter *Nazaha* Law]. *See also About Us, National Anti-Corruption Commission*, NAZAHA, <https://www.nazaha.gov.sa/en-us/pages/establishment.aspx> (last visited Oct. 7, 2018).

There is high social capital backing these anti-corruption institutions in light of fiscal tightening discussions due to decreased oil revenues. Citizens, as do governments, show very low tolerance towards corrupt gains of individuals at the expense of society, leaving them with less resources than they have once enjoyed. The concurrent Saudi crackdown on local business elites and prominent princes was a simple message that corruption shall not be tolerated in the Kingdom's new development phase.<sup>961</sup> This crackdown led to a settlement worth \$100 Billion.<sup>962</sup> The additional message the crackdown sent was that institutions like the Saudi *Nazaha* shall be enabled to function with complete impartiality and supersede all government agencies. This is what Article 4 of the Royal Decree A/65 establishing the Commission reiterated.<sup>963</sup> It provided, "The Commission's tasks shall include all the governmental sectors with no exceptions whatsoever, and shall be assigned the tasks of monitoring the implementation of orders and instructions of the public affairs. The Commission shall also be responsible for monitoring the administrative and financial corruption as well."<sup>964</sup> The upcoming years that are full of multi-billion-dollar infrastructure projects shall reveal the sincerity penned in the regulations about the impartiality of *Nazaha* and other agencies with similar mandates. Ultimately, these anti-corruption agencies are only as powerful as their creators truly want them to be.<sup>965</sup>

#### Word of Caution: The List of Stakeholder Entities May Go On

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<sup>961</sup> Alaa Shahine, *Saudi Arabia Struck Gold with Corruption Crackdown*, BLOOMBERG BUSINESSWEEK (Jan. 24, 2018), <https://www.bloomberg.com/news/articles/2018-01-25/saudi-arabia-struck-gold-with-corruption-crackdown>.

<sup>962</sup> *Id.*

<sup>963</sup> Nazaha Law, art. 4; *About National Anti-Corruption Commission*, *supra* note 960.

<sup>964</sup> Nazaha Law, art. 4; *About National Anti-Corruption Commission*, *supra* note 960.

<sup>965</sup> TREBILCOCK & PRADO, *supra* note 280, at 157.

The list of agencies does not stop at the aforementioned institutions. The list is highly dependent on the type of infrastructure project and may be much longer. The institutions that may additionally be included could involve environmental agencies to ensure environmental assessments are conducted for the project to take place. Tax authorities would also be involved to enforce any tax obligations the private partner has. The parliament itself may be engaged in the approval processes and reporting scheme in order to ensure a societal check. Municipality and zoning authorities could also play a critical role in enabling the smooth implementation of an infrastructure project, especially for highways, bridges, or public transportation projects.<sup>966</sup> Capital market authorities may be essential to listing investment instruments like equity and bonds in which a broad array of investors such as institutional investors may invest in projects directly or indirectly and raise financing in addition to debt offered by lenders. Mature capital market authorities are especially important considering the specific requirements for establishing SPVs or project companies in cases like Kuwait, where an eventual public joint stock company must be established and listed and 50% of its shares would be reserved for Kuwaiti citizens to subscribe in through initial public offerings (IPOs).<sup>967</sup> Moreover, competition authorities may play a role in ensuring fair competitive market practices are preserved. Such competition

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<sup>966</sup> The Kuwait Municipal Council and its executive body, the municipality, for instance, are both responsible for approving the allotment of plots of public lands and property and all necessary zoning, including that of the Kuwaiti islands, for any infrastructure project to take place over. *Almajlis Albaladay wa Ikhtisasatoho* [Municipal Council and its Competencies], KUWAIT MUNICIPALITY, <http://www.baladia.gov.kw/sites/ar/MunicipalityCouncil/Pages/default.aspx?menuItem=item1> (last visited Dec. 4, 2019); Law No. 33 of 2016, art. 3, Regarding Kuwait Municipality (Kuwait).

<sup>967</sup> Kuwait PPP Law, art. 13 (“The Authority shall establish a public joint-stock company following the procurement of the project and selection of the Successful Investor, and shall distribute its shares as follows: . . . 3.Fifty percent (50%) shall be allocated for subscription through an initial public offering to living Kuwaitis listed in the register of the Public Authority for Civil Information on the date of the invitation to pay the price of the shares in compliance with the provisions of the following Article.”).

authorities exist in the GCC with the observation that SOEs do not generally fall under their scope of application.<sup>968</sup>

PPP projects ultimately involve more than government entity stakeholders. The projects could include civil society like indigenous peoples groups. Different local and international banks as lending institutions would similarly play a critical role in providing financing for the private partner after ensuring the project's feasibility. The private partner must find financing, which is provided regularly by lenders as debt in addition to equity shareholders. This would mean the market must appeal to banks, if not local, international.

Nevertheless, to reiterate a conclusion reached previously, more is not necessarily better. More institutions mean more time for projects to start and operate, which also means more resources required to fund these additional institutions and run them. This also leads to more complexities to coordinate different stakeholders as a major challenge. A public entity in Kuwait by the name of the Government Performance Follow-Up Agency surely sounds very relative and flashy, yet the impulse is to also question its role in the context of Kuwait's infrastructure projects.<sup>969</sup> The Decree establishing this entity gives it competencies that include:

The Agency shall coordinate with the concerned ministers, each in their purviews, to assist them in following up the performance of the ministries and the governmental bodies affiliated thereto, and in implementing laws and regulations

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<sup>968</sup> See, e.g., Saudi Implementing Regulations to the Competition Law, art. 3. There are more recent amendments introduced to the Saudi Law to add more effectiveness according to Saudi officials. *Saudi Arabia: SA Revamps its Competition Law*, COMPETITION POL'Y INT'L (Mar. 13, 2019), <https://www.competitionpolicyinternational.com/saudi-arabia-sa-revamps-its-competition-law/>; *New Competition Law to Stimulate Investment in KSA*, SAUDI GAZETTE (Mar. 11, 2019), <https://saudigazette.com.sa/article/560936/BUSINESS/New-competition-law-to-stimulate-investment-in-KSA>. See Kuwait Competition Law, art. 6; U.A.E. Competition Law, art. 4. The competition authority in Saudi Arabia is called the General Authority for Competition. In Kuwait, it is the Competition Protection Agency; and in the UAE, there is a Federal competition agency under the name of the Competition Regulation Committee, see U.A.E. Competition Law, art. 12.

<sup>969</sup> The Government Performance Follow-Up Agency is currently headed by a member of the Kuwaiti ruling family, Ahmed Al-Meshal Al-Ahmed Al-Sabah, in yet what appears to be a political strategy in adding more leverage to the agency. *About Gov't Performance Follow-Up*, COUNCIL OF MIN., <https://www.gpf.gov.kw/En/goals.aspx> (last visited Oct. 5, 2018).

and their commitment to the general policy of the state according to the Government Action Program.<sup>970</sup>

The Agency's competencies appear to be all-encompassing, yet in its essence the Agency is not much more than a political statement that a government institution exists that checks other government institutions that are already checked by other public institutions, like the aforementioned audit agencies. What if not added confusion would this self-standing Follow-Up Agency serve.

The focus of this study was presenting more of the public entities' roles within the institutional framework for PPPs. Yet, amongst all these previously mentioned public entities, there remains an essential body or forum that must take its fair share of discussion individually. The judiciary or adjudication forum is a key component to infrastructure projects that the private sector is party to.

#### The Judiciary's Leading Role in Ensuring the Three Fs (Form Follows Function)

Almost necessarily is any relationship between two or more parties going to result in some sort of disagreement, in some more than others. And the lengthier the relationship is, regularly the case for PPPs, the more prone it is to have provoked conflicts between its parties. Take a forty-year marriage for instance. The more diligence parties have put into its earlier days, the more prospects for long-lasting success it is likely to endure. This, nevertheless, certainly does not exclude differences from creeping into a relationship like this.<sup>971</sup>

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<sup>970</sup> Decree No. 346 of 2007, art. 2, Establishing the Government Performance Follow-Up Agency (Kuwait).

<sup>971</sup> The analogy of PPP relationships to marriages is influenced by Jeffrey Delmon's blog. Jeffrey Delmon, *PPP Cancellations: If You Do Not Change Direction, You May End Up Where You Are Heading (Lao Tzu)*, WORLD BANK BLOG (Aug. 29, 2018), <http://blogs.worldbank.org/ppps/ppp-cancellations-if-you-do-not-change-direction-you-may-end-where-you-are-heading-lao-tzu>.

Dispute settlement or resolution is key to any PPP contract.<sup>972</sup> An independent adjudicative body would provide the necessary level of certainty to any party to a relationship.<sup>973</sup> An independent dispute settlement mechanism would offer checks that are in place should the government in its executive role or private partner according to their contractual obligations deviate from the illustrated course of partnership.<sup>974</sup> Disputes in this context simply refer to the situation where, “one party believes the other has not done something it was contractually obliged to do, but the other party disagrees as to what its obligations were, or what should be done to remedy the situation.”<sup>975</sup> Neither party can bear the level of instability and unpredictability that may occur as a result of ambiguity in connection with the proper implementation of a contract lasting thirty or more years. Countries engage in war, wake up to extreme civil disturbances, and other similar circumstances within time periods such as these. All these political risks and more, are legitimate daunting conditions. The MENA regional is certainly no stranger to political instability. Kuwait itself has come out of a war just under three decades ago.<sup>976</sup> The neighboring states including Iraq and Iran have been in internal wars and under extreme international sanctions threatening to use all that is necessary to survive.<sup>977</sup> In

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<sup>972</sup> The two terms — dispute resolution and dispute settlement — shall be used interchangeably.

<sup>973</sup> Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 342, at 7–8.

<sup>974</sup> Kennedy, *supra* note 340, at 159. Alvaro Santos emphasizes though that there is no empirical causal relation between judicial reform and economic growth. He focuses on the many other factors that investors identify, like tax incentives, the magnitude of market opportunities that are offered, and other factors. Santos, *supra* note 635, at 257, 264–65, 275. And while Santos’s claim appears to be rather convincing, it is very contextual and contingent on predicting the likelihood that investors may enter a market, reap its benefits and profits, and exit smoothly with no complexities and disagreements. Hence, an unestablished adjudicatory process is a risk the investor must account for.

<sup>975</sup> PPP REFERENCE GUIDE, *supra* note 103, at 185.

<sup>976</sup> Alma Milisic, *Timeline: Iraq’s Invasion of Kuwait, 25 Years on*, ALJAZEERA (Aug. 2, 2015), <https://www.aljazeera.com/indepth/interactive/2015/08/timeline-iraq-invasion-kuwait-25-years-150802100248000.html>.

<sup>977</sup> Rick Gladstone, *Iran Sanctions Explained: U.S. Goals, and the View from Tehran*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/world/middleeast/iran-sanctions-explained.html>; *Iran Able to Flourish Under Sanctions: Revolutionary Guard*, REUTERS (Nov. 7, 2018), <https://www.reuters.com/article/us-usa-iran-sanctions->

addition to these *force majeure*-like circumstances, in many instances, the government must be restrained as a result of its adverse actions that could affect the smooth implementation of a PPP contract. The same applies to the private investor, such investor cannot simply always enjoy unfettered business activity within the country where its premise such as is the case with PPPs, affects the state's provision of public needs to its society. The government's role in PPPs is more evident than other investment schemes within the country that the private sector may partake in.<sup>978</sup>

Impartial dispute resolution would ensure due process and check the functioning of other state entities and the private partner itself.<sup>979</sup> Neither party should simply relieve themselves of their contractual obligations in breach of the PPP agreement. And a regularly extended period for contract management of PPPs is nothing but proof that proper preparation and procurement of PPPs is but one component of the project's success. The other major component is its guarantees to ensure its successful operation that include adequate dispute resolution mechanisms. Regulating relevant dispute settlement schemes or agreement on such mechanism in the PPP contract is as preemptive and deterrent to such disputes as it is a resolution to them once they actually occur.

The next important step after acknowledging the importance of dispute resolution to any future PPP program prospect is to understand whether the concurrent institutional adjudication framework in the Gulf corresponds with the PPP parties' aspirations. And while the countries'

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guards/iran-able-to-flourish-under-sanctions-revolutionary-guard-idUSKCN1NC2NQ; Peter Beinart, *How Sanctions Feed Authoritarianism*, ATLANTIC (June 5, 2018), <https://www.theatlantic.com/international/archive/2018/06/iran-sanctions-nuclear/562043/>; Joy Gordon, *The Human Costs of the Iran Sanctions*, FOREIGN POL'Y (Oct. 18, 2013), <https://foreignpolicy.com/2013/10/18/the-human-costs-of-the-iran-sanctions/>.

<sup>978</sup> DELMON, *supra* note 60, at 129.

<sup>979</sup> TREBILCOCK & PRADO, *supra* note 280, at 146.



local judicial competencies may not particularly be what foreign investors thrive for,<sup>980</sup> path dependency theories could describe the level of willingness GCC rulers would have in adapting their domestic adjudication styles. The transformation away from local courts could be difficult due to engrained reinforcement of the monarchs' role in adjudication when it comes to government contracts. Rulers themselves could have vested interests in local courts remaining effective in the GCC. Control over such domestic authorities would potentially be in their grasp, notwithstanding ideals of impartiality. Waiving what is perceived as a country's sovereignty by designating an external adjudicatory process is often a contentious issue for the state.<sup>981</sup> Dispute resolution options are often identified in the PPP contract or directly by the relevant law itself. It is necessary to display the options that GCC regulators provided with regards to PPP contracts before transitioning to a discussion about local judicial capacity in the Gulf.

#### Is Party Autonomy an Option in Gulf PPP Contracts?

A fundamental point that must be discussed in PPP contracts is the parties' role in designating their preferred means of dispute resolution. Parties to a PPP agreement should have assessed all potential risks surrounding the project while drafting their PPP contract.<sup>982</sup> The agreement would ultimately reflect the designated dispute settlement mechanism,<sup>983</sup> whether voluntarily chosen or required by law.

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<sup>980</sup> Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 113 (2005); PPP REFERENCE GUIDE, *supra* note 103, at 154.

<sup>981</sup> DELMON, *supra* note 60, at 133, 341. There is much to be discussed about sovereign immunity and the role of investor-state arbitration, yet this study only engages in such review in as much as it serves the topic of PPPs and upholding investment principles.

<sup>982</sup> PPP REFERENCE GUIDE, *supra* note 103, at 70–71.

<sup>983</sup> *Id.* at 70–71, 148.

The country's regulations may offer only one source of adjudication and no other. This means the PPP contract parties' role is limited. In many instances, standardized contracts strongly guide the PPP agreement's parties to adopt a certain dispute settlement mechanism. This soft tool portrayed by standardized or model contracts is empowered by regular application of these model provisions by relevant government authorities. The empowered model contracts hence ultimately acquire a hard enforcement character. Japan for instance strongly enforces its standard PPP contracts and expects project specific agreements to follow its standards.<sup>984</sup> Similarly, both New Zealand and India have developed model agreements.<sup>985</sup> (*Annex: Model Agreements*).

The New Zealand PPP Form Project Agreement prepared by the Treasury clarifies that while it would not address all specific needs of a project, "the PPP project agreement does provide the underlying commercial principles that the New Zealand PPP projects should adhere to, and we estimate that over 80% of the PPP project agreement remains unchanged for operational-focused and user-pays infrastructure PPP contracts."<sup>986</sup> The strong language with

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<sup>984</sup> This data has been obtained from the *World Bank Procuring Infrastructure PPPs 2018* database. *Procuring Infrastructure Public-Private Partnerships: Japan*, WORLD BANK, [http://bpp.worldbank.org/en/data/exploreconomies/japan/2017#ppp\\_preparation](http://bpp.worldbank.org/en/data/exploreconomies/japan/2017#ppp_preparation) (last visited Oct. 10, 2018). In Japan, the PFI Promotion Office publishes guidelines pertaining to contracts and attaches standard agreements to such guidelines of different types. *See also Cabinet Office*, PFI PROMOTION OFF., <http://www8.cao.go.jp/pfi/hourei/keiyaku1/keiyaku1.html> (last visited Dec. 4, 2019); *Selection of PFI Standard Contracts*, PFI PROMOTION OFF. (June 23, 2003), <http://www.pfikyokai.or.jp/doc/doc-model/2PFIrankouH20.pdf>; *City Elementary and Junior High School Earthquake Resistance Project Business Contract (Draft)*, PFI PROMOTION OFF., [http://www.pfikyokai.or.jp/doc/doc-model/08\\_keiyakusho\\_an.doc](http://www.pfikyokai.or.jp/doc/doc-model/08_keiyakusho_an.doc) (last visited Dec. 4, 2019).

<sup>985</sup> This data has been obtained from the *World Bank Procuring Infrastructure PPPs 2018* database. *Infrastructure Public-Private Partnerships: India*, WORLD BANK, <http://bpp.worldbank.org/en/data/exploreconomies/india/2018> (last visited Oct. 10, 2018); *Infrastructure Public-Private Partnerships: New Zealand*, WORLD BANK, <http://bpp.worldbank.org/en/data/exploreconomies/new-zealand/2018> (last visited Oct. 10, 2018). Model Concession Agreements for national highways, including BOT Projects in India are available at <https://www.pppinindia.gov.in/standardized-bidding-documents>. Other Model Concession Agreements (India) are available at <http://planningcommission.gov.in/sectors/index.php?sectors=infrastructure>. *See also* NEW ZEALAND GOV'T, STANDARD FORM PUBLIC PRIVATE PARTNERSHIP (PPP) PROJECT AGREEMENT: BASE AGREEMENT (2013), <https://treasury.govt.nz/sites/default/files/2015-03/sfppppa-v3-base-oct13.pdf> [hereinafter STANDARD FORM PPP AGREEMENT].

<sup>986</sup> STANDARD FORM PPP AGREEMENT, *supra* note 985, at 2.

words like the aforementioned “should”, emphasizes the will of the New Zealand Government to standardize the basics of its PPP contracts to the extent possible, and in this context, this would certainly include dispute settlement mechanisms. The New Zealand Model PPP Agreement identifies what it calls “accelerated dispute resolutions procedures” after parties have resorted to a “Disputes Panel”.<sup>987</sup> The Model Agreement does defer to parties only if they both agree to substitute their ad hoc dispute resolution procedures, which is not particularly always an easy matter.<sup>988</sup> Otherwise, the procedures illustrated in the Model Agreement shall apply. This is an example of party autonomy dynamics within standardized PPP agreements.

Party autonomy may be described by either parties’ choice of law or choice of forum. These are fundamental principles in conflict of laws or private international law studies. While the choice of law element is very important, the focus at this moment would be on what is referred to as forum selection, or choice of forum.<sup>989</sup> The Hague Principles on Choice of Law in International Commercial Contracts describes this term as, ““Jurisdiction clauses” (or agreements), “forum selection clauses” (or agreements) or “choice of court clauses” (or agreements), all of which are synonyms for the parties’ agreement on the forum (usually a court) that will decide their dispute.”<sup>990</sup> The Hague Principles also add a category for “arbitration

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<sup>987</sup> This Panel, when no other scheme is mutually elected, is obligatory as the Model Agreement uses the phrase, “the Crown and the Contractor will establish a panel (Disputes Panel) as a forum for representatives of the parties to meet and attempt to resolve Disputes...” *Id.* at cls. 87.4 & 88.1 (NZ).

<sup>988</sup> *Id.* at cls. 87.2 (NZ).

<sup>989</sup> The Hague Principles on Choice of Law in International Commercial Contracts provide some clarification about the different terms. *See* Hague Conference on Private International Law, Hague Principles on Choice of Law in International Commercial Contracts ¶ 1.7 (Mar. 19, 2016) [hereinafter Hague Principles] (“Choice of law agreements should also be distinguished from ‘jurisdiction clauses’ (or agreements), ‘forum selection clauses’ (or agreements) or ‘choice of court clauses’ (or agreements), all of which are synonyms for the parties’ agreement on the forum (usually a court) that will decide their dispute. Choice of law agreements should also be distinguished from ‘arbitration clauses’ (or agreements), that denote the parties’ agreement to submit their dispute to an arbitral tribunal. While these clauses or agreements (collectively referred to as ‘dispute resolution agreements’) are often combined in practice with choice of law agreements, they serve different purposes.”

<sup>990</sup> *Id.* ¶ 1.7.

clauses”, i.e. choosing to resort to arbitration.<sup>991</sup> For the sake of this study though, the discussion would include choice of arbitration under the forum selection category.

First and foremost, an important observation must be clearly communicated when it comes to disputes linked to PPP projects. Disputes pertaining to PPPs may mainly generally fall under two separate categories: 1) Disputes related to the procurement or tendering process; 2) Disputes linked to the implementation or execution of a PPP project. The first of these two categories are often referred to as grievances and is rather about complaints concerning the tendering procedures that the relevant line ministry or procuring entity has followed. This would mean arguing that the selection process was unfair, not competitive, or transparent, amongst other grounds of violation. An example of such damage would be awarding the contract to a higher bid price or least economically advantageous in violation of the award criteria, which upholds winning standards for submitted proposals. The procurement procedures could be carried out in collaboration with other entities like the PPP unit in particularly Kuwait. Thus, the dispute does not purely target the line ministry. Nonetheless, what occurs in the disputes of the first nature, is that they usually embody proactive rules to prevent high transaction costs when it is later discovered that certain PPP projects have been awarded to a private party in violation of existing laws and procurement rules. Complaints in this occasion are regularly filed with the same line or procuring authority and often contain a stand-still period, i.e. a suspension period after the award of the contract and before its signing where disputes pertaining to the tendering process are resolved. This period may vary from 5 days to 15, 20, or even 35 days in countries like Italy.<sup>992</sup>

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<sup>991</sup> *Id.*

<sup>992</sup> *Procurement of PPPs*, WORLD BANK, <https://bpp.worldbank.org/en/data/exploreindicators/procurement-of-ppp> (last visited Oct. 11, 2018).

Implementation disputes in the second category would refer to breaches of the signed PPP agreement by any of its parties, government counterpart or private partner. This breach may include the failure of the relevant government agency to make timely payments to the private partner as agreed upon, or the private partner's irregular delay in implementing certain components of the PPP project in violation of the timeline drawn by the contract.

### Grievances about Tendering Procedures

The Kuwait PPP Law designates a specific committee called the "Grievance Committee" to oversee any complaints filed by interested parties that are related to violations within the tendering procedures.<sup>993</sup> The decision of this Committee would be raised to the PPP Higher Committee, which will issue its Final decision on the matter.<sup>994</sup> Different consequences may result from this review, which may even result in the cancellation of the whole procurement procedures of the project.<sup>995</sup> Perhaps an extreme consequence may be interpreted as a savior to the PPP project or a complete costly delay. Being proactive is necessarily easier than fixing breaches that pile up after a decade or so of a project's life. Ultimately, these administrative decisions would be subject to Kuwaiti local court's competency if either party to a PPP agreement wishes to appeal the Higher Committee's decision.

The Dubai PPP Law designates the Department of Finance as the state entity competent to hear any complaints about violations to the procurement process in a similar manner to the

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<sup>993</sup> Kuwait PPP Law, art. 32; Kuwait PPP Executive Regulation, art. 70; Kuwait PPP Law, art. 32(2) ("The committee shall receive grievances from concerned persons in connection with any decision issued in violation of the provisions of this Law or its executive regulations. Every interested party may file a complaint or grievance before the committee in connection with any error with regards to any of the contracting procedures carried out by the Authority or any decision issued by the Higher Committee.").

<sup>994</sup> Kuwait PPP Executive Regulation, art. 76.

<sup>995</sup> KUWAIT PPP MANUAL, *supra* note 640, at 121.

PPP Law of Kuwait.<sup>996</sup> Yet, furthermore, it appears that the Department of Finance in Dubai may also extend its competency to beyond tendering procedures violations where, “any affected party may submit a written grievance to the DOF against any decision or procedure taken by a Government Entity against him under this Law, the resolutions issued in pursuance hereof, or the Partnership Contract.”<sup>997</sup> The provision is broad enough to add both confusion and possibility to incorporate implementation-related conflicts under the Department of Finance’s auspices. Judicial review is expected to clarify this provision should any disputes be heard in the upcoming days related to violations of this sort. As for now, the legislative approach in Dubai distinguishes between two separate articles in its PPP Law, one for the mutually agreed upon dispute resolution mechanisms in Article 35 and the grievance procedures as per Article 37. It seems thus logical that the scope of disputes in each distinct article differs and consequently, grievances pertain to violations to tendering procedures and not implementation breaches.

Grievances for PPP projects in Saudi Arabia would also fall under the scope of general provisions in the Government Procurement Law and its Implementing Regulations. This general regulatory approach was previously mentioned due to the current regulatory framework in Saudi Arabia.<sup>998</sup> Article 54 of the Government Procurement Law provides for a committee and Board of Grievances to be established.<sup>999</sup> These established entities would hear complaints related to

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<sup>996</sup> Dubai PPP Law, art. 37(a) (“Any affected party may submit a written grievance to the DOF against any decision or procedure taken by a Government Entity against him under this Law, the resolutions issued in pursuance hereof, or the Partnership Contract, within thirty (30) days from the date on which the contested decision or procedure is taken. The grievance must be accompanied by supporting documentation.”).

<sup>997</sup> *Id.* art. 37(a).

<sup>998</sup> See discussion *supra* Ch. III of this study, Sui Generis PPP Regulations, on PPP Regulatory Frameworks in the GCC.

<sup>999</sup> Saudi Government Procurement Law, art. 78 (“(a) The Minister of Finance shall form a committee of advisors comprising of at least three members from the Ministry and other relevant government authorities, after coordination with said authorities. Said committee shall include among its members a legal advisor and a technical expert. It shall be headed by a legal advisor whose rank is not lower than ‘Grade Thirteen’ or its equivalent. Its formation shall provide for a substitute member and specify the remunerations of its members and secretary. The committee shall be re-formed every three years and its membership may only be renewed once. (b) This committee shall review

the procurement procedures themselves in addition to its applicability to the contract execution phase as shall come next.

### Disputes Pertaining to PPP Contract Implementation

PPP contract implementation related disputes are the more common ground for upholding party autonomy, being less rigid than grievance procedures. Article 26 of the Kuwait PPP Executive Regulation lists the different mandatory components of a PPP agreement and includes, “dispute resolution method”.<sup>1000</sup> The Kuwait PPP Law left no room for choice of law by identifying its obligatory application to any PPP project and agreement.<sup>1001</sup> As for forum selection, the Law granted the parties to a PPP agreement a degree of autonomy. Article 29 of the PPP Law provided:

The agreement shall regulate the mechanism for dispute resolution in relation to its interpretation or its implementation. Kuwaiti courts shall be the competent authority to examine all the disputes arising from the implementation of the provisions of this Law. In exception to the Emiri Order issued by Law No. 12 of

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compensation claims submitted by contractors and suppliers as well as reports of deceit, fraud and manipulation, in addition to decisions of withdrawal of works. It shall also review claims submitted by government authorities to the Minister of Finance requesting to boycott a contractor who executed a project in a defective manner or in violation of the terms and specifications of the project. (c) This committee shall hear statements of grievant contractors and suppliers and those accused of violations, their defenses and views of the Government Authority either in person or in writing. The committee may seek the assistance of technical specialists and shall issue its decision, with all its members attending, unanimously or by majority. The dissenting opinion, if any, and the argument of each party shall be stated in the minutes of the committee. (d) If the contractor or supplier prevails in his claims, the committee shall issue its decision to award compensations. This decision may be objected to before the Board of Grievances within sixty days from the date of notification of the person concerned. (e) If the contractor is found in default, as stated in Paragraph (c) of this Article, the committee shall issue a decision to boycott him for a period not exceeding five years. This decision may be objected to before the Board of Grievances within sixty days from the date of notification of the person concerned. After a final judgment is rendered against him by the Board of Grievances or if the period for objection expires without submitting an objection, the contractor shall be publicly exposed at his expense in two local newspapers. All government agencies shall be informed of the boycott by a circular from the Minister of Finance. (f) The Implementing Regulations of this Law shall provide for the necessary procedures for the work of this committee.”). Article 152 of the Saudi Implementing Procurement Regulation reiterates this.

<sup>1000</sup> Kuwait PPP Executive Regulation, art. 26(17).

<sup>1001</sup> Kuwait PPP Law, art. 29 (“PPP Projects and the agreements thereof shall be subject to the provisions of this Law and its executive regulations, as well as the provisions of applicable laws in the State of Kuwait, provided they do not contradict with the provisions of this Law . . .”).

1960, and based on the Higher Committee's approval, disputes arising between the contracting Public Entity and the Investor may be settled through arbitration.

The Kuwait PPP Projects Manual issued by KAPP reassures the parties' supremacy in choosing their desired dispute resolution mechanism.<sup>1002</sup> It stresses the importance of resolving disputes at an early stage to prevent further escalations and litigation costs.<sup>1003</sup> These delays and escalations in turn have detrimental impacts in delaying the project's implementation.<sup>1004</sup> Accordingly, reference to Kuwaiti courts in the PPP Law is to rather identify the default rule of its competency should the parties not agree on their alternative preferred dispute resolution mechanism. It is perhaps a logical approach where foreign investors might not particularly be acquainted with the Kuwaiti judicial capacity.<sup>1005</sup> And it must be noted that with the language reflected in the Kuwait PPP Manual,<sup>1006</sup> one must not restrict the interpretation to hard alternative dispute settlements. It is not only about courts, arbitration, and the like. Mediation should well fit into the idea of "resolving disputes at an early stage to prevent further escalations and litigation costs." Parties to the contract may choose mediation as the first step to resolve any dispute. That is a likely less costly mechanism in comparison with litigation transaction costs.

The Dubai PPP Law stands out in comparison with that of Kuwait, and even perhaps many other countries. The Law acknowledges the parties' autonomy yet restricts it boldly when it specifically comes to agreeing on arbitration. Article 35(b) of the Dubai PPP Law provides:

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<sup>1002</sup> KUWAIT PPP MANUAL, *supra* note 639, at 139.

<sup>1003</sup> *Id.*

<sup>1004</sup> *Id.*

<sup>1005</sup> The Kuwait PPP Manual itself acknowledges this aspect that may concern foreign investors. KUWAIT PPP MANUAL, *supra* note 639, at 139 ("It is important that the settlement mechanisms are consistent with international best practices, particularly when large-scale investments from the foreign private sector are expected. Foreign investors, for example, will seek recourse to international arbitration as a final option.").

<sup>1006</sup> KUWAIT PPP MANUAL, *supra* note 639, at 139 ("A wide range of dispute settlement mechanisms should be available in order to avoid court cases that may be lengthy and costly. These may include dialogue, mediation (possibly by a third-party expert), and arbitration. Consideration should also be given to establishing a Dispute Resolution Board, in the form of a panel to assist with the prevention and early resolution of disputes.").



b. A Partnership Contract may not stipulate that disputes arising therefrom be referred to arbitration outside of the Emirate, or that any dispute regarding the arbitration or its related procedures be subject to any laws or rules other than those in force in the Emirate. Any provision to the contrary will be deemed void and non-binding.

Arbitration is well established in Dubai. This Emirate has established the Dubai International Financial Centre (DIFC) Dispute Resolution Authority, or Arbitration Institute (DAI) in 2008, as a key forum not only in this emirate, but for the region as well.<sup>1007</sup> This entity is actually known as DIFIC-LCIA (London Court of International Arbitration) as a joint venture between the Dubai and London entities.<sup>1008</sup> The draft PPP agreement in the Dubai PPP Guide stresses the importance of amicable solutions to disputes, of which these entities also offer.<sup>1009</sup> Dubai moreover hosts the Dubai International Arbitration Centre (DIAC) seated in Dubai, which is attached to the Dubai Chamber of Commerce and Industry and hears international commercial arbitration disputes according to its rules.<sup>1010</sup> Dubai actually pursues what may appear to be a speedy industry-oriented dispute resolution procedure. Within the DIFC Courts there exists a technology and construction division with professionals holding expertise in construction and technology that oversee construction-related disputes.<sup>1011</sup> In fact, Dubai goes as far as to

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<sup>1007</sup> *Why was the DIFC-LCIA Established?*, DIFC LCA ARB. CTR, <http://www.difc-lcia.org/why-was-the-difc-lcia-established.aspx> (last visited Oct. 12, 2018).

<sup>1008</sup> *Id.*

<sup>1009</sup> Dubai PPP Manual at 210.

<sup>1010</sup> The Dubai International Arbitration Centre (DIAC) has been established in accordance with DIAC Statute Rules 2004 (amended in 2009), [http://www.diac.ae/portal/pls/portal/!PORTAL.wwpob\\_page.show?\\_docname=503990.PDF](http://www.diac.ae/portal/pls/portal/!PORTAL.wwpob_page.show?_docname=503990.PDF), and follows DIAC Arbitration Rules 2007 as last amended and launched in 2018, <http://www.diac.ae/idias/rules/>. Art. 3 of DIAC Statute Rules provides that, “1.The Centre shall execute the following powers and duties: 2. a. Providing services for settling national and international commercial disputes through using Methods of Alternative Dispute Resolution in accordance with the rules and by-laws issued under the provisions of this Statute or in accordance to the rules agreed upon between the parties of the dispute . . . .” A further amendment to these Rules seems to have very recently taken place with no further details issued yet. See *Mohamed bin Rashed Issues Decree on Dubai International Arbitration Centre*, DUBAI MEDIA (Apr. 28, 2019), <http://www.dmi.gov.ae/content/corporate/en-ae/programs/41/decree.html>.

<sup>1011</sup> Jack Ball, *Construction Dispute Resolution Key for Investors in Dubai and Beyond*, CONSTRUCTION WEEK ONLINE (Apr. 8, 2019), <https://www.constructionweekonline.com/events/conferences/180685-what-does-dubai-law-say-about-alternative-dispute-resolution-and-benefits-for-investors>.

anticipating future demands and goes smart by working on establishing blockchain-related tribunals that oversee such virtual monetary transactions even when the government is involved.<sup>1012</sup> This fits well with the City’s innovative aspirations to come, as mentioned when discussing Dubai’s development plan. Ultimately, all trans-border transactions equally bring the emirate a pool of international cases.<sup>1013</sup> Whatever arbitration procedures exist does not eventually rule out local judicial competency of the Dubai courts should the parties to an agreement choose so. It would not be the most sensible approach however in light of DIFC-LCIA’s presence.<sup>1014</sup>

Saudi Arabia’s Privatization Manual has minimal reference to dispute resolution mechanisms, other than nominal acknowledgment in a rather indirect way. The Privatization Manual provides that request for quotations (RFQs) shall contain instructions about bidders’ rights and procurement dispute resolution procedures, *inter alia*.<sup>1015</sup> With this very general guidance, general provisions within the Government Procurement Law and its Implementing Regulations would be applicable to PPP contracts as a default rule. While grievances are established for tendering procedure violations in Article 78 of the Government Procurement Law, a basis for implementation disputes may be found in the same provision. Article 78(b) of the Government Procurement Law provides:

(b) This committee shall review compensation claims submitted by contractors and suppliers as well as reports of deceit, fraud and manipulation, in addition to decisions of withdrawal of works. It shall also review claims submitted by government authorities to the Minister of Finance requesting to boycott a contractor

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<sup>1012</sup> Viva Dadwal & Mark Beer, *What We Can Learn from Asia’s Courts of the Future*, WORLD ECON. F. (Nov. 2, 2018), <https://www.weforum.org/agenda/2018/11/what-we-can-learn-from-asia-s-courts-of-the-future>; COURTS OF THE FUTURE, <http://www.courtsofthefuture.org/> (last visited Nov. 3, 2018).

<sup>1013</sup> Dadwal & Beer, *supra* note 1013.

<sup>1014</sup> A more detailed discussion about Dubai’s local capacity *vis-à-vis* DIFC-LCIA shall follow later in this study under Emirati Jurisprudence.

<sup>1015</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, § 3 on “RFQ Instructions.”

who executed a project in a defective manner or in violation of the terms and specifications of the project.

Article 54 of the Government Procurement Law also provides, "A Government Authority shall execute the contract in accordance with its terms. If it defaults in the performance of its obligations, including delay in payment of entitlements, the contractor may file these claims for payment with the committee provided for in Article 78 of this Law."

The provisions here go beyond the procurement process to the execution of the works projects. Complaints directed towards the implementation of PPPs are filed with the Committee then Board of Grievances accordingly. Furthermore, arbitration cannot simply be ruled out.

Article 2 of Royal Decree No. M/34 regulating the Law of Arbitration provides:

Without prejudice to provisions of Islamic Sharia and international conventions to which the Kingdom is a party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law.<sup>1016</sup>

Article 3 of this Law regulates international arbitration.<sup>1017</sup> The provision above regulates arbitration as a means to settle disputes in the Kingdom. PPP contracts should be able to reflect a specific dispute settlement mechanism in the case where a mutual agreement between its parties is reached, and thus party autonomy is implicitly acknowledged in Saudi Arabia. This agreed upon mechanism may be arbitration. Notwithstanding the availability of arbitration as an option, institutional approval to resort to arbitration by Saudi government entities is required. According to Article 10(2) of the Law of Arbitration, "Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special

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<sup>1016</sup> Royal Decree No. M/34, 24/5/1433H (2011), Regulating the Law of Arbitration (Saudi Arabia) [hereinafter Saudi Law of Arbitration].

<sup>1017</sup> *Id.* art. 3 identifies the different criteria to consider arbitration to be of an international character.

provision of law.” Arbitration is thus not prohibited for public entities; it simply must be pre-authorized.

To recap on the two types of disputes, tender-process related and contract implementation conflicts, the GCC states have differed slightly especially in areas of the latter type of disputes. Procurement or tendering process grievances have appeared to be fairly similar in the three countries. The reason may be justified by strong global consensus towards generally unified procurement rules.<sup>1018</sup> Moreover, whether the country belongs to a civil law background or common, the sanctity of a contract is preserved.<sup>1019</sup> The parties to a contract start off with freedom to choose their preferred rules. And while this may seem relatively easy to comprehend in private relationships, the situation is more complex when a government entity is involved. The contract with the presence of a sovereign, demands acknowledgement of two different principles, freedom of contract on the one side, and public interest on the other. The government entity would be given an advantage in its contract with a private partner to provide the public interest element to its society.<sup>1020</sup> Any extreme towards either principle though would tilt the scale too far in one direction. This is why perhaps the presence of independent dispute settlement boards to resolve PPP contract implementation-related conflicts appears to expediate lengthy litigations, yet its design and location within the state public institutional framework may raise legitimate concerns as to its legitimate impartiality and separation from government biases. So, even a conflict deterrence role for such boards could be questioned. Confidence in the independence

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<sup>1018</sup> This is guided by model laws on procurement that have been adopted by states, like the UNCITRAL PROCUREMENT MODEL LAW, *supra* note 160.

<sup>1019</sup> Tvarno, *supra* note 137, at 225–26.

<sup>1020</sup> *Id.* Even in common law the United Kingdom, notions of public interest are considered in public-private disputes. The Arbitration Act of England 1966 (UK) in §1(b) provides, “Parties can be liberal to agree how their disputes are resolved, subject only to such safeguards as are necessary in public interest.”

maturity of GCC government institutions is not yet there. A middle ground may be if these boards facilitate negotiations between its parties in a non-binding manner to resolve disputes, which still depends on the contractual parties' trust in these boards and will highly depend on negotiation strategies. This intersects with the idea of mediation.

Nevertheless, as a recap of what appears to be a feature of the different main stages of infrastructure contracts is that standard legal rules may stringently apply to the means of selecting the private partner by following certain procedures.<sup>1021</sup> As for details of a PPP contract, that should largely be left to its parties, because of the ad hoc nature of each project and its parties' often divergent aims. Ultimately, to understand jurisprudence on principles that apply to conflicts and local judicial capacity in the Gulf, it is indispensable to know what has been held and how supportive the courts are to PPP contract specifics and upholding party autonomy.

### *Kuwaiti Jurisprudence*

The PPP Law in Kuwait and its projects are both fairly recent and very few. The project that has surpassed financial close into operations having officially commenced is the Az-Zour North IWPP (Phase 1) project so far.<sup>1022</sup> The Umm AlHayman WWTP project has additionally reached financial close and contract signing in 2018.<sup>1023</sup> There has been prima facie no reported disputes at least with the one project that has been procured based on this new Law. Kuwaiti courts are yet to be further tested in its near future with regards to specific PPP provisions.

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<sup>1021</sup> Tvarno, *supra* note 137, at 225–26.

<sup>1022</sup> *KAPP Projects*, *supra* note 16.

<sup>1023</sup> *Projects: Water Management*, KAPP, <http://www.kapp.gov.kw/en/Umm-AlHayman-WWTP> (last visited Nov. 10, 2018); *Tawqeeaa Aaqd Aliltizam Mahatat Um Alhayman [Contract Signing of Um Alhayman Station]*, KAPP (Nov. 2018), <http://www.kapp.gov.kw/ar/Sub.aspx?pageid=5203>; James Hebert, *WTE Signs Contract for Umm Al Hayman Wastewater PPP*, IJ GLOBAL (Nov. 5, 2018), <https://ijglobal.com/articles/136335/wte-signs-contract-for-umm-al-hayman-wastewater-ppp>.

What the Kuwaiti judiciary has ruled extensively on nevertheless are on public contracts and traditional procurement-led infrastructure projects. That is, public contracts also know and regularly described as administrative contracts,<sup>1024</sup> as means for the government’s acquisition or disposal of property, performance of services, or other aims the government may have.<sup>1025</sup> European Union (EU) Directive on Public Procurement defines public contracts in Article 2(1)(5) as, “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.”<sup>1026</sup> This Directive, is in fact what governs PPP contracts in the EU, in addition to another directive regulating concessions. And consequently, PPPs are public contracts.

Kuwaiti courts have assessed public contracts under the scope of what is known as administrative law. Administrative law is more accustomed with civil law legal systems that distinguish private from public contracts.<sup>1027</sup> Administrative law here is used to refer to the law that governs the relationship between the government and private individuals.<sup>1028</sup> While some sources identify Kuwait’s legal system as an amalgam of common, civil, and Sharia law, the

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<sup>1024</sup> The two terms — “public contracts” and “administrative contracts” — are used interchangeably in this study.

<sup>1025</sup> John W. Whelan & Edwin C. Pearson, *Underlying Values in Government Contracts*, 10 J. PUB. L. 298, 302 (1961). Public contracts in contrast with private contracts that emerge from the idea of minimalizing any state role in them other than recognition and enforcement of the contract. Its private parties are free to agree on their desired terms. JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERMODO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 93 (John Henry Merryman & Rogelio Perez-Permodo eds., 3d ed. 2007).

<sup>1026</sup> EU Directive on Public Procurement applies to, “procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.” Directive 2014/24/EU of the European Parliament and of the Council of 26 Feb. 2014 on Public Procurement and repealing Directive 2004/18/EU, 2014 O.J. (L 94/65), art. 1(1).

<sup>1027</sup> MERRYMAN & PEREZ-PERMODO, *supra* note 1025, at 92–94.

<sup>1028</sup> *Id.* at 94.

country certainly seems to lean more towards the classification of a civil law system.<sup>1029</sup> Many of Kuwait's judicial structure characteristics exemplify that of a civil law system, by establishing specialized judicial bodies inter alia. In fairness, civil law diameters between public and private law contracts does not mean common law legal systems do not engage in such taxonomy and to a certain extent distinguish between these two types of contracts.<sup>1030</sup> It is rather a common feature that more so classifies civil law legal systems.

Amongst the most important consequences of adopting a civil law legal model are the courts that are particularly established to hear cases involving public contracts, i.e. disputes that include the state. These are called administrative courts, and depending on the judicial structure of the country, are often separate entities from what would be referred to as ordinary or civil courts.<sup>1031</sup> There are many historical reasons that justified such ad hoc courts, but amongst them was separation of power and suspicion about judges interfering with the government's executive functions by dictating what proper conduct ought to be.<sup>1032</sup> Once again, a similar discussion about judicial activism and interference with state functions is not all that foreign to common law jurisdictions as well.<sup>1033</sup> The debate in common law countries is perhaps less structured based on distinct separation of judicial structures or the public v. private law divide.

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<sup>1029</sup> The GlobalLex resource identifies the Kuwaiti legal system as an amalgam of British common law, French civil law, Islamic legal principles, and Egyptian law. Ahmed Aly Khedr, *Kuwait's Legal System and Legal Research*, GLOBALEX, <http://www.nyulawglobal.org/globalex/Kuwait.html#thekwaitlegalsystem> (last visited Oct. 12, 2018).

<sup>1030</sup> Carol Harlow, "Public" and "Private" Law: *Definition without Distinction*, 43 MOD. L. REV. 241, 257–58, 264–65 (1980).

<sup>1031</sup> MERRYMAN & PEREZ-PERMODO, *supra* note 1025, at 88.

<sup>1032</sup> *Id.*

<sup>1033</sup> Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441, 1442–45, 1452–55 (2004). For instance, an arbitration decision in the United States may be vacated under Federal Arbitration Act §10(a)(4) on the ground that an arbitrator exceeded their powers, only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses their own brand of industrial justice. An arbitrator's task is to interpret and enforce a contract, not to make public policy. *See Stolt-Nielsen S.A. v. Animalfeeds Int'l Co.*, 559 U.S. 662, 663 (2010) (referencing *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 504, 509 (2001)).

Kuwait has a currently toned-down version of administrative courts. They are essentially administrative courts, yet their structure nonetheless falls within the confinements of the hierarchy of the ordinary judicial system. These sorts of quasi administrative courts are known as administrative circuits or chambers (*Dae'ra idariyah*). The Kuwaiti aspirations for such administrative tribunals have been paved by its constitution. Article 169 of the Constitution of Kuwait provides, “The law regulates the settlement of administrative suits by means of a special Chamber or Court, and prescribes its organization and the manner of assuming administrative jurisdiction including the power of both nullification and compensation in respect of administrative acts contrary to law.” Based on this constitutional provision, Decree-Law No. 20 of 1980 regarding the Establishment of a Circuit in the Court of First Instance (*Almahkamah Alkulliya*) to hear Administrative Disputes in the State of Kuwait was issued (Administrative Circuit Law).<sup>1034</sup> This Circuit’s decisions may be appealed to a chamber established in the Appeals Court of Kuwait.<sup>1035</sup>

In connection with PPPs as privately financed infrastructure projects, the Administrative Circuit shall exclusively hear any dispute between a government entity and contractor arising from public works and supply contracts or any other administrative contract.<sup>1036</sup> Administrative contracts are used here to refer to public contracts. The provision in Article 2 of the Administrative Circuit Law establishes exclusive jurisdiction for this judicial entity. Although, even with the presence of an administrative judicial circuit, its role is limited in scope.

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<sup>1034</sup> Decree Law No. 20 of 1980, Regarding the Establishment of a Circuit in the Court of First Instance (*Almahkamah Alkulliya*) to hear Administrative Disputes in the State of Kuwait as amended by Law No. 61 of 1982 (Kuwait) [hereinafter Kuwait Administrative Circuit Law].

<sup>1035</sup> *Id.* art. 13.

<sup>1036</sup> *Id.* art. 7.



While the Administrative Circuit has competency to hear cases of infrastructure disputes in contracts between the government and private contractors, this would not include third parties such as sub-contractors, lenders, or even between them in connection with this public contract.<sup>1037</sup> The highest Kuwaiti Cassation Courts in their Commercial Circuits have heard two disputes mentioning the core and original contract as a PPP between the Ministry of Finance and private investor in an operation and maintenance (O&M) type contract of a traditional market in Kuwait auctioned out to the highest bidder.<sup>1038</sup> The dispute the Cassation Court did hear in both cases was the contract between the private investor who won the PPP contract with the state and a lessee of one of the shops, i.e. a private type contract. The Court acknowledged that the original PPP contract would be of an administrative special nature.<sup>1039</sup> This meant the Commercial Circuit did not wish to engage in extensively discussing the original PPP contract beyond what justifies the right of the private investor to charge lessees higher lease amounts to operate the different shops within the market. This naturally also meant acknowledging the jurisdiction of the Administrative Circuit to hear such types of contracts.

This limitation of sub-contractors falling outside the jurisdiction of the original contract however is not particularly concrete. The 2016 new version of the Kuwaiti Public Tenders Law has established exclusive jurisdiction for the Administrative Circuits to “hear cases related to public tenders (and what fall under this term) of public purchases transactions and what is associated therewith or branches therefrom it of administrative disputes.”<sup>1040</sup> The phrase in this

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<sup>1037</sup> Mashaal A. Alhajeri, *Judiciary and the Administration of Justice in Building and Construction Disputes under Kuwaiti Law*, 22 ARAB L. Q. 199, 205 (2008).

<sup>1038</sup> See Court of Cassation Decision No. 767/2018, Dec. 25, 2018, Commercial/3, at 3–8 (Kuwait); Court of Cassation Decision No. 1216/2018, Dec. 26, 2018, Commercial/1, at 3–8 (Kuwait).

<sup>1039</sup> See Cassation Decision No. 767/2018, at 3–8; Cassation Decision No. 1216/2018, at 3–8.

<sup>1040</sup> Kuwait Public Tenders Law, art. 79.

provision is fairly broad to entail sub-contracts linked to administrative contracts. There needs to be more clarification from the Administrative Circuits in the coming years. Nonetheless, as a result of this exclusivity, other judicial means to settle administrative disputes in Kuwait are uncertain. In specific, judicial arbitration in Kuwait.

Law No. 11 of 1995 regarding Judicial Arbitration in Civil and Commercial Cases (Judicial Arbitration Law) was issued and established an arbitration panel or more in the Appeals Court comprised of three members of the judiciary and two arbitrators.<sup>1041</sup> While the title of this law is pretty self-explanatory,<sup>1042</sup> Article 2 on jurisdiction is a bit ambiguous. According to Article 2, this arbitration panel shall be competent to here three categories of disputes:

- a) Decide on disputes that the concerned parties agree to refer to the arbitration panel;
- b) Exclusively decide on disputes that arise between ministries or government entities or public legal persons and between corporations in which the state owns all its capital or between these corporations;
- c) Decide on arbitration applications that are submitted by individuals or private legal persons against ministries or government entities or public legal persons in the disputes that arise between them.<sup>1043</sup>

The disputes mentioned above have been appropriately categories into: *1. Voluntary arbitration*: as per previously mentioned category 1, where parties to a contract agree to resort to the arbitration panel; *2. Compulsory arbitration*: as per aforementioned category 2, applicable to those disputes between government bodies and public corporations themselves; *3. Mixed*

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<sup>1041</sup> Law No. 11 of 1995, art. 1, Regarding Judicial Arbitration in Civil and Commercial Cases (Kuwait) [hereinafter Kuwait Judicial Arbitration Law].

<sup>1042</sup> *Id.* art. 5 (providing that the Arbitration Panel shall review the preliminary matters that are presented to it in the disputes and falls under the jurisdiction of the civil and commercial judiciary).

<sup>1043</sup> *Id.* art. 2.

*arbitration*: where the private individual or corporation decide to resort to the arbitration panel whereas the government entity possesses no such option, in the manner described in category 3 above.<sup>1044</sup> There is not much doubt that especially the last type of arbitration raises unconstitutionality claims for restricting the right to litigation that is ensured by the constitution for one party and not the other.<sup>1045</sup> The second type of arbitration obliging government bodies to resort to arbitration may raise similar claims due to its litigation restriction on courts exercising their competency.

As for subject-matter jurisdiction in Law 11 of 1995, the issue is equally controversial and most pertinent to the discussion about judicial reviews in PPPs as public contracts. There have been extensive debates about whether judicial arbitration as per Law 11 of 1995 covers administrative disputes, such as those related to public works contracts or infrastructure projects intended to serve the public interest.<sup>1046</sup> Explicit jurisdiction has been established for the Administrative Circuit according to its establishing Decree-Law 20 of 1980. The previously mentioned constitutional provision in Article 169 moreover stresses that the Administrative Circuit is the natural competent judicial body to hear administrative disputes, which complicates prospects for judicial arbitration in administrative contracts. And while Law 11 of 1995 does not properly address judicial arbitration in public contracts, neither does the Panel itself.<sup>1047</sup>

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<sup>1044</sup> Azeeza Alshareef, *Tatweer Alikhtisas Alqadhaey Binathar Munazaat Alqanoon Alaam Fee Aaqab Sudoor Alqanoon Raqam 11 Lisanat 1995 Bishaen Atahkeem Alqadhaey* [The Development of Judicial Jurisdiction in Hearing Public Law Disputes following the Enactment of Law No. (11) of 1995 Regulating Judicial Arbitration], 22 KUWAIT UNIV. J. L. 13, 24–26 (1998); Mashaal Abdulaziz Alhajeri, *A Critical Approach to the Kuwaiti Law of Judicial Arbitration No. 11 of 1995 with Reference to the UNCITRAL Model Law on International Commercial Arbitration*, 15 ARAB L. Q. 48, 51–52 (2000); Khalifah Alhamidah, *Administrative Contracts and Arbitration, in Light of the Kuwaiti Law of Judicial Arbitration No. 11 of 1995*, 21 ARAB L. Q. 35, 47–48 (2007).

<sup>1045</sup> KUWAIT CONSTITUTION, art. 166 (“The right to litigation is guaranteed to all. The Law shall determine the procedure and the conditions necessary for the exercise of that right.”). See also Alhajeri, *supra* note 1044, at 61; Alhamidah, *supra* note 1044, at 48.

<sup>1046</sup> Alshareef, *supra* note 1044, at 26–35; Alhajeri, *supra* note 1044, at 60; Alhamidah, *supra* note 1044, at 60–65.

<sup>1047</sup> The difficulty with reaching clear conclusions about jurisdiction is with the issue of non-publication of Judicial Arbitration Panel decisions in the name of the preservation of confidentiality between parties, unless agreed upon by

As a result of the lack of clarity, some scholars concluded that the provisions of Law No. 11 of 1995 when read in light of the Administrative Circuit Law establishing this *sui generis* entity with exclusive jurisdiction, judicial arbitration does not therefore cover administrative disputes.<sup>1048</sup> Others, interpret the instability of Kuwaiti judicial arbitration panels as to whether they are competent to hear administrative disputes, the necessity of distinguishing public interest intents from commercial, and the need for such contracts to have a level of flexibility that coincides with interconnected globalized world demands, should consequently allow such panels to hear administrative disputes.<sup>1049</sup> Additionally, this latter view believes that *lex posterior derogat legi priori* is applicable in the relationship between Law No. 11 of 1995 on Judicial Arbitration and Decree-Law 20 of 1981 establishing the Administrative Chamber. The former's provisions are applicable as *sui generis*, although they remain largely ambiguous.<sup>1050</sup>

The Arbitration Panel has issued differing decisions on its *kompetenz-kompetenz* as far as its available judgments at least that are cited by scholars. This Panel has in one of its routes completely rejected arbitration in administrative contracts with the reasoning of explicit and exclusive jurisdiction established for the Administrative Circuit.<sup>1051</sup> The Arbitration Panel has, in other instances, accepted the fact that it may be competent to hear administrative disputes only in the condition that concerned public contracts reflect the government particularly exercising exceptional powers and not merely being party to such contract even while providing public

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the parties. Art. 7 of the Kuwait Judicial Arbitration Law forbids publication of all or part of the decision without the consent of its parties.

<sup>1048</sup> Alhajeri, *supra* note 1044, at 60; Alshareef, *supra* note 1044, at 26–35.

<sup>1049</sup> Alhamidah, *supra* note 1044, at 60–65.

<sup>1050</sup> *Id.* at 60–65.

<sup>1051</sup> Arbitration Panel Decision No. 3/96, Mar. 15, 1999, at 37 (Kuwait); Arbitration Panel Decision No. 22/99, Apr. 12, 2000 (Kuwait); Arbitration Panel Decision No. 23/99, Apr. 17, 2000, at 137 (Kuwait); Arbitration Panel Decision No. 17/95, May 12, 1995, at 30 (Kuwait); Arbitration Panel Decision No. 4/98, Mar. 23, 1998, at 90 (Kuwait); Arbitration Panel Decision No. 13/98, Feb. 8, 1999, at 98 (Kuwait); Arbitration Panel Decision No. 30/2000, Mar. 19, 2001, at 156 (Kuwait).

services.<sup>1052</sup> This is an intrinsically restricted circumstance in such contracts. Additionally, the Panel in occasions did stress that when the relationship in what appears to be a public contract is of a financial nature and aim, arbitration as per Law 11 of 1995 may serve as an exceptional or alternative means to settle the dispute.<sup>1053</sup>

The Administrative Circuit ultimately, and in multiple occasions, ruled on this matter by rejecting the notion that the Arbitration Panel may extend its jurisdiction to matters within an administrative contract's domain, and limited this Panel's reach to civil and commercial matters.<sup>1054</sup> This was further supplemented by the Government's arm in performing its executive role, the Department for Legal Advice and Legislation (DLAL).<sup>1055</sup> This Department, linked with the Council of Ministers, issues its legal advice to government entities on legal issues pertaining to their actions that are of an administrative nature and represents these entities in court.<sup>1056</sup> This

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<sup>1052</sup> Arbitration Panel Decision No. 26/96, Mar. 2, 1997 (Kuwait); Arbitration Panel Decision No. 13/79, June 1, 1998 (Kuwait).

<sup>1053</sup> Arbitration Panel Decision No. 3/1995, Dec. 30, 1996, at 7 (Kuwait); Arbitration Panel Decision No. 13/1995, May 21, 1996 (Kuwait).

<sup>1054</sup> Court of Cassation Decision No. 155/96, Apr. 7, 1997 (Kuwait); Court of Cassation Decisions No. 444 and 450/98, Mar. 14, 1999, at 1, 297 (Kuwait); Court of Cassation Decision No. 22/1997, Nov. 1, 1998, Commercial, at 706 (Kuwait); Court of Cassation Decision No. 368/1999, Dec. 19, 1999, Commercial, at 707 (Kuwait); Court of Cassation Decision No. 431/1999, Mar. 3, 2000, Commercial, at 708 (Kuwait); Court of Cassation Decision No. 412/2000, Dec. 4, 2000, Commercial, at 707 (Kuwait). Azeeza Alshareef did lean towards this view as the only very narrow exception towards the Arbitration Panel being competent to hear solely certain financial implications of an administrative contract. This competency shall not include most of the general Administrative Circuit competencies that include the assessment of legitimacy and the authorities of the government entity in its relationship with the private party and its contractual privileges and any administrative resolutions in connection with such contract. Alshareef, *supra* note 1044, at 31.

<sup>1055</sup> DLAL was established according to constitutional provisions of Articles 170 & 171 of the Kuwait Constitution and Amiri Decree No. 12 of 1960, Law Organizing the Legal and Advice Department of the State of Kuwait (Kuwait) [hereinafter DLAL Law]. *See* DLAL Law, art. 1.

<sup>1056</sup> DLAL stresses in many occasions its mandatory role in providing legal advice to government entities on any contract that exceeds 750,000 Kuwaiti Dinars (US \$2,470,000.00) according to art. 5 of DLAL Law. *See* Advice No. 2/445/166-2009, Jan. 12, 2010 (Kuwait); Advice No. 2/306/6826-2009, Dec. 10, 2009 (Kuwait); Advice No. 2/415/4706-2009, Aug. 20, 2009 (Kuwait); Advice No. 2/682/113-2008, Jan. 8, 2009 (Kuwait); Advice No. 2/66/98-1114, May 5, 1998 (Kuwait).

advice shall be binding on any government agency in relation with the issue subject to DLAL's advice.<sup>1057</sup>

And in this context, it is important to clarify that DLAL is to issue its advice on PPP contracts when different entities are to enter into its agreements, yet this advice is limited in terms of essentially being of a legal nature.<sup>1058</sup> DLAL has previously declared the scope of its role in relation with BOT contracts, as a type of PPP.<sup>1059</sup> This advice was based on the previous repealed governing legal framework, BOT Law, that was very limited in scope. The Directorate General of Civil Aviation, a Kuwaiti public entity, was seeking DLAL's advice on its intention to engage the private sector in designing and implementing the new international airport structure and potentially privatizing certain components thereof.<sup>1060</sup> The Directorate moreover provided feasibility studies that have been conducted in this regard.<sup>1061</sup> DLAL affirmed that its competencies in no way stretch as far as to displace public entities from exercising their main functions, one of which is deciding on how, when, and by which means they intend to implement their infrastructure projects and all financial aspects of such decision, provided it falls within legal limits, i.e. *intra vires*.<sup>1062</sup> This is the additional legal screening process to the PPP agreement by a quasi-independent entity with no obvious stake in PPP projects. It is nonetheless an added layer of government bureaucracy and timelines to issue this advice as for other

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<sup>1057</sup> DLAL provides that government agencies shall abide by what it concludes of observations and adjustments to the public entity's contract as long as no urgent circumstance exists that necessitates deviating from such conclusions, which shall be under the government agency's sole responsibility. Advice No. 6826-2/306/2009, Dec. 10, 2009 (Kuwait).

<sup>1058</sup> See DLAL Law, art. 5. See also Advice No. 38- 2/623/2008, Jan. 4, 2009 (Kuwait); Advice No. 113-2/682/2008, Jan. 8, 2009 (Kuwait) (identifying the components of its advice that make it of a legal nature).

<sup>1059</sup> Advice No. 2786-2/211/2006, June 10, 2006 (Kuwait).

<sup>1060</sup> *Id.*

<sup>1061</sup> *Id.*

<sup>1062</sup> *Id.*

screening segments are to be established to ensure PPP project procurement does not last for unreasonable periods.

Yet, in connection with the choice of arbitration, DLAL, in a request for advice submitted to the Department about resorting to judicial arbitration in relation to a dispute arising from a contract between the Ministry of Education and a contractor to build, operate, and maintain the College of Literature and Science of Humanities, the Department concluded that judicial arbitration is not accepted as an adjudicative option.<sup>1063</sup> The Department reiterated the exclusive jurisdiction of the Administrative Circuit to hear disputes related to administrative contracts. And it declared its stance that the Arbitration Panel's jurisdiction is rather confined to civil and commercial cases only.<sup>1064</sup>

Even in light of the discussion on the jurisdiction of arbitration panels to hear administrative disputes, one fact remains, this type of arbitration is not the only means of arbitration. It remains one of a judicial nature, and local or international arbitration may not be eliminated as an option in light of the parties' autonomy that is cemented in the PPP Law provisions as provided before.

DLAL concluded in one of its views that government entities are not obliged to include arbitration clauses in their administrative contracts with foreign investors, as they are rather advised to clearly designate Kuwaiti courts and its laws as the source for reviewing any disputes that arise, unless urgent conditions exist in such contract.<sup>1065</sup> This conclusion was based on Council of Minister's Resolution No. 11 of 1988 (amended by Resolution No. 424 of 1990)

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<sup>1063</sup> Advice No. 2128-2/86/2005, May 8, 2005 (Kuwait); Advice No. 2062-2/173/98, June 6, 1998 (Kuwait).

<sup>1064</sup> Advice No. 2128-2/86/2005; Advice No. 1800-2/150/95, July 29, 1995 (Kuwait).

<sup>1065</sup> Advice No. 1179-2/151/95, Oct. 1, 1995 (Kuwait). As for disputes between government entities themselves, DLAL is clear that arbitration is not an option and that rather DLAL retains the exclusive authority to settle such disputes on behalf of the Council of Ministers. *See* Advice No. 2/M A/2637, Sept. 15, 1998 (Kuwait).

stressing to government entities not to consider either local or international arbitration in their contracts with foreign contractors in connection with domestic projects.<sup>1066</sup> This advice and Council of Minister's Resolution can be explained by the French legal system's influence on Kuwaiti legal institutions. French courts have ruled and set precedent that arbitration shall not be accepted in administrative contracts where the state is party.<sup>1067</sup> Administrative contracts in France are viewed as too important for arbitration, which is viewed as a sort of private intervention not capable of understanding circumstances of public interest.<sup>1068</sup> The French Civil Code does strike a contrast between contracts of a public nature and others entered into by public entities that are of a commercial or industrial character.<sup>1069</sup> Arbitration in the latter type of contracts is accepted.<sup>1070</sup> Even with some exceptions being developed to allow arbitration in administrative contracts in France, the general rule of prohibition stands.<sup>1071</sup> Notwithstanding the advice from DLAL issued back in 1998, it does not correspond with recent clear provisions of the PPP Law that uphold the autonomy of PPP contract parties.

Moreover, local Kuwaiti judicial precedent upholding party autonomy, precisely in relation with arbitration, exists. The Cassation Court considers parties' resort to arbitration an exceptional means to resolve disputes on the basis of departing from the normal judicial

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<sup>1066</sup> DLAL Advice No. 1179-2/151/95.

<sup>1067</sup> Ching-Lang Lin, *Arbitration in Administrative Contracts: Comparative Law Perspective* 60–64, 66–70, 425 (PhD Dissertation in Public Law, Sciences Po Law School, 2014); Jacques Bouillon, François-Guilhem Vaissier & Jean-François Le Corre, *French Administrative Supreme Court Clarifies its Interpretation of the Validity of an Arbitration Award*, WHITE & CASE (Dec. 21, 2016), <https://www.whitecase.com/publications/alert/french-administrative-supreme-court-clarifies-its-interpretation-validity>.

<sup>1068</sup> Lin, *supra* note 1067, at 66–70.

<sup>1069</sup> CODE CIVIL [C. CIV.] [CIVIL CODE], art. 2060 (France) (“One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned. . . . However, categories of public institutions of an industrial or commercial character may be authorized by decree to enter into arbitration agreements.”).

<sup>1070</sup> *Id.*

<sup>1071</sup> Lin, *supra* note 1067, at 66–70, 93–95, 425; *Procuring Infrastructure PPPs 2018 Database: France*, WORLD BANK, <https://bpp.worldbank.org/en/data/exploreconomies/france/2018> (last visited Oct. 19, 2018).



route.<sup>1072</sup> Yet, when such means is chosen, the parties' choice and will shall be upheld and become the major source of prescribing such means, even where such method is provided for in the law.<sup>1073</sup> Furthermore, when a means like arbitration is chosen by the contractual parties, they shall be obliged by its jurisdiction in their disputed matters and the judiciary shall refrain from exercising its regular functions in the matter.<sup>1074</sup>

Ultimately though, DLAL must strictly issue its advice pertaining to any government entity's decision in its public contract with the private partner to resort to arbitration, beforehand.<sup>1075</sup> Article 5 of DLAL Law in its second sentence after providing DLAL with authority to review public contracts beforehand and look into contract implementation issues, provides, "And no Government Department, Entity, or other body shall be permitted to enter, accept, or allow any contract, conciliation, or arbitration in a matter valued in excess of 75,000 Dinar without the Department's (DLAL) advice."<sup>1076</sup> This remains an advice that is to be issued by DLAL, which means either scenario stands. DLAL may issue its legal advice permitting or disallowing the choice of arbitration in the contract. DLAL should nevertheless be flexible enough to apprehend the importance of upholding party autonomy when PPP contract parties elect arbitration as their preferred choice of forum.

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<sup>1072</sup> Court of Cassation Decision No. 1207/2010, May 5, 2011, Commercial, at 3 (Kuwait); Court of Cassation Decision No. 155/2010, Feb. 2, 2011 Commercial, at 3 (Kuwait).

<sup>1073</sup> Cassation Decision No. 1207/2010, at 3; Cassation Decision No. 155/2010, at 3.

<sup>1074</sup> Cassation Decision No. 1207/2010, at 3; Cassation Decision No. 155/2010, at 3; Court of Cassation Decision No. 494/2009, Jan. 28, 2010, Commercial, at 3 (Kuwait).

<sup>1075</sup> Review prior DLAL legal advice emphasizing the obligatory nature of its advice before final agreement on designating arbitration as the dispute settlement mechanism of a contract. *See* DLAL Advice No. 2/445/166-2009; DLAL Advice No. 2/306/6826-2009; DLAL Advice No. 2/415/4706-2009; DLAL Advice No. 2/682/113-2008; DLAL Advice No. 2/66/98-1114.

<sup>1076</sup> DLAL considers its prior intervention in signing a contract, or accepting conciliation or arbitration, as a prior approval to contract from a legal standpoint, which is required beforehand. *See* DLAL Advice No. 6826-2/306/2009.

The Administrative Circuit shall ultimately remain the default dispute settlement mechanism should the parties to a PPP contract not agree otherwise. This Circuit has already sustained different principles that are pertinent to any private partner when entering into a contract with a government counterpart to implement one of Kuwait's well anticipated infrastructure development projects.

*Public Contract Specific Principles in Kuwait: Public Interest is the Star of the Show*

The government, according to the Administrative Circuit, shall enjoy unconventional powers not known to private contracts. These privileges slant the balance of the contractual relationship towards the government. This conclusion is critical in terms of its potential impact on the bargaining power in a PPP relationship. The Administrative Circuit in the Court of Cassation, the highest court in Kuwait, rules consistently that administrative contracts fall under a special legal framework that distinguishes them and differs from that of a civil contract regime due to the unbalanced intentions of the parties to such contract.<sup>1077</sup> The public entity acts on behalf of the public interest (*almaslaha alaama*) of the state, whereas the contractor represents their private interest.<sup>1078</sup> This justifies the government entity's right to incorporate in the contract exceptional provisions and unconventional financial penalties not accustomed to private contracts with the intention to secure public services and their smooth functioning. These powers in turn guarantee the contractor's compliance with the contract terms and diligence in thriving to implement the project.<sup>1079</sup> It should be of no surprise that public interest, as loose as this concept

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<sup>1077</sup> Court of Cassation Decision No. 84/2014, June 18, 2014, Administrative Circuit (Kuwait); Court of Cassation Decisions No. 768 & 769/2002, Feb. 3, 2005, Commercial Circuit (Kuwait).

<sup>1078</sup> Cassation Decision No. 84/2014 (Kuwait).

<sup>1079</sup> *Id.*

may be, trumps private objectives and remains the standard that justifies an unbalanced contractual relationship.<sup>1080</sup> Limits and safeguards to what the government may exercise in the name of public interest then remain crucial to a private partner. Such assurances may include compensation clauses, tax incentives, and other means that ensure the contract remains feasible to the private partner.

Administrative contracts are one of state entity actions related to public contracts that Administrative Circuits are competent to hear. Other governmental actions are resolutions (*qararat*) or ministerial decrees issued by public entities, which fall under the scope of the Administrative Circuit's jurisdiction.<sup>1081</sup> These resolutions would entail decisions a government agency issues in connection with matters that include results of a public tendering process, upholding a competitive environment, or even penalties imposed on a private partner pertaining to the implementation of an ongoing public contract. The Kuwaiti judiciary has decided on this matter, on many occasions. Chiefly, Administrative Circuits have clarified what falls under the meaning of an administrative resolution, and thus benefits from a superior legal status. The Cassation Administrative Circuit has reaffirmed:

The administrative resolution that the Administrative Circuit in *Almahkama Alkulliyah* shall be competent in its requests for repealing or compensation thereof is that resolution in which the public entity (*idara*) expresses its compulsory intention in what it possesses of public authority (*sulta aama*) in accordance with laws and regulations and in the form required by law with the aim of creating a certain legal effect whenever such is legally permissible and possible and the motive was attaining a public interest.<sup>1082</sup>

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<sup>1080</sup> MERRYMAN & PEREZ-PERMODO, *supra* note 1025, at 71–73, 93–94.

<sup>1081</sup> Kuwait Administrative Circuit Law, art. 1 (providing that the Administrative Circuit shall be competent to hear “[r]equests submitted by individuals or entities to repeal final administrative resolutions other than decisions issued pertaining to nationality matters, the stay and deportation of foreigners, and licenses to issue newspapers, magazines, and establish religious worship venues”).

<sup>1082</sup> Court of Cassation Decisions Nos. 86 & 115/2006, Jan. 7, 2008, Administrative Circuit, at 5 (Kuwait).

The public interest comes up once again as a factor distinguishing public resolutions as it had for public or administrative contracts. Yet, with the broad undertones this concept has, the same Circuit in the decision above further clarified how this differentiation of a public resolution may be well understood. The Circuit stressed:

Needless to clarify that merely issuing a resolution by a public entity (*jaha idariya*) shall not deem it necessarily and in all cases a public resolution in the meaning previously described. Rather, to achieve this description [sic of an administrative resolution], it must be such due to its content and substance. If the resolution addresses a matter within the matters of private law or was related to administering private entity funds, it shall fall outside the scope of administrative resolutions regardless of the source issuing such or status in the administrative hierarchy.”<sup>1083</sup>

A central conclusion must be drawn from this decision. The source of resolution, as this should also apply to administrative contracts, is not the decisive factor in labeling an action as public. It is rather the content of both, resolutions and contracts, that must ultimately aim to achieve a matter of public interest that serves the society as a whole and not simply commercial objectives. In a country like Kuwait with a significant amount of SOEs, such as its large Public Institution for Social Security (PIFSS), the state’s pension fund, i.e. public entity, this may offer abundant grey areas when it comes to assessing the status of an entity’s actions.<sup>1084</sup> PIFSS, for instance, invests its funds for commercial purposes, as does it distribute pension payments to its citizen retiree beneficiaries, i.e. public interest, and so consequently issues resolutions and enters into contracts according to its two differing roles.<sup>1085</sup> Further, in the case above, the National Petroleum Company, while established by the Government, and fully owned by the state, issued a resolution that was deemed of a private nature.<sup>1086</sup> This resolution was to initiate a procurement

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<sup>1083</sup> *Id.* at 5. *See also* Court of Cassation Decision No. 862/2004, Nov. 26, 2005, Commercial Circuit, at 8 (Kuwait).

<sup>1084</sup> *About PIFSS*, NEW KUWAIT, [https://www.pifss.gov.kw/Ar\\_About.cms](https://www.pifss.gov.kw/Ar_About.cms) (last visited Oct. 12, 2018).

<sup>1085</sup> *Id.* *See also* Law No. 61 of 1976, arts. 3–6, 11, Law on Social Security (Kuwait).

<sup>1086</sup> Cassation Decisions Nos. 86 & 115/2006, at 6.

process exercising what the Circuit described as an economic role and aim that rather falls under the auspices of private laws, as this Corporation's main purpose is to engage in industrial and commercial activity in the field of petroleum.<sup>1087</sup> And to put this more into perspective, an agreement may not be a PPP when the private sector contracts with an SOE exercising such commercial activity. This would rather be a private-private relationship.

As for the private partner, known to administrative contracts as "contractor", the judiciary in Kuwait set the moment in which this status begins. According to the Cassation Court's Administrative Circuit, a private bidder shall remain outside the scope of a contractor until the point in which a contract is specifically signed with the public entity.<sup>1088</sup> What precedes such signature are known as "preliminary procedures", which includes notifying the winner of the procurement process.<sup>1089</sup> The implications of such a judicial decision are important, as they frame the basis of rights that the contractor may claim. A contractor may only submit contractual claims once a contract is signed, not before, even if damage in that respect is incurred.<sup>1090</sup> Before that, all grievances are to be directed to the procurement process and the procedures drawn for this. The private entity shall remain a bidder in such stage, and the public entity, according to the Administrative Circuit, is under no obligation to sign such contract, especially when exercising its right in the name of public interest.<sup>1091</sup>

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<sup>1087</sup> *Id.* at 6.

<sup>1088</sup> Court of Cassation Decisions Nos. 523 & 559/2004, Apr. 26, 2004, Administrative Circuit, at 5 (Kuwait) ("The bidder shall not be considered a contractor until the date the contract is signed between its parties whether the tender was carried out by the Central Tenders Committee or the entity responsible for the project, whereas, notifying the winner bidder of the acceptance of their proposal and success in the tender are merely preliminary procedures to signing the contract in accordance with principles that contracts in public tenders stand on.").

<sup>1089</sup> *Id.* at 5.

<sup>1090</sup> *Id.*

<sup>1091</sup> *Id.*

Yet, the same Circuit in a previous occasion accepted damage based on what is known as compensation for “missed gains” (*alkasb alfae ’t*) outside the scope of the contract, that is, the administrative contract.<sup>1092</sup> In this case, the Circuit still did not establish such compensation based on damage arising from an administrative contract, rather as a result of an illegitimate administrative resolution violating established procurement rules that require the tendering process to follow the established criteria, here being, the lowest valued bid wins.<sup>1093</sup> The Resolution did not follow this course and was reckoned illegitimate.<sup>1094</sup> On the foundation of missed gains as per Article 230 of the Civil Law of Kuwait, the Administrative Circuit upheld the decision to award the bidder compensation for material and moral damage.<sup>1095</sup> And while the two different avenues, contractual or civil law based, appear to reach the same objective for the contractor, the extent of both and burden of proof required for missed gains claims unquestionably differs and is more arduous. Kuwaiti Courts emphasized that in missed gains, it is not sufficient to claim that damage was expected as a result of an action, rather, such damage in the context of missed gains must be (*muhaqqq*), which means that damage has either occurred or shall inevitably occur (*hatman*).<sup>1096</sup> In this case a foreign corporation claimed its local representative caused it damage as a result of losing a public tender with the Kuwait Oil Company, a public entity, because of the submission of insufficient documents in a untimely manner.<sup>1097</sup>

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<sup>1092</sup> Court of Cassation Decision No. 225/2002, Apr. 21, 2003, Administrative Circuit, at 7 (Kuwait).

<sup>1093</sup> *Id.* at 7.

<sup>1094</sup> *Id.*

<sup>1095</sup> *Id.* Kuwait Civil Code, art. 230 (“Damage in which the actor of an illegitimate act shall be responsible to compensate shall be determined based on the loss that has occurred and missed gains as long as it is a natural result to the illegitimate act.”).

<sup>1096</sup> Court of Cassation Decision No. 141/2005, Apr. 17, 2007, Commercial, at 7 (Kuwait).

<sup>1097</sup> *Id.* at 7.

The related aforementioned aspect that a private partner must well understand in their relationship with Kuwaiti government entities is the degree of powers these entities enjoy in the name of public interest. The Cassation Court's Administrative Circuit in Kuwait asserted the legality of irregular provisions that a government entity may introduce to an administrative contract.<sup>1098</sup> In a build-operate contract, the Circuit regarded as acceptable, exceptional clauses in the contract that represented stringent requirements to establish a timeline to implement the contract far before operations commence, resort to high penalties for delays in contract implementation, and imposing multiple bank guarantees and insurance to ensure smooth implementation.<sup>1099</sup> In another case, the Circuit justified the public entity's resort to unilaterally dissolve its administrative contract with a private contractor on the basis of the principle of public interest and the need to maintain the provision of services to the public.<sup>1100</sup>

Judicial consideration to specificities of PPP projects are perhaps infantile and need time to grow and produce some sort of guidance. Nonetheless, the principles applicable to public contracts shall remain relevant and pertinent in the meantime. They are certainly not complete, albeit, the Kuwaiti Administrative Circuit is not expected to deviate much from its established administrative law principles, should it be designated with hearing PPP disputes. And if there were a principle that wins first place, it seems it is rather the principle of public interest. Nevertheless, there are many principles that must be upheld for foreign investors to particularly be aware of local judicial capabilities in Kuwait, yet other adjacent countries such as the UAE may have some lessons of their own to offer.

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<sup>1098</sup> Court of Cassation Decision No. 75/2011, June 26, 2014, Administrative, at 8 (Kuwait).

<sup>1099</sup> *Id.* at 8.

<sup>1100</sup> Court of Cassation Decision No. 326/2007, May 11, 2011, Administrative, at 6 (Kuwait).

A glimpse of the dispute settlement process sophistication pertaining to private investments in infrastructure projects in Dubai was presented previously. The discussion here about Dubai's dispute settlement mechanisms is provided in as much as these mechanisms relate to PPP or public contracts. One of the pre-requisite issues to this discussion that is accounted for yet will not take the vast space of this topic would be the local v. federal level judiciary dynamics. And the most important factor in these dynamics is that Dubai courts shall be competent in matters that logically fall within the boundaries of this Emirate.<sup>1101</sup> The significant role Federal Courts may play would be in the particular role of the Federal Supreme Court, in its major competency of checking the constitutionality of laws and precedents, amongst other competencies, and its decisions shall be authoritative and binding to all courts.<sup>1102</sup>

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<sup>1101</sup> U.A.E. CONSTITUTION, art. 104 (“The local judicial authorities in each Emirate have jurisdiction in all judicial matters not assigned to the U.A.E. courts under the Constitution.”).

<sup>1102</sup> Sultan & Al-Muhairi, *supra* note 396, at 142–44. *See also* U.A.E. CONSTITUTION, art. 101 (“The judgements of the Supreme Court of the Federation shall be final and binding upon all. If the Court, in rendering judgement on the constitutional legality of laws, legislation and regulations, rules that Union legislation is inconsistent with the Constitution of the Federation, or that local legislation or regulations under consideration contain provisions which are inconsistent with the Constitution of the Federation or with a Federation law, the authority concerned in the Federation or in the Emirate as applicable shall be obliged to take the necessary steps to remove or rectify the constitutional inconsistency.”). Article 99 of the U.A.E. Constitution outlines the general competencies of the Supreme Federal Court in the local v. federal context. *Id.* art. 99 (“1. Decide on different disputes among the member Emirates of the U.A.E., or between any one or more Emirates and the federal government in case that the dispute is remitted to the Court upon the request of any of the concerned parties; 2. Consider the constitutionality of a federal law if it is challenged by one or more Emirates on the grounds that it is in conflict with the Constitution of the U.A.E. The Court also has the power to consider the constitutionality of a legislation enacted by an Emirate if it is challenged by a federal authority on the grounds that it is in conflict with the Constitution of the U.A.E. or the federal laws; 3. Consider the constitutionality of laws, legislations and regulations in general if it is so requested by any court in the country while hearing a relevant case. The concerned court shall comply with the decision of the Federal Supreme Court rendered in this connection; 4. Interpret the provisions of the Constitution, if it is so requested by any federal authority or by the Government of any Emirate. Any such interpretation is binding to all; 5. Call into account the ministers and senior officials of the U.A.E. appointed by decree for their actions while performing their official duties upon the request of the Supreme Council and in accordance with the relevant law; 6. Decide on the crimes which directly affect the interests of the U.A.E., such as the crimes relating to the U.A.E.’s internal or external security, forgery of the official records or seals of a federal authority, and counterfeiting of currency; 7. Hear the cases of conflict of jurisdiction between a federal court and a local court in an Emirate; 8. Hear the cases of conflict of jurisdiction between a court in an Emirate and a court in another Emirate. The rules



The Emirate of Dubai's local judiciary system, like Kuwait, is comprised mainly of a two-tier system, first-instance courts and appeals courts. In addition, the Dubai Cassation Court serves as the superior judicial entity of the emirate entrusted with particularly ensuring the legality of judicial rulings of lower Dubai courts, not revisiting the factual matters of a case.<sup>1103</sup> The Cassation Court of this emirate added clear evidence of Dubai's judicial independence within this *Emara* from federal courts.<sup>1104</sup> Yet, one major difference exists between this emirate and Kuwait, no specialized administrative courts are established in Dubai.<sup>1105</sup> And at the time where Dubai, UAE, appears to adopt the civil law legal system model, the situation is much more complicated than that.<sup>1106</sup>

In Dubai, the Civil Courts within the Courts of First Instance (*Almahakim Alibtidae 'ya*) shall be competent to hear cases related to administrative disputes within the meaning previously provided.<sup>1107</sup> Decisions may be appealed to the Court of Appeals under the ultimate auspices of the Dubai Court of Cassation, like any other court decision, unless otherwise provided by law.<sup>1108</sup> The Dubai Government Contracts Law explicitly designates Dubai courts as the

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governing these cases are regulated by a federal law; 9. Any other powers provided in the Constitution or which may be conferred upon the Federal Supreme Court by a federal law.”)

<sup>1103</sup> Sultan & Al-Muhairi, *supra* note 396, at 133.

<sup>1104</sup> *Id.*

<sup>1105</sup> The same applies to the federal judicial system of the U.A.E. No specifically designated administrative courts nor circuits are established to particularly hear administrative disputes. Rather, administrative disputes would fall under the jurisdiction of the civil courts, major (*kulliyah*) circuits. See *The System of Courts*, U.A.E. GOV'T, <https://www.government.ae/en/about-the-uae/the-uae-government/the-federal-judiciary/the-system-of-courts> (last visited Oct. 16, 2018). See U.A.E. CONSTITUTION, art. 102.

<sup>1106</sup> There is also the influence of Sharia Law. Sultan & Al-Muhairi, *supra* note 396, at 126–27; Ahmed Aly Khedr & Bassam Alnuaimi, *A Guide to United Arab Emirates Legal System*, GLOBALEX, [http://www.nyulawglobal.org/globalex/United\\_Arab\\_Emirates.html#legalsystem](http://www.nyulawglobal.org/globalex/United_Arab_Emirates.html#legalsystem) (last visited Oct. 16, 2018); *The Federal Judiciary*, U.A.E. GOV'T, <https://www.government.ae/en/about-the-uae/the-uae-government/the-federal-judiciary> (last visited Oct. 16, 2018).

<sup>1107</sup> *Civil Court*, DUBAI COURTS, <https://www.dc.gov.ae/PublicServices/CMSPage.jsf?PageName=CivilCourt&lang=ar> (last visited Oct. 16, 2018).

<sup>1108</sup> Law No. 3 of 1992, June 6, 1992, art. 22, Regarding the Formation of the Courts in the Emirate of Dubai [hereinafter Dubai Courts Law] (U.A.E.).

competent courts to hear disputes arising from contracts regulated by such Law.<sup>1109</sup> While this Law dates back further, 1997, than the Dubai PPP Law, 2015, this may explain the inclination to identify Dubai Courts as the competent judicial entity to hear such government contracts disputes. Yet, a specific regulation was established pertaining to government cases, where the Attorney General shall be representative of the different public entities in cases related to the rights of these public entities in their contracts brought to the Dubai Courts.<sup>1110</sup> There is no specific guidance that may be inferred from local civil courts decisions in Dubai. It is also rather important to nevertheless consider the role of grievances presented to the same procuring authorities in Dubai when it comes to tender-related complaints, which remains in place in the aforementioned manner.

*Dubai is a Civil Law Jurisdiction, but Not Really*

Although disputes pertaining to PPP contracts and other public or administrative contracts fall under the competency of Dubai's general civil courts, the complexity of these contracts and metropolitan nature of the city has led to a more progressive dispute settlement system. This system certainly coincides with the city's fast pace and international presence. Party autonomy is preserved in PPP contracts and a main dispute settlement is provided in this emirate, arbitration. Dubai hosts two primary arbitral forums, DIAC and DIFC-LCIA, as mentioned before. And Dubai's PPP Law asserts the need to either resort to forums or rules within the *emara*.

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<sup>1109</sup> Dubai Government Contracts Law, art. 83.

<sup>1110</sup> Law No. 3 of 1996, Dec. 15, 1996, arts. 2–5, Government Cases Law, as amended in 1997 & 2005 (U.A.E.).

Prior to more concurrent legal amendments, DIFC-LCIA was restricted to its confinements within the established free trade zone that is within Dubai's parameters but actually serves as its own entity.<sup>1111</sup> DIFC is a sort of quasi-autonomous territory still within the confines of Dubai that not only launches its own institutions, but is also rather authorized to issue its own regulations which are autonomous from Dubai's regulations.<sup>1112</sup> And with this authorization, civil law Dubai is no longer completely civil law. The DIFC zone, instead, adopts a common law system of rules. And if some are still wondering whether this system is restricted to the DIFC zone, the more recent legal reforms provide otherwise.<sup>1113</sup> When DIFC-LCIA is elected as the forum, its common law rules would apply even if parties are domiciled or incorporated elsewhere, like Dubai, i.e. extraterritorial, should parties to the contract mutually agreed to such.

To clarify one point, while DIFC courts comprised of Courts of First Instance and Appeals Courts, exist to hear civil and commercial cases according to its common law mandate,<sup>1114</sup> Arbitral Tribunals may be set up and apply DIFC-LCIA Rules in arbitration proceedings, which follow UNCITRAL Model Law on International Commercial Arbitration

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<sup>1111</sup> *Legal Framework*, DIFC COURTS, <https://www.difccourts.ae/about-courts/legal-framework/> (last visited Oct. 18, 2018); Ahmed M. Almutawa & A.F.M. Maniruzzaman, *The UAE's Pilgrimage to International Arbitration Stardom: A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to be a Middle East Business Hub*, 15 J. WORLD INV. & TRADE 193, 204–05 (2014).

<sup>1112</sup> This is all in accordance with a 2004 constitutional amendment that authorizes the different emirates to establish similar free trade zones. See *Legal Framework*, *supra* note 1111; Almutawa & Maniruzzaman, *supra* note 1111, at 202.

<sup>1113</sup> Law No. 16 of 2011, art. 5, Amending Certain Provisions of Law No. 12 of 2004 Concerning Dubai International Financial Centre Courts (U.A.E.) [hereinafter DIFC Law] (“1. The Court of First Instance shall have exclusive jurisdiction to hear and determine: . . . b. Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract.”).

<sup>1114</sup> *Id.* art. 5.

provisions.<sup>1115</sup> And as a reminder, we are no longer in the domain of differentiating between civil cases and administrative disputes anymore under DFIC jurisdictions with its common law approach. Mediation services are also offered by DIFC-LCIA.<sup>1116</sup> And parties to the contract may even cherry pick by designating DIFC-LCIA as the forum but choosing other rules to be applied, i.e. choice of law.<sup>1117</sup> Party autonomy is upheld, yet even with the parties' authority to cherry pick, it is not all that clear that in light of Article 35(b) of the Dubai PPP Law this is particularly accepted. It is rather closer to being permitted as Article 35(b) of the PPP Law discusses the two distinct situations that are not permitted, which are either designating a foreign arbitral forum from outside Dubai or applying non-Dubai rules. The Article uses "or" to address the different situations.

Claims have in fact been brought to DIFC-LCIA by private investors against host governments and for the DIFC Court to recognize and enforce judgments, such as *Pearl Petroleum Company Limited & Others v The Kurdistan Regional Government of Iraq [2017] DIFC ARB 003*, where the Kurdistan Regional Government in Iraq was defendant.<sup>1118</sup> In this case, the Court considered the arbitration agreement a waiver by the Kurdistan Regional Government of its sovereign immunity, as is well established in investor-state arbitrations.<sup>1119</sup>

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<sup>1115</sup> DIFC-LCIA Arbitration Rules, arts. 1–5 (2016) (U.A.E.); *Arbitration*, DIFC COURTS, <https://www.difccourts.ae/judgements/arbitration/> (last visited Oct. 15, 2018); U.N. COMM'N INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985), U.N. Doc. A/40/17, annex I, U.N. Doc. A/61/17, annex I.

<sup>1116</sup> DIFC-LCIA Mediation Rules, arts. 1–2, 6–7 (2012) (U.A.E.).

<sup>1117</sup> Almutawa & Maniruzzaman, *supra* note 1111, at 209–10.

<sup>1118</sup> *Pearl Petroleum Company Limited & Others v. The Kurdistan Regional Government of Iraq [2017] DIFC ARB 003*, ¶ 39 (Aug. 20, 2017), <https://www.difccourts.ae/2017/08/20/pearl-petroleum-company-limited-others-v-kurdistan-regional-government-iraq-2017-difc-arb-003/>.

<sup>1119</sup> Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 127–28 (2006).

Where jurisdiction, though settled now, has been an issue in DIFC-LCIA being a seat of arbitration for disputes in Dubai, this is not an issue with Dubai's other and perhaps more established arbitration forum, DIAC (*see Figure 19*).<sup>1120</sup> Like many arbitral forums, arbitral awards are not regularly published in the name of respecting parties' confidentiality, unless these parties provide otherwise.<sup>1121</sup> This causes challenges in understanding where the DIAC Arbitral Tribunal stands on different substantive issues. Nevertheless, where a very distinct common law feature suddenly characterizes DIFC within Dubai, DIAC, on the contrary, lives up to this *emara's* rather historic identity and applies its laws, particularly civil and commercial procedures laws and new Federal Arbitration Law, that are based on the civil law system.<sup>1122</sup> The major highlight of applying laws of this nature are the *sharia* principles that are actually upheld in Dubai. To be precise, the Federal Arbitration Law provisions that would be applicable could initiate this obscurity by providing in Article 2 about its scope of application, "Any Arbitration conducted in the State, unless the Parties have agreed that another law should govern the Arbitration, provided there is no conflict with the public order and morality of the State." "Public order and morality of the state" is a statement so broad and enticing to a degree of discretion, that it necessarily entails *sharia* compliance assessments. As previously mentioned, for instance, there are prohibitions in place when it comes to transactions between two individuals or entities, including gambling-sourced funds and debatably, interest (*fai'da*), or *riba*. This must be understood by the contracting parties in advance to set expectations clear from the forefront.

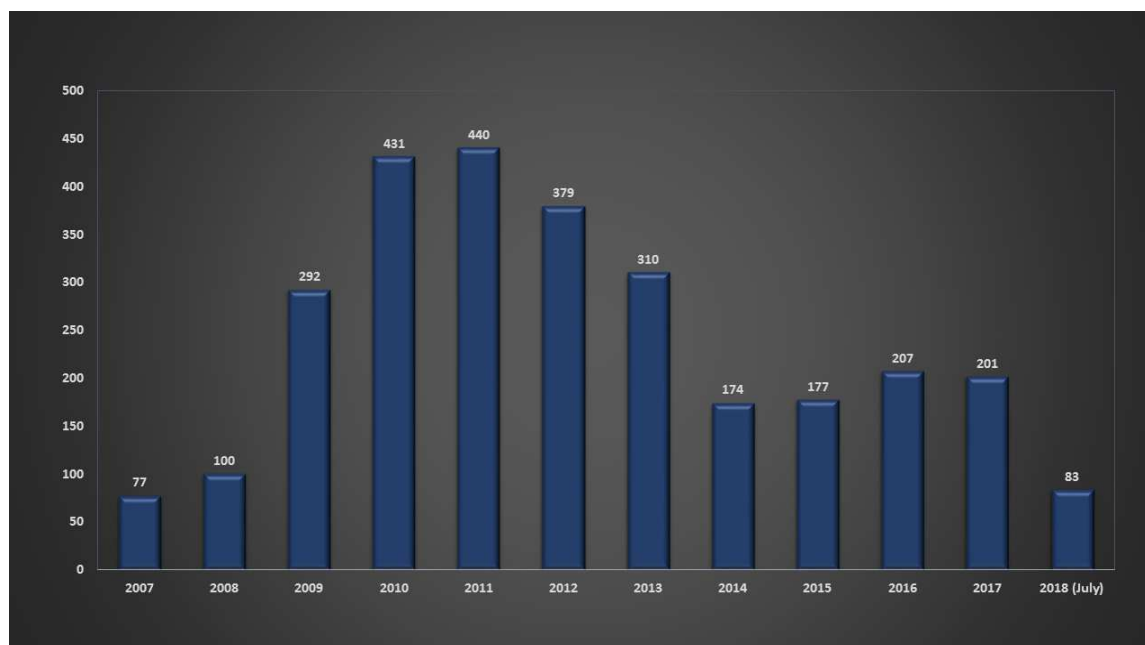
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<sup>1120</sup> Almutawa & Maniruzzaman, *supra* note 1111, at 217–18.

<sup>1121</sup> DIAC Statute Rules, art. 23 (as last amended); DIAC Arbitration Rules art. 37.9 (as last amended). *See also Advantages of Arbitration at DIAC*, DUBAI INT'L ARB. CTR., <http://www.diac.ae/idias/services/diac/advantages/> (last visited Oct. 19, 2018).

<sup>1122</sup> Federal Law No. 6 of 2018, Arbitration (U.A.E.) [hereinafter U.A.E. Federal Arbitration Law]; Almutawa & Maniruzzaman, *supra* note 1111, at 217–18.

Figure 19: Number of Cases Registered with DIAC from 2007 to July 2018



Source: <http://www.diac.ae/idias/archiveevents/CASESTATIC>

The one problem that may need more clarification is guidance on resorting to either of the two different arbitral entities. Future litigants need to better know where to direct their disputes. While DIFIC-LCIA appears to be expanding its mandate in terms of its jurisdiction to so to say mainland Dubai in addition to the free trade zone area, and so prospective litigants are left with both DIFIC-LCIA or DIAC and their rules as forums, i.e. creating an opportunity for forum shopping. The most recent DIAC Rules amendments of 2018 have actually brought DIAC closer to DIFIC-LCIA, or perhaps the other way around, by identifying DIFC as the default seat for arbitration proceedings governed by DIAC Rules.<sup>1123</sup>

### Saudi Arabian Jurisprudence

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<sup>1123</sup> Habib Al Mulla, Celine Kanakri & Sally Kotb, *The New DIAC 2018 Arbitration Rules*, GLOBAL ARB. NEWS (Dec. 12, 2017), <https://globalarbitrationnews.com/new-diac-2018-arbitration-rules/>.

If the first thing that comes to a reader's mind when discussing the Saudi Arabian judiciary and its regulating laws is *sharia*,<sup>1124</sup> there is much more to the Kingdom's judicial system than being summarized as such.<sup>1125</sup> The new Saudi state has undergone many reforms to meet the current and future demands of an everchanging globalized world.<sup>1126</sup> Nevertheless, it, like the Kuwaitis and Emiratis in Dubai, has a three-tier court hierarchy comprised of mainly two factual tiers, courts of first instance, courts of appeals, in addition to a supreme court that oversees the lower court's proper application of legal and *sharia* provisions.<sup>1127</sup>

While with regards to the horizontal judicial scheme, there are different types of courts, where purely *sharia* courts no longer assume competencies that fall under today's general courts, like commercial cases.<sup>1128</sup> And amongst the different types of courts, one of which is referred to as Boards of Grievances, (*Diwan Ilmathalim*), exists within the general courts.<sup>1129</sup> *Diwan Ilmathalim* is the equivalent to an administrative law or public law specialized judicial body. The Board of Grievances is comprised of its own hierarchy of Administrative Courts, Administrative Courts of Appeal, and the Highest Administrative Court.<sup>1130</sup> An Administrative Judicial Council

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<sup>1124</sup> DYNAMISM IN ISLAMIC ACTIVISM: REFERENCE POINTS FOR DEMOCRATIZATION AND HUMAN RIGHTS 114–17, 42–50 (2006); MERRYMAN & PEREZ-PERMODO, *supra* note 1025, at 4; Aharon Layish, *Saudi Arabian Legal Reforms as a Mechanism to Moderate Wahabi Doctrine*, 107 J. AM. ORIENTAL SOC'Y 279, 279–83 (1987); William Ochsenwald, *Saudi Arabia and the Islamic Revival*, INT'L J. MID. E. STUD. 271, 273–76, 278–80 (1981); Joseph Nevo, *Religion and National Identity in Saudi Arabia*, 34 MID. E. STUD. 34, 35–43 (1998).

<sup>1125</sup> Hassan Mahassni & Neal F. Grenley, *Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court*, 21 INT'L L. 827, 827–28 (1987); Nevo, *supra* note 1124, at 44; DYNAMISM, *supra* note 1124, at 142–50.

<sup>1126</sup> Ahmed Basrawi, *The Development of the Judicial System in Saudi Arabia under Vision 2030*, TAMIMI.COM (Mar. 2018), <https://www.tamimi.com/law-update-articles/the-development-of-the-judicial-system-in-saudi-arabia-under-vision-2030/>; Abdullah F. Ansary, *UPDATE: A Brief Overview of the Saudi Arabian Legal System*, GLOBALEX (Aug. 2015), [http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html#\\_Toc424144407](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html#_Toc424144407).

<sup>1127</sup> *Judiciary System in Saudi Arabia*, SAUDI NAT'L PORTAL, <https://www.saudi.gov.sa/wps/portal/snp/pages/judiciary/> (*Judiciary System in Saudi Arabia*, SAUDI NAT'L PORTAL, <https://www.saudi.gov.sa/wps/portal/snp/pages/judiciary/> (last visited Nov. 30, 2019)).

<sup>1128</sup> Today's known sharia courts more so have jurisdiction over cases including family law and criminal law-related disputes. Mahassni & Grenley, *supra* note 1125, at 829–30.

<sup>1129</sup> *Judiciary System in Saudi Arabia*, *supra* note 1127; Ansary, *supra* note 1126.

<sup>1130</sup> Royal Decree No. M/78, 19/9/1428H (2007), Law of the Board of Grievances (Saudi Arabia) [hereinafter Saudi Law of Board of Grievances].

oversees the affairs of the administrative courts.<sup>1131</sup> And by that, Saudi Arabia develops a civil law model of civil courts on the one side, and administrative courts on the other. This is the most structured judicial framework for administrative disputes of the three States in this study in relation to public contracts like PPPs.

The Saudi Board of Grievances has general competencies similar to those of the Kuwaiti Administrative Circuits. According to Article 13 of the Law of Board of Grievances:

(b) Cases for revoke of final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, abuse of power, including disciplinary decisions and decisions issued by quasi-judicial committees and disciplinary boards as well as decisions issued by public benefit associations and the like relating to their activities. The administrative authority's refusal or denial to make a decision required to be made by it in accordance with the laws and regulations shall be deemed an administrative decision.

(c) Tort cases initiated by the persons concerned against the administrative authority's decisions or actions.

(d) Cases related to contracts to which the administrative authority is party.

(e) Disciplinary cases filed by the competent authority.

(f) Other administrative disputes.

Saudi Administrative Courts according to these provisions exercise full competencies when it comes to actions, or inactions, of a public entity, and are thus the natural judicial entity to hear such cases.<sup>1132</sup> They have jurisdiction over governmental contracts as they do over final resolutions or orders issued by public institutions, which include procurement decisions to award PPP or traditionally procured infrastructure contracts. Moreover, this competency not only includes compensating for the administration's wrongdoing, but also completely revoking governmental actions. Some scholars believe that aforementioned Article 13 in its broadness about competency to hear contracts entails that the Board of Grievances thus not only has

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<sup>1131</sup> *Id.* arts. 4–7.

<sup>1132</sup> Mahassni & Grenley, *supra* note 1125, at 830–31.



jurisdiction over purely administrative contracts in which the government acts in the name of public interest, but also to hear contracts that are of a private nature as long as a government entity is party.<sup>1133</sup> These scholars justify their reasoning by reading the Explanatory Memorandum to the old repealed Board of Grievances Law that defines administrative contracts in an absolute manner, not only the legal meaning of such contracts but even where they are of a private nature.<sup>1134</sup> As confusing as this interpretation appears to be, the broadness of Article 13 about jurisdiction pertaining to contracts should nevertheless not mean that all government contracts are treated equally. This would defeat the whole purpose behind establishing such administrative courts to be able to consider the state's unique role in the name of society by upholding the public's interests. Yet, when the government voluntarily acts in its capacity as a private legal person and engages in economic activity, there is no justification to uphold advantageous administrative principles on these contracts by the Saudi specialized judicial body.

In this regard, Saudi Arabian administrative courts have ruled continuously on the meaning of administrative contracts and distinguished them from private contracts in a manner similar to the Kuwaiti Administrative Circuits. The Board of Grievances nonetheless hears disputes pertaining to a private government contract,<sup>1135</sup> unlike Kuwait's Administrative Circuits that rule they have no jurisdiction and refer the case to the civil courts of the country.<sup>1136</sup> The Board of Grievances in this contrast between private *viz a viz* public contracts, nonetheless distinguishes between the applicable rules. Where private contracts primarily fall under

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<sup>1133</sup> Sultan bin Hasan Al Yahya, Bedir Edien Ibrahim & Mohamed Liba, *Raqabat Qatha' Almatalim Ala Amal Aledara fi Almamlaka Alarabiya Alsoudiya Wa Tameeziha An Raqabat Qathat Almatalim fi Alnitham Alislamy* [The Grievances Judiciary Check on Administration Acts in the Kingdom of Saudi Arabia in contrast with the Check of the Grievances Judiciary under the Islamic System], 13 J. ISLAM ASIA 125, 135, 147 (2016).

<sup>1134</sup> *Id.* at 135.

<sup>1135</sup> Case No. 301/T/3-1410H, at 189 (Principle 253), in 1 JUDGMENTS OF BOARD OF GRIEVANCES: ADMINISTRATIVE JUDICIARY IN FIVE YEARS 1410-1414 HIJRI (ANNULMENT-COMPENSATION-DISCIPLINARY) (Saudi Arabia).

<sup>1136</sup> See *supra* Kuwaiti Jurisprudence.

principles upholding party autonomy and the law of the contract, administrative contracts find specific applications of public interest concepts and intentional inequality between the contractual parties, where government entities enjoy a considerable amount of authority over the private counterpart.<sup>1137</sup> Some summarize *Diwan Almathalim*'s so to say positive discrimination in favor of state entities in connection with public contracts into the following categories: 1. Government command over content of the contract; 2. Right of the public agency to introduce changes to the contract; 3. The right to impose penalties ; 4. The state entity's authority to terminate a contract in the name of public interest.<sup>1138</sup>

The point in which the contract is legally concluded is also a critical point as seen when discussing Kuwaiti judicial jurisprudence. This point establishes the scope of rights whether premised on a contractual basis or procurement grievances. The Saudi Board of Grievances has followed the Kuwaiti pursuit and affirmed that government entities are under no obligation to conclude a contract in a tendering process with a bidder, even when such bidder succeeds in meeting all requirements.<sup>1139</sup> The state entity may rather cancel the tender and in such case no contractual rights shall be founded.<sup>1140</sup> The Appeals Administrative Court of *Diwan Almathalim*

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<sup>1137</sup> Case No. 75/T/1-1413H, at 120–21 (Principle 59), in 1 JUDGMENTS OF BOARD OF GRIEVANCES: ADMINISTRATIVE JUDICIARY IN FIVE YEARS 1410-1414 HIJRI (ANNULMENT-COMPENSATION-DISCIPLINARY) (Saudi Arabia); Case No. 351/Q-1397H, Appeals Res. No. 3/T-1400H, at 13-15, in COLLECTION OF SHARIA AND LEGAL PRINCIPLE, DEPARTMENT OF CLASSIFICATION AND PUBLICATION OF JUDGMENTS, KINGDOM OF SAUDI ARABIA OF YEAR 1400 HIJRI (Saudi Arabia); Case No. 266/1/Q-1399H, Appeals Res. No. 7/T-1400H, at 61-62, in COLLECTION OF SHARIA AND LEGAL PRINCIPLE, DEPARTMENT OF CLASSIFICATION AND PUBLICATION OF JUDGMENTS, KINGDOM OF SAUDI ARABIA OF YEAR 1400 HIJRI (Saudi Arabia); Ayoub M. Al-Jarbou, *Administrative Contracts Under Saudi Arabian Law*, 41 PUB. CONT. L. J. 75, 82 (2011).

<sup>1138</sup> Al-Jarbou, *supra* note 1137, at 82–87.

<sup>1139</sup> Case No. 88/T/1-1413H, at 110, in 1 JUDGMENTS OF BOARD OF GRIEVANCES: ADMINISTRATIVE JUDICIARY IN FIVE YEARS 1410-1414 HIJRI (ANNULMENT-COMPENSATION-DISCIPLINARY) (Saudi Arabia); Case No. 33/T/3-1411H, at 191, in 1 JUDGMENTS OF BOARD OF GRIEVANCES: ADMINISTRATIVE JUDICIARY IN FIVE YEARS 1410-1414 HIJRI (ANNULMENT-COMPENSATION-DISCIPLINARY) (Saudi Arabia).

<sup>1140</sup> *Id.* at 110.

overturned a Court of First Instance Decision that ruled the government entity is obliged to conclude the contract with a bidder who won a public tender.<sup>1141</sup>

The legal substance that has been applied to public contracts disputes has been largely influenced throughout the years by principles extracted from French and Egyptian administrative law judicial practices due to the educational backgrounds of legal advisors that have assisted *Diwan Almathalim*, provided such principles do not violate sharia law.<sup>1142</sup> Hence, judges have been applying what can be referred to as secular administrative law principles juxtaposed with sharia principles on public contracts disputes.<sup>1143</sup>

Sharia, nevertheless, finds its way into the interpretation of the concept of public interest, one of public contracts' fundamentals. The Board of Grievances reiterated that public interest (*almaslaha alaama*) is an essential component that government agencies exercise in their relationship with private individuals and entities.<sup>1144</sup> In some instances though, this norm of public interest may extend further than one may anticipate and blend in with what appears to be *sharia* principles. In one case, the Saudi Appeals Court upheld a lower court judgment to reject a plaintiff's, American Tobacco Company, appeal of the decision of the Ministry of Commerce's Committee of Complaints.<sup>1145</sup> This Committee refused to register this company's trademark for its tobacco products with the justification that these are products that "God Almighty and his Prophet have prohibited."<sup>1146</sup> The Appeals Court stressed that the judge is competent in going beyond assessing the legitimacy of the administrative resolution to reject the claim when such

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<sup>1141</sup> *Id.*

<sup>1142</sup> Al-Jarbou, *supra* note 1137, at 76–77; Mahassni & Grenley, *supra* note 1125, at 835.

<sup>1143</sup> Mahassni & Grenley, *supra* note 1125, at 835–36.

<sup>1144</sup> Case No. 266/1/Q of 1399H (Saudi Arabia) at 61–62; Al-Jarbou, *supra* note 1137, at 81.

<sup>1145</sup> Case No. 11/T/3-1411H, at 199-200, in 1 JUDGMENTS OF BOARD OF GRIEVANCES: ADMINISTRATIVE JUDICIARY IN FIVE YEARS 1410-1414 HIJRI (ANNULMENT-COMPENSATION-DISCIPLINARY) (Saudi Arabia).

<sup>1146</sup> *Id.* at 199–200.

trademark encourages what is despicable.<sup>1147</sup> Public interest has perhaps been largely unfettered ground where countries have overridden legal rules that would have otherwise been applicable. This, here, is an example of how important project preparation in PPP infrastructure projects is, which entails all assessments being conducted to understand a state's market and institutions well before entering what may prove to later be a rocky ride.

Competencies of *Diwan Almathalim* have not stopped at what was explicitly mentioned in Article 13 of the Board of Grievances Law. The Board moreover enjoys specific statutory competencies according to the Foreign Investment Law of Saudi Arabia.<sup>1148</sup> In addition to the matters preserved as per Article 13 of the Board of Grievances Law, this Board also hears matters pertaining to penalties for violations by investors of the Investment Law through appealing decisions to the Board.<sup>1149</sup> These penalties would include the revocation of investment licenses, imposition of fines, withdrawal of all or some investment incentives such as tax breaks.<sup>1150</sup>

### *Judicial Confirmation Upholding Arbitration in the Kingdom*

Even where the Board of Grievances enjoys vast competencies to hear all of what pertains to government contracts and its overall actions, this did not prevent the Saudi local

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<sup>1147</sup> *Id.*

<sup>1148</sup> Saudi Foreign Investment Law, art. 12.

<sup>1149</sup> David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 125 GEO. WASH. J. INT'L L. & ECON. 131, 147–48 (1991).

<sup>1150</sup> Saudi Foreign Investment Law, art. 12 (“1) The authority shall notify the foreign investor in writing when violating the provisions of this Law and its regulation, in order to rectify such violation within a period of time specified by the authority for the rectification of the violation; 2) Without prejudice to any harsher penalty, the foreign investor shall be subject to any of the following penalties if the violation persists: a. Withholding all or some of the incentives and benefits given to the Foreign Investor; b. Imposing a fine not exceeding SR 500 thousands; c. Revoking the foreign investment license; 3) The penalties referred to in paragraph (2) shall be applied pursuant to a resolution by the board of directors; 4) The penalty resolution issued may be appealed before the Board of Grievances in accordance with its Law.”).

judiciary from acknowledging other means to settle disputes. With regards to party autonomy and arbitration, *Diwan Almathalim* has upheld the principle in multiple occasions.<sup>1151</sup> In one case, it involved the Ministry of Post and Telecommunication with a private contractor about providing radio and phone services to the public.<sup>1152</sup> The Court first and foremost considered both the sub-contract and main public works contract with the public entity of a relationship that does not accept fragmentation, as the former emanates from the latter main contract.<sup>1153</sup> And where the contractor brought the dispute to Court, this Court ruled it had no jurisdiction to hear this dispute due to the contractual clause identifying recourse to arbitration to settle any dispute between its parties in accordance with the Saudi Law of Arbitration.<sup>1154</sup> The Court thus upheld the parties' autonomy even while acknowledging that in other circumstances with no contractual agreements otherwise, it would have been competent to hear the substance of the dispute. *Diwan Almathalim* stressed in other occasions that where no mutual agreement exists on designating arbitration as the means of adjudication, the default rule shall be that Saudi courts are the competent judicial entities.<sup>1155</sup>

Saudi Arabian courts have also confirmed that electing international arbitration and particularly choosing foreign forums outside the Kingdom is to be upheld when parties to a contract choose so.<sup>1156</sup> Albeit, one important observation about choosing an international arbitral

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<sup>1151</sup> Case No. 1748/1/Q-1426H, Appeals Decision No. 207/AP/3-1430H, *in* 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1436 HIJRI, at 143 (Saudi Arabia); Case No. 2005/2/Q-1428H, Appeals Decision No. 595/AP/7-1430H, *in* 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1436 HIJRI, at 158, 162 (Saudi Arabia); Case No. 637/3/Q-1428H, Appeals Decision No. 739/AP/7-1430H, *in* 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1436 HIJRI, at 163, 166–67 (Saudi Arabia).

<sup>1152</sup> Case No. 1748/1/Q-1426H, at 143, 149.

<sup>1153</sup> *Id.* at 155–57.

<sup>1154</sup> *Id.* at 155–57.

<sup>1155</sup> The Court ultimately upheld the arbitration, as it did exist. Case No. 2005/2/Q-1428H, at 158, 162.

<sup>1156</sup> Case No. 155/T/4-1415H, Case No. 178/T/4-1413H, *in* THE COLLECTION OF PRINCIPLES DECIDED BY THE COMMERCIAL AUDITING CIRCUIT OF *DIWAN ILMATHALIM* FROM 1407-1423 HIJRI (Saudi Arabia).

forum must be clarified, it is not an option for two Saudi contractual parties. In other words, if the parties to the contract are both of a Saudi nationality, individuals or legal persons in this case, are not permitted to designate an international or foreign arbitral forum to hear their disputes.<sup>1157</sup>

*Diwan Almathalim* stressed:

Since the dispute is between two Saudi parties, Saudi courts shall be the competent entity to hear this case and the agreement between two Saudi parties to resort to arbitration outside the Kingdom is the equivalent to the agreement to dispossess the Saudi judiciary the competency to hear the dispute that falls within its jurisdiction and this violates the public policy of the Kingdom which deems the clause to resort to external arbitration between two Saudi parties void.<sup>1158</sup>

*Diwan Almathalim* nonetheless upheld the principle of party autonomy explicitly and provided that even with this restriction, “the agreement on the principle of arbitration shall be preserved.”<sup>1159</sup> This means that the Saudi judiciary values arbitration as a means to settle disputes, yet, also seems to believe that when it comes to its Saudi citizens, local courts are better equipped to resolve their disputes.

*Diwan Almathalim* moreover respected the adjudicative competencies retained by other local state entities, such as the Telecommunications and Information Technology Authority, a public entity in Saudi Arabia.<sup>1160</sup> *Diwan Almathalim* affirmed the ad hoc statutory competencies that must be followed to settle disputes that in this case related to telecommunication service providers that must resort to the Telecommunications and Information Technology Authority to

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<sup>1157</sup> Case No. 3050/1/Q-1431H, Appeals Decision No. 702/AP/7-1432H, in 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1436 HIJRI, at 112-13 (Saudi Arabia).

<sup>1158</sup> *Id.* at 112–13.

<sup>1159</sup> *Id.*

<sup>1160</sup> Case No. 2730/1/Q-1432H, Appeals Decision No. 510/AP/7-1432H, in 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1436 Hijri, at 11, 13-15 (Saudi Arabia).

settle their disputes.<sup>1161</sup> *Diwan Almathalim* thus ruled it had no jurisdiction to hear this case in light of the special statutory provisions that must be followed.<sup>1162</sup>

Lastly, while the above-mentioned reflects the general adjudicative scheme in the Kingdom, a pivotal exemption has been constructed. In a similar manner as Dubai's DIFC, Saudi new massive endeavor, NEOM, advocates a major deviation from the concurrent Saudi dispute settlement paradigm. NEOM, the \$500 Billion project in the North East of the Country in conjunction with Egypt and Jordan to develop a state-of-the-art smart city.<sup>1163</sup> This project entails the development of about 26,500 kilometers squared worth of land on the Red Sea and Gulf of Aqaba.<sup>1164</sup> What is nonetheless challenging in connection with this mega project is the lack of detailed existing data. In particular, the chief feature in the context of dispute settlement in that NEOM City is that it shall be an international free zone with both a distinct regulatory framework and autonomous judicial system subject to separate set of regulations consistent with international best practices.<sup>1165</sup> NEOM, thus, "will be independent of the Kingdom's existing governmental framework, excluding sovereign laws."<sup>1166</sup> The Kingdom promises investors a role in drafting such framework.<sup>1167</sup> This is the only available information about what this independent regulatory and institutional framework shall replicate according to the project's official website NEOM.com. This approach signals the Kingdom's acknowledgment of the

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<sup>1161</sup> *Id.* at 11, 13–14.

<sup>1162</sup> *Id.* at 14.

<sup>1163</sup> *Factsheet*, at 1, 5, NEOM, [https://www.neom.com/en-us/static/pdf/en/NEOM\\_FACT\\_SHEET\\_EN.pdf](https://www.neom.com/en-us/static/pdf/en/NEOM_FACT_SHEET_EN.pdf) (last visited Nov. 3, 2018).

<sup>1164</sup> *Id.* at 1.

<sup>1165</sup> *Frequently Asked Questions*, at 2–4, NEOM, [https://www.neom.com/en-us/static/pdf/en/NEOM\\_FAQ\\_EN.pdf](https://www.neom.com/en-us/static/pdf/en/NEOM_FAQ_EN.pdf) (last visited Nov. 3, 2018).

<sup>1166</sup> *Id.*

<sup>1167</sup> *Id.* at 2–3.

importance of adopting a different adjudicative method in an intensely foreign direct investment global trade hub.

After having delved into case law and the disputes pertaining to identifying the nature of a public contract and juxtaposing such from mere state commercial roles, well-defined boundaries to whether the Gulf states have or are diligently working on transforming into a regulatory state model, is unclear, in practice.<sup>1168</sup> Many of these countries' institutions perform roles that appear to be intruding on a fair market that provides, for instance, energy services like electricity and water, where SOEs or ministries crowd out what the private sector may also deliver.<sup>1169</sup> These giant government owned entities are subsidized and enter the market with two steps ahead carrying the advantages bestowed upon them.<sup>1170</sup> SOEs in this grey area may simply portray a setting where government is deceiving government. SOEs may end up displaying a confusing situation, where essentially, an SOE is actually implementing the infrastructure project and financing this project. This would mean government is paying government to establish a government anticipated infrastructure project. All of the stakeholders and objectives in the previous sentence are clearly governmental. No actual private role exists, which must be accurately reflected in the country's budget sheets.<sup>1171</sup> Consequently, SOEs may as a result further incur the privileges of adjudicating in special courts, administrative courts, that uphold

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<sup>1168</sup> Many good governance reforms have pushed towards the divide between the state as an actor in the economy or merely a regulator, within the meaning of a regulatory state. This concept has, nonetheless, undergone its share of criticism. And as a result of this criticism, other terms seemed more elaborate, such as the “enabling state” whereby the state nonetheless protects certain individual rights while preserving a free competitive market. Rittich, *supra* note 143, at 36–37, 216–20. *See also* OECD GUIDELINES ON CORPORATE GOVERNANCE, *supra* note 520, at 45–46.

<sup>1169</sup> OECD Guidelines on Corporate Governance of State-Owned Enterprises warn against challenges to a leveled playing field when SOEs' engagement in the market is ambiguous and non-transparent. OECD GUIDELINES ON CORPORATE GOVERNANCE, *supra* note 520, at 15, 18–21, 29–30, 45.

<sup>1170</sup> *Id.* at 45–50.

<sup>1171</sup> Marcos Siqueira, Gerardo Reyes-Tagle & Kyeong Eun Heo, *Institutional Frameworks for Public-Private Partnerships*, in BRINGING PPPS INTO THE SUNLIGHT: SYNERGIES NOW AND PITFALLS LATER 76 (Gerardo Reyes-Tagle ed., 2018).



concepts like public interest. This concept has justified actions that would not have been otherwise acceptable in private contracts.

And in terms of path dependence and institutional reform, the judiciary's role in these countries must adapt to upholding party autonomy and ultimately acknowledging other adjudicative entities. These other entities, such as arbitration centers, must not be perceived as purely alternative dispute settlement mechanisms in PPP contracts, but rather as primary means due to the nature of these complex contracts. And while reiterating the critical role of a judicial-like dispute settlement mechanism, it is imperative to acknowledge that other public entities shall remain effective actors not only in enforcing legal provisions in PPP contracts, but also, in many cases, adjudicating and mediating disputes such as procurement process related grievances that are presented to these relevant procuring public institutions themselves.<sup>1172</sup> Yes, there is a bias towards such government entity serving as an opponent at a given time preceding the contract yet transforming into an adjudicator thereafter. Nevertheless, the doors shall remain open to appealing these decisions to the local judiciary if necessary or superseding the process by resorting to other means like arbitration or mediation.

Consequently, when the private sector is not characterized by nationality, international investment and trade principles must be upheld. Institutions may vary and further adapt to local individualities, yet applicable norms must be as close to being comparable in the context of multi-decade infrastructure development projects in GCC countries.

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<sup>1172</sup> MERRYMAN & PEREZ-PERMODO, *supra* note 1025, at 156.

## CHAPTER V

### DOMESTIC PECULIARITIES ASSESSED AGAINST INTERNATIONAL BEST PRACTICES: THE WAY FORWARD TO WHAT GCC STATE PPP INSTITUTIONS OUGHT TO SEEK

No specific conclusion has been drawn thus far as to precisely which infrastructure governance structure is finest, whether associated with the regulatory framework or public institutions. There have been many features that were previously exhibited that could better help stimulate public entities' performance in their relationship with private partners. This is also exactly why law and development scholarship may not establish a clear-cut study that concludes the universal perfect model that always works for enhancing business environments worldwide. Trebilcock and Prado accentuate that while universalism in its extreme is hardly attainable, striking the right balance between maintaining a shared degree of common fundamentals yet preserving the necessary context of the country or region is an unhinged undertaking.<sup>1173</sup> There may not accordingly be a simple equation like: If  $x$  is Law and  $y$  is institution, then both added = economic development. The obvious following question would be, what are both law and institutions exactly and what form do they embrace?

Contextualism is key but certainly not exclusive. When countries want to expand their target audience in certain fields, i.e. foreign direct investment in infrastructure, they must offer what is recognizable. There are international trade and investment principles that states adhere to should they choose to engage multinational corporations in domestic transactions. These principles aim to provide minimum standards of treatment and perhaps beyond for investors in foreign and unique countries such as in the GCC. The indispensable role international best practices play in Gulf institutions thus follows the necessarily globalized engagement of these

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<sup>1173</sup> TREBILCOCK & PRADO, *supra* note 280, at 220.

countries as many of the infrastructure projects embarked upon are significantly complex and require advanced know-how capabilities.<sup>1174</sup> Safeguards would start from creating a transparent business environment to establishing and protecting guarantees that help keep parties from deviating from the scheduled course for project implementation over the course of its life. Aberrations would necessarily eventually be costly to either or both parties.

This part of the study will kick off by discussing the importance of transparency in the whole procurement and implementation of GCC countries' PPP programs. All state institutions must observe and uphold such nondiscriminatory business environment. Subsequently as well, international investment principles in particular will provide the right preemptive checks in such that there display in this study is not intended to guide the adjudicative process as much as to prevent public entities from the costs of acting in a way that could not otherwise be easily reversible. This would mean these local government entities must understand such principles well in advance and know their effect on market confidence. Notwithstanding such guidance to government entities, private parties would be better off consequently understanding the limits to their engagement in the GCC when it comes to government institutional practice, especially in the domain of public interest.

#### Transparency Ushers Fairness and together they Bolster Predictability with Public Entities

Regulations may be in place, and well-functioning institutions could exist, yet a crucial component of any successful PPP program and the facilitation of private investments in infrastructure is by moreover creating an environment dominated by transparency.<sup>1175</sup> This is

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<sup>1174</sup> Rittich, *supra* note 143, at 211.

<sup>1175</sup> *PPP Units: Lessons*, *supra* note 872, at 62.

especially relevant to the procurement or tendering process of infrastructure projects. This feature is created largely by the country's institutional scheme and relevant to such state entity's behavior. A transparent process means that there may be winners and losers when it comes to having the opportunity to enter into the infrastructure market within the state, nonetheless, in both cases, the reasons shall be revealed. And as a consequence, lessons may be learned in order for private investors to better approach the given market, once again, in the future.

And while many transparency metrics are often included within corruption indicators,<sup>1176</sup> the goal here is not to measure the existing level of corruption in GCC institutions. Transparent practices necessarily fundamentally help induce a non-corrupt business environment when information is shared and checks on a widescale foundation are enabled. Corruption in and of itself is perhaps one difficult feature of the society to measure.

A discussion about transparency is nothing but a continuum of the role of law and institutions in development. Particularly, legal formalization through clear rules and access to information provides less public official discretion as a result. This also means more concurrent checks that are perhaps better at proactively preventing violations from taking place.<sup>1177</sup> The consequences of encroachments as such that may be linked to corrupt practices for instance, are, in light of readily available information, publicly displayed in advance. And the addition of the social element that came along with second and third generation reforms to law and development

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<sup>1176</sup> See, e.g., Corruption Perception Index by Transparency International and the World Governance Indicator by the World Bank that reserves one whole section on control of corruption. *Corruption Perceptions Index*, TRANSPARENCY, <https://www.transparency.org/research/cpi/overview> (last visited Nov. 30, 2019); *World Governance Indicators*, WORLD BANK, <http://info.worldbank.org/governance/wgi/index.aspx#doc> (last visited Nov. 7, 2018).

<sup>1177</sup> Kennedy, *supra* note 340, at 137–47; Santos, *supra* note 635, at 275.

studies demands public participation in the transparency process within the meaning of laws and institutions.<sup>1178</sup>

A statement claiming that PPPs are generally more transparent than any other traditionally procured infrastructure project would be inaccurate.<sup>1179</sup> PPPs are as transparent as state governments make them. These projects are highly dependent on the regulatory and institutional framework to preserve a transparent project cycle.<sup>1180</sup> The benefits of perpetuating a transparent environment for private sector engagement in state future infrastructure development projects are anything but surprising. The World Bank Group has worked on a Disclosure Framework for PPPs projects.<sup>1181</sup> This Framework studied the status quo of 13 different jurisdictions around the world in connection with transparency through disclosing necessary information.<sup>1182</sup> The advantages and incentives of disclosure that were reiterated across all jurisdictions encompassed: reducing the risk of corruption, mobilizing private capital for investment in infrastructure, increasing public confidence and awareness, and achieving value for money through PPP transactions.<sup>1183</sup> Accordingly, a mechanism to hold an identifiable actor accountable is existent when transparency is upheld and knowledge of all participants is facilitated.

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<sup>1178</sup> Rittich, *supra* note 143, at 228–34.

<sup>1179</sup> Gerardo Reyes-Tagle & Carlos Leon Gomez, *Are PPPs the Genie in the Bottle?*, in BRINGING PPPS INTO THE SUNLIGHT, *supra* note 1171, at 5.

<sup>1180</sup> *Id.* at 5–7.

<sup>1181</sup> WORLD BANK, A FRAMEWORK FOR DISCLOSURE IN PUBLIC-PRIVATE PARTNERSHIPS: TECHNICAL GUIDANCE FOR SYSTEMATIC, PROACTIVE PRE- & POST-PROCUREMENT DISCLOSURE OF INFORMATION IN PUBLIC-PRIVATE PARTNERSHIP PROGRAMS 11-16 (2016) [hereinafter WORLD BANK FRAMEWORK FOR DISCLOSURE IN PPPS].

<sup>1182</sup> The countries in this study included: New South Wales and Victoria in Australia, Minas Gerais in Brazil, British Columbia in Canada, Chile, Colombia, Honduras, the central government and the state of Karnataka in India, Kenya, the Philippines, South Africa, and the United Kingdom. *Id.* at 12.

<sup>1183</sup> *Id.* at 17.

Amongst the stakeholders that are also necessarily affected by and are primary beneficiaries of the government's infrastructure projects and public services at the same time are the general public.<sup>1184</sup> The countries' constituents must be well informed about the project's costs, progress, and even private partners.<sup>1185</sup> These constituents are tax payers in many instances, in addition to groups like environmental activists that provide a critical check about the environmental impacts of a project. And so, these residents are as much incentivized as the private sector about the PPP process. They must be informed about facts pertaining to projects and how they will specifically be affected, i.e. public interest. These factors all contribute to the smooth procurement and implementation of infrastructure projects.<sup>1186</sup>

The journey to becoming transparent in infrastructure projects is arduous and encompasses many different elements. The magic ingredient to transparency though is consistency throughout the whole PPP project cycle. If a project lives for 30 plus years, then it will have to provide all necessary information to last that whole breath. There are many rudiments to the transparency potion, and it will affect different stakeholders more than others at different points of the PPP project cycle. Preparing a PPP project and procuring it may be all the more critical for both the government and private partner, and debatably to a lesser degree the public, in terms of obtaining all necessary information through a transparent process. This means all private parties have equal access to better prepare their bids and know the result of such, whereas the government observes fair practice amongst all private bidders. Yet, during the

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<sup>1184</sup> Rittich, *supra* note 143, at 223.

<sup>1185</sup> GETTING INFRASTRUCTURE RIGHT, *supra* note 768, at 31; WORLD BANK FRAMEWORK FOR DISCLOSURE IN PPPs, *supra* note 1181, at 17.

<sup>1186</sup> Jeffrey Ghannam & Andrew Jones, *Everyone is a Potential Influencer: Effective PPP Stakeholder Engagement*, WORLD BANK BLOGS (Apr. 3, 2019), <https://blogs.worldbank.org/ppps/everyone-potential-influencer-effective-ppp-stakeholder-engagement>.

implementation of the infrastructure project, while it is still key for the private partner to have access to information, the general public may have the primary concern about whether there are cost overruns, deceptive renegotiations to the original contract that raised the overall price unwarrantedly, and reasons for unjustified delays and environmental implications that have not been accounted for and addressed accordingly at the time.

Components of what makes the PPP project cycle transparent through disclosure addresses different details like publishing the advertisement embodying the invitation of request for proposals, or quotes, or the like, in widely accessible electronic portals and local and international newspapers.<sup>1187</sup> This also entails publishing all conducted assessments that the projects envisions, financial, environmental, socio-economic.<sup>1188</sup> Opening the proposals should be public and open to all bidders and more broadly stakeholders to observe the process. Additionally, award notices of the procurement process and reasons for selecting the winning bidder and not choosing other proposals is key.<sup>1189</sup> This information, to a large degree, addresses the preparation and procurement stages of infrastructure projects. The efforts to uphold transparent practices cannot stop at this point.

The implementation process of the infrastructure project, by far the lengthiest, must be transparent as well, which is unfortunately generally not the case, as it appears to be largely omitted.<sup>1190</sup> The public should have access to the signed PPP agreement between the government and private entity. Also, progress to operations should be publicly revealed and all changes to the

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<sup>1187</sup> PROCURING INFRASTRUCTURE PPPS, *supra* note 162, at 26–27, 51–53.

<sup>1188</sup> *Id.*

<sup>1189</sup> *Id.*

<sup>1190</sup> GETTING INFRASTRUCTURE RIGHT, *supra* note 768, at 31–32. The *World Bank Procuring Infrastructure PPPs 2018 Report* showcasing 135 countries in its assessment concludes that the contract management stage of PPP projects is the least transparent. There is only a range of 10-14% of the countries in the Report that uphold transparent practices through making information public about the implementation of such projects. PROCURING INFRASTRUCTURE PPPS, *supra* note 162, at 27, 53.

contract displayed to the general. And where reporting to state entities such as the parliament is required by regulation, this could also be made public for all constituents to see. The emphasis is on actual access to information. The official gazette of a country might not be the best candidate to achieve this goal when it comes to retrieving it and realistically obtaining information contained within.

One of the valuable approaches towards implementing PPP projects in this regard is therefore the digitalization of the PPP process. While human errors, intentional or not, are a reality, trust and confidence in digital systems to avert such errors should logically be higher. Guidance for such digitalization, for instance, may be obtained from systems like the BIM model, which refers to Building Information Modeling (BIM) for infrastructure.<sup>1191</sup> While this so-called discipline principally targets the engineering field, public administration may largely be integrated as it is a major stakeholder in infrastructure projects. This model could streamline the whole infrastructure project from inception to execution in a digitalized manner.<sup>1192</sup> Instead of continuous interaction with public entities, the private party is largely dependent on automated information throughout different project milestones.<sup>1193</sup> Government officials as well would rely on virtual data to assess licenses and permit applications, proposals, and progress of the project. Who runs these systems? Humans. And yes, technical capacities must be developed in the Gulf to better run these systems and consequently be more dependent on their performance. The outcome should lead to a less costly project life-cycle and a more transparent one. This is part of

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<sup>1191</sup> *What is BIM?*, AUTODESK, <https://www.autodesk.com/solutions/bim> (last visited Nov. 7, 2018); Salman Azhar, *Building Information Modeling (BIM): Trends, Benefits, Risks, and Challenges for the AEC Industry*, 11 LEADERSHIP & MGMT. ENGINEERING 241, 241 (2011).

<sup>1192</sup> Azhar, *supra* note 1191, at 241.

<sup>1193</sup> *Id.* at 243.



the larger global scheme of keeping up with what is yet to lead many societies, artificial intelligence (AI).<sup>1194</sup>

A digitalized system like this also means standardization. This soft tool would mean to the largest extent possible, different components of the PPP cycle adopt the same structure. If project design templates are submitted, they are digitally accepted and processed in the same manner. Non-abiding templates are rejected. Essentially as simple as that. No human discretion involved. And this system would be public to provide access and monitoring of the ongoing process. BIM is not the single most exclusive system. The European Union embraced a similar system for public procurement across EU member states, and for non-EU members interacting with these Union countries.<sup>1195</sup> The EU's E-Procurement or Single Procurement Model has been consistently updated to eventually address the whole infrastructure project model, that is, by also addressing the contract management period.<sup>1196</sup> This wholistic approach attends to the weaknesses of the limited streamlining and transparency of only certain segments of the project cycle, as argued before.

Kuwait has acknowledged that transparency shall be one of the core principles to guide the choice of the private party to implement its infrastructure projects according to the PPP Law.<sup>1197</sup> KAPP also recognizes that the target audience of transparency is wide and largely

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<sup>1194</sup> UNGER, *supra* note 448, at 68–69.

<sup>1195</sup> *E-Procurement, Single Market and Standards*, EUR. COMM'N, [https://ec.europa.eu/growth/single-market/public-procurement/e-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement/e-procurement_en) (last visited Nov. 7, 2018).

<sup>1196</sup> What is referred to here as the EU E-Procurement or Single Procurement Model embodies different components and revisions that include: European Single Procurement Document (ESPD), E-Invoicing Directive 2014/55/EU, Communication on “End-to-end e-procurement to modernize public administration,” Communication on “A strategy for e-procurement,” Green Paper on “expanding the use of e-procurement in the EU,” and other instruments. *E-Procurement, Single Market and Standards*, *supra* note 1195.

<sup>1197</sup> Kuwait PPP Law, art. 8 (“The selection of the Investor shall be subject to the principles of transparency, openness, freedom of competition, equal opportunity and equality in accordance with the rules and procedures provided for under this Law and its executive regulations.”). *See also* KUWAIT PPP MANUAL, *supra* note 639, at 11, 15, 254–58.

includes the public.<sup>1198</sup> PPP practice must reflect the values that these regulations uphold. The KAPP website provides fair amount of information about the relevant PPP project. This includes publishing relevant announcement notices and the stages in which the project is currently in.<sup>1199</sup> KAPP can perhaps do a better job at making its conducted assessments, i.e. socio-economic, environmental, and affordability, inter alia, public for everyone to see and understand the candid feasibility of the project.<sup>1200</sup> The positive aspect about this data is that it is on perhaps the most relevant entity's website, KAPP, as the facilitator and coordinator of PPP related information. The difficulty is when information is available, yet not easily accessible, such as in the case of prerequisite memberships or subscriptions, or unknown digital platforms. Genuine access to information is half the way to becoming transparent, as transparency is not a checklist to tick, it is rather an authentic opportunity to offer to all.

The UAE emphasizes that transparency is one of the building blocks of PPPs in Dubai and this entails clear communication between the contractual partners and any changes that occur.<sup>1201</sup> The Dubai PPP Law considered “openness, transparency, fair competition, equal opportunity, equality, announcement of competition, and achieving the public interest” amongst the principles that drive the selection of the private partner.<sup>1202</sup> And in retrospect to the decentralized nature of PPP coordination activity with no centralized PPP unit; consequently, no central repository of information is available.<sup>1203</sup> Disclosure is thus incumbent upon the relevant

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<sup>1198</sup> KUWAIT PPP MANUAL, *supra* note 639, at 254.

<sup>1199</sup> See KUWAIT AUTHORITY PARTNERSHIP PROJECTS (KAPP), <http://www.kapp.gov.kw/en/default.aspx?pageid=10> (last visited Nov. 7, 2018).

<sup>1200</sup> See *Procuring Infrastructure PPPs 2018 Economy Data: Kuwait*, WORLD BANK, <https://bpp.worldbank.org/en/data/exploreconomies/kuwait/2018> (last visited Nov. 8, 2018).

<sup>1201</sup> Dubai PPP Manual (U.A.E.) at 21.

<sup>1202</sup> Dubai PPP Law, art. 14.

<sup>1203</sup> Overall, the Emirate has lagged in some components of the project cycle more than others in a similar manner to Kuwait, in terms of disclosure in PPP projects. See *Procuring Infrastructure PPPs 2018 Economy Data: United*

line ministries to reveal necessary information even though the PPP Manual formulates the policy to disclose different elements within the project cycle.<sup>1204</sup> The RTA for instance is to publish the pertinent information concerning transportation projects on its website.

In Saudi Arabia, transparency in PPP projects is just not all that clear. While the big picture policy of the Kingdom highlights transparency, the roadmap to get to this target and explicit details are essentially absent.<sup>1205</sup> Different elements of the PPP project cycle are communicated to bidders and private partners such as project announcements and bidding conferences.<sup>1206</sup> It is rather questionable whether the broader public has access to this data in Saudi Arabia, absent explicit guidance. The Privatization Manual actually keeps reiterating that participants of conferences and meetings that relevant state entities organize to proceed with project bids include private bidders, their representatives, and key public sector individuals.<sup>1207</sup> The Saudi Privatization Manual nonetheless stipulates the importance of stakeholder engagement

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*Arab Emirates*, WORLD BANK, <https://bpp.worldbank.org/en/data/exploreconomies/united-arab-emirates/2018> (last visited Nov. 8, 2018).

<sup>1204</sup> The PPP Manual does stress the importance of displaying relevant information to bidders about proposals online. The Manual emphasizes: “The website is a liaison for communication between bidders and the governmental body, through which the latter provides bidders with explanations and responses to raised questions. Communication with bidders shall be made with complete transparency and impartiality. All correspondence between bidders and the Government Entity shall be in writing. In addition, all explanations and answers –together with relevant questions – shall be distributed to all bidders without disclosing such bidder that raised those questions. This shall not apply at those questions pertinent to the technical proposal which shall be deemed as a property right to the asking bidder. Moreover, bidders may be asked to present observations about the partnership contract draft or any other documents such as the by-laws of the due to be established company for the project in case the partnership committee prepares and suggests the same.” Dubai PPP Manual (U.A.E.) at 153.

<sup>1205</sup> See, e.g., Saudi Implementing Procurement Regulation, art. 31 (providing that any clarifications and questions must preserve equal opportunities for all and thus all bidders shall be informed about information affecting the bidding process).

<sup>1206</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, at 46–49. While Saudi Arabia’s PPP policy addresses certain aspects of publishing invitations to bid and awards to create a transparent environment, it has overall performed poorer than the other Gulf States, Kuwait and the U.A.E., according to World Bank data. See *Procuring Infrastructure PPPs 2018 Economy Data: Saudi Arabia*, WORLD BANK, <https://bpp.worldbank.org/en/data/exploreconomies/saudi-arabia/2018> (last visited Nov. 8, 2018).

<sup>1207</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, at 58.

to promote transparency and disclosure.<sup>1208</sup> This engagement seems to only broadly guide appropriate line agencies to consider upholding clear communication with their stakeholders in whichever manner they deem fit. Where sector specificities are plausible when it comes to operating certain highly technical infrastructure projects, standardizing transparency policies across sectors in the Kingdom does not contravene contextual needs. This standardization rather feeds the need for consistency that that private sector awaits about access to information.

The positive aspect about the Saudi PPP transparency policies nonetheless is that it accentuates the need to have a single point of contact for each partnership project. This would mean that all information would be accessed through a “single window” whichever format that takes, whether an electronic document room, general website, or the like.<sup>1209</sup> This allows for some form of publicly accessible information, although it seems it is more so to preserve access to information by bidders only.

The GCC States of this study, in summary, perform relatively weakly worldwide when it comes to certain key areas. This is not to oversee the fact that global performance itself is not as promising as well. In *Figure 20* below, of the three datasets on: disclosing assessments for the public that include socio-economic, environmental, and other financial studies; publishing the signed PPP contract; and making performance information publicly available for scrutiny; the publication of a summary of the PPP contract is the only element that is attained, and this is by way of Saudi Arabian regulations mandated such (*see* *Figure 20*).

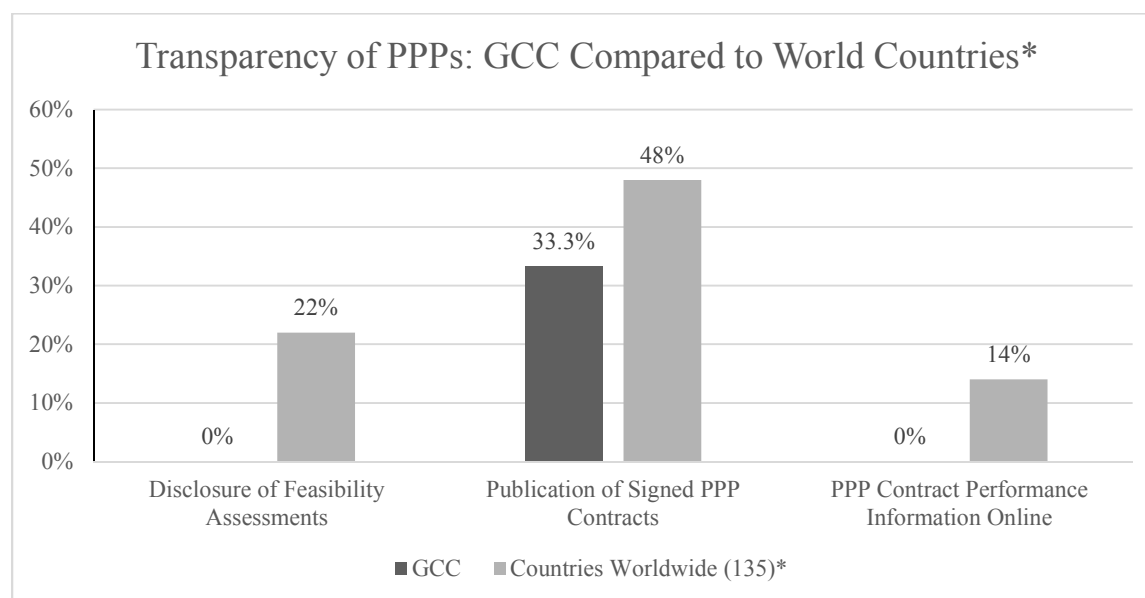
*Figure XX*

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<sup>1208</sup> *Id.* at 75. For instance, part of this stakeholder communication scheme according to the Manual is that it “may include passive information being provided on project related websites, general public announcements, press releases to news organizations, or other means of providing information for the public to access.” *Id.* at 75–76.

<sup>1209</sup> *Id.* at 79.

Figure 20: Transparency of PPPs in the GCC Compared to the Rest of the World



\* Based on the dataset of the *World Bank Procuring Infrastructure PPPs 2018*.

\* Countries Worldwide= 135 countries around the world.

One of the challenges that face GCC governments, and any government out there, is deciding on the right balance between two seemingly contravening values: upholding confidentiality on the one side and disclosing information that provides fair access to important data by all on the other, with regards to large infrastructure projects. Any individual, and private or public entities must retain some degree of confidentiality when it comes to the level of information that is revealed. This data may contain trade secrets or other pieces of information in which providing access to such may otherwise provide an unfair advantage to other parties. In many countries, the criteria and balance between confidentiality and public access to information is embodied in the general framework of the freedom of information acts.<sup>1210</sup> This is not the case in the GCC. No general frameworks of such nature exist, yet.

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<sup>1210</sup> See, e.g., Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c 165 (Can.); Government Information (Public Access) Act 2009 (N.S.W.) (Austl.); Freedom of Information Act 2000, c 36 (UK). See also WORLD BANK FRAMEWORK FOR DISCLOSURE IN PPPs, *supra* note 1181, at 9, 132, 192.

Article 56 of the PPP Executive Regulation of Kuwait addresses the balance between confidentiality and transparency. This provision provides:

The principle of confidentiality shall not hinder the procurement of the project in accordance with the principles of free competition, whereby during the preparation of the project documents all the sufficient data and information to prevent the project's monopoly by the Concept Proposer are provided, ensuring the competition thereon while being procured as per the standards of transparency and fairness.

Striking the right balance invites room for the government contracting entity's discretion in Kuwait, as the list of confidential information is not exhaustive. The preparation of project documents by the public entity in collaboration with KAPP must ensure "non- disclosure of confidential technical, economic and financial information of the project submitted", according to the Executive Regulation.<sup>1211</sup> The devil is in the details. The basis for confidential information is as broad as the terms "free competition", "transparency", and "fairness" in the above-mentioned provision and needs KAPP's practice and judicial precedent to help elaborate. And so, KAPP stepped in and softly added some clarity to this terminology through its Manual.<sup>1212</sup> Confidential information that is primarily not to be disclosed according to KAPP's PPP Manual shall embody:

Information (however it is conveyed or on whatever media it is stored) the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of either Party, including all personal data and sensitive personal data<sup>1213</sup>

The PPP Manual also adds "commercially sensitive" information that parties to a PPP agreement must identify in advance and consequently preserve. The flexibility that follows

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<sup>1211</sup> Kuwait PPP Executive Regulation, art. 56.

<sup>1212</sup> The Kuwait PPP Manual provides draft contractual provisions to help guide PPP parties, which was largely influenced by the UK PF2 Guidance Model, *Infra* Australia PPP Guidelines, and the South Africa PPP Guidelines. KUWAIT PPP MANUAL, *supra* note 639, at 254.

<sup>1213</sup> *Id.* at 255.

drafting a PPP agreement is understandable to uphold party autonomy. The problem is, the journey to get to such draft is tedious, and access to information amongst all relevant private parties before that, must similarly be guaranteed. It remains incumbent on contracting authorities and KAPP to understand that any extreme slant either way, i.e. unlimited disclosure of information or very restricted, has its consequences. If very limited available information may adversely affect the PPP market and private sector's interest in potentially engaging in what may be an unfair process, unrestrained public access could equally be difficult for private entities to imagine their commercial secrets being revealed to their corporate rivals. KAPP's approach to this balance of values is rather positive and should be comparatively considered. The default presumption in this balance is to disclose information and thus uphold transparency.<sup>1214</sup> Confidentiality is hence the exception, and exceptions should be limited as such.<sup>1215</sup>

The Dubai PPP Manual provides a draft PPP agreement, which aims to guide the contractual parties. This draft agreement attempts to strike the confidentiality v. disclosure balance. The PPP parties are guided to “balance between the need for providing information service the common interest taking into account the principle of transparency on one hand and the sensitivity of commercial information exchanged by both parties on the other hand.”<sup>1216</sup> The Manual considered many reasons that may be deemed confidential. This would include national security or sensitive commercial information as any information about the private sector partner shall not be disclosed to other competitors.<sup>1217</sup> The private partner nevertheless has the option to request financial and economic forecasts not to be published.<sup>1218</sup>

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<sup>1214</sup> *Id.* at 254.

<sup>1215</sup> *Id.*

<sup>1216</sup> Dubai PPP Manual (U.A.E.) at 209.

<sup>1217</sup> *Id.* at 209.

<sup>1218</sup> Dubai PPP Law, art. 16(b).

The Saudi balance between confidentiality and disclosure provides minimal guidance and therefore more discretion. This is not ideal. The Privatization Manual preserves confidentiality in certain parts of the project cycle more than others, especially at the projects' early stages.<sup>1219</sup> There is, however, no clear criteria to differentiate and uphold one of these two important values over the other.

And to put transparency into action, one example of the implications of concealing information when market participants need such communication is fear of the unknown and distrust. The Saudi ARAMCO issue, namely the privatization of this oil giant, has led investors to undermine the sincerity of the Kingdom's government with any privatization program of a large scale yet to come.<sup>1220</sup> This privatization process has lasted a considerable amount of time. And the problem that has evolved with this IPO is the lack of obtainable information and as a result ambiguity about the decision-making process.<sup>1221</sup> The unexpected sudden shift from an anticipated IPO of Aramco to instead Aramco's acquisition of a Saudi petrochemical company, Sabic, left investors in awe. The move was aimed at advancing the assets of the Public Investment Fund, the Kingdom's SFW, by \$70 Billion.<sup>1222</sup> Situations like these must be properly evaluated when endeavoring on setting a new phase of the country's development scheme to attract the private sector into a translucent business environment.

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<sup>1219</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, at 77.

<sup>1220</sup> Raval, Massoudi & Kerr, *supra* note 906; Nicole Parasie, Dinesh Nair & Matthew Martin, *Aramco IPO Bankers Question Whether Deal is Worth the Effort*, BLOOMBERG NEWS (July 18, 2019), <https://www.bloomberg.com/news/articles/2019-07-18/bankers-once-scrambling-for-aramco-ipo-now-ask-if-it-s-worth-it>.

<sup>1221</sup> Raval, Massoudi & Kerr, *supra* note 906; Parasie, Nair & Martin, *supra* note 1220. The Global Competitiveness Report 2017-2018, for instance, ranks Saudi Arabia in 48<sup>th</sup> place in terms of transparency of government policy making. GLOBAL COMPETITIVENESS REPORT 2017-2018, *supra* note 27, at 33.

<sup>1222</sup> Raval, Massoudi & Kerr, *supra* note 906.



Waiving Sovereignty to Public Policy is Oranges to Apples When it Comes to Enforcing Contracts:

The multinational nature of infrastructure project parties could make deciding on foreign forums or applying foreign rules to preserve a more impartial solution between parties, complex. While this is almost as big of a problem in private-private relationships of an international nature, the involvement of a sovereign only adds a level of nuisance to this relationship. The importance of understanding the State's interaction with foreign elements, forums and rules, in its relationship is equally contemplating its consistency in upholding this relationship in both its sweet and bitter phases.

The states' sovereign immunity is an established concept in international law.<sup>1223</sup> This concept shields the country from many actions that can be brought against it, such as compensation claims directed against the government of a country for violations that are allegedly directly linked to its orders, like large oil spills in foreign state seas, or genocides ordered by heads of states and the like. The concept evolved from the idea that the state has exclusive competency in its internal affairs. International customary law used to require the state itself to espouse diplomatic protection to any of its citizens engaging in activities abroad, of which include business undertakings.<sup>1224</sup> This was a complex process for a state to engage in, as

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<sup>1223</sup> Convention on Jurisdictional Immunities of States and Their Property, art. 5 G.A. Res. 59/38, annex (Dec. 2, 2004) (Convention not in force) [hereinafter U.N. State Immunities Convention]. This sovereign immunity may be perceived also as part of customary international law. Pal Wrange, *Sedelmayer v. Russian Federation*, 106 AM. J. INT'L L. 347, 353 (2012). See also Int'l Law Commission, Rep. on the Work of its Forty-Third Session, art. 5, U.N. Doc. A/46/10 Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries [hereinafter Draft Articles on State Immunities]. This immunity necessarily includes the state's property as well. See *id.* art. 6, ¶ 12.

<sup>1224</sup> *Mavrommattis Palestine Concessions (Greece v. Great Britain)*, 1924 P.C.I.J. (ser A) No. 2, 12 (Aug. 30); Van Harten & Loughlin, *supra* note 1119, at 128.

it nevertheless gives priority for the host state to exhaust its local remedies first.<sup>1225</sup> Only should the host state of the business activity fail to address the issue at stake, would diplomatic protection be accepted, in a narrow manner. There is existing case law around the globe in this regard, yet the contents underlining sovereign immunity are still a ground for debate. Nevertheless, what is not a ground for debate is the state's sovereign immunity itself. In connection with dispute settlement, the country may waive such immunity when it designates a foreign entity to settle disputes it engages in.<sup>1226</sup> That is the easy part. The hard part is living up to that waiver.

The state's waiver of its sovereign immunity raises two main issues that are to be applied to the GCC context in connection with infrastructure projects. This waiver first, entails designating a foreign entity to conduct its sovereign adjudicative role or in applying foreign rules to its domestically located business activity. The second issue that follows is the extent to which the infrastructure host state may diminish or at least weaken the role of this waiver through what is known as the public policy exception. These are pivotal topics with regards to GCC governments whom have led infrastructure projects themselves and acted more freely in their contractual relationships. Now that the infrastructure development dynamics are promising change, with private sector lead, the interplay of these two issues are questionable and must consequently be highlighted. Necessary evolution to the role of public policy must be addressed. Both these issues shall be discussed subsequently.

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<sup>1225</sup> Barcelona Traction, Light and Power Co. (Belgium v. Spain), Judgment (Feb. 5, 1970), 1970 I.C.J. Rep. 3, <https://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>; Van Harten & Loughlin, *supra* note 1119, at 128.

<sup>1226</sup> Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960-2000*, 60 INT'L ORG. 811, 826 (2006).

## Local Public + Foreign Private ≠ Lex Fori

Amongst the principal natural consequences of any diverse contract, i.e. contractual parties from different states, is agreement on applicable rules and dispute settlement mechanisms. The issue here is not about retaining the option to opt for such choice. This has been displayed in this study before. It is rather about the sovereignty discussion that guarantees the full range of foreign rules to apply to a relationship between a sovereign state and a private party. The full range entails accepting foreign jurisdiction and rules to settle conflicts and sincerely executing any outcomes to such disagreements, even if this meant colossal monetary commitments on the part of the state. This is at the core of the GCC State's institutional framework commitment to the international nature of its infrastructure contracts in numerous instances. The local courts and executive agencies must uphold the sanctity of the contract and its consequences, i.e. enforcement of contracts.

The journey to acknowledging the international characteristic of the PPP contract starts with overcoming the idea of sovereign immunity. The UN Convention on Jurisdictional Immunities of States and Their Property, adopted by the International Law Commission at its fifty-ninth session (2004), like aforementioned local administrative GCC Courts, has struck the contrast between the state's actions as a sovereign or its commercial role. And so, agreement to resort to arbitration between parties of which the state is one of may not invoke state sovereign immunity if the conflict is related to a commercial transaction.<sup>1227</sup> The Convention considers three categories of "commercial transactions" that the state may engage in: 1) it covers all kinds of commercial contracts or transactions for the sale of goods or supply of services; 2) a contract

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<sup>1227</sup> State Immunities Convention, art. 17.

for a loan or other transaction of a financial nature, such as commercial loans or credits or bonds floated in the money market of another State; 3) other types of contracts or transactions of a commercial, industrial, trading or professional nature, thus taking in a wide variety of fields of State activities, especially manufacturing, and possibly investment, as well as other transactions, but not including employment contracts of persons.<sup>1228</sup> The UN Convention even confirms that commercial transactions shall include “investment matters”, which is a large category of itself and requires further excavation into its nature and the state sovereign intent when engaging in such matters.<sup>1229</sup> State actions and its properties that do not fall under the scope of commercial transactions are consequently those in which immunity subsists, and they henceforth are of a sovereign nature.<sup>1230</sup>

State waiver of its sovereign immunity is generally facilitated by either bilateral investment treaties (BITs) or multilateral treaties such as the International Center for the Settlement of Investment Disputes (ICSID) Convention. This is the case in a pre-prescribed waiver.<sup>1231</sup> There may also be a specific contractual waiver that applies ad hoc to a certain agreement solely, such as in a select PPP agreement.<sup>1232</sup> BITs are technically treaties between two sovereign nations that regulate joint foreign direct investment provisions, amongst other aspects.<sup>1233</sup> These BITs today accordingly enable the private sector of either state to bring a

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<sup>1228</sup> State Immunities Convention, art. 2(1)(c); Draft Articles on State Immunities, art. 2 at Commentary ¶¶ 19-20, art. 10.

<sup>1229</sup> State Immunities Convention, art. 17.

<sup>1230</sup> *Id.* art. 10; Draft Articles on State Immunities, art. 2 at Commentary ¶¶ 19, 25, art. 10.

<sup>1231</sup> Van Harten & Loughlin, *supra* note 1119, at 129–30, 143; State Immunities Convention, art. 7; Draft Articles on State Immunities, art. 7 Commentary.

<sup>1232</sup> Van Harten & Loughlin, *supra* note 1119, at 129–30, 143–44; State Immunities Convention, art. 7; Draft Articles on State Immunities, art. 7 Commentary.

<sup>1233</sup> The fact that the document containing an arbitration agreement is a treaty does not make a critical difference, since, as a general matter, a treaty is a contract, though between nations. *See Republic of Argentina v. AWG Grp. Ltd.*, 211 F. Supp. 3d 335, 344 (D.D.C. 2016).

claim against the host government, where the infrastructure project is being implemented, automatically based on the authority provided by the BIT with no further consent required.<sup>1234</sup> The number of BITs has accelerated so rapidly to about 3000 BITs around the world today.<sup>1235</sup> Some may explain this phenomenon as a shift away from multilateral relations to a set of bilateral ones instead in light of a concurrent backlash against multilateral trade and investment systems such as the WTO.<sup>1236</sup> Yet, another hypothesis might also be of relevance. The BIT proliferation may rather be a phase that the multilateral system is going through to call for more reforms to negative consequences of multilateral systems.<sup>1237</sup> In any case, this state waiver of its sovereignty is the gateway to facilitating what may promise lengthy proceedings yet to come.

#### Recognition and Enforcement of Foreign Judgments and Arbitral Awards and the Public Policy Exception:

If the designation of international adjudicative systems to settle disputes has alluded to confusion about the importance of local judicial bodies and institutions, this needs to be further clarified. While impartiality is to a large degree preserved by international forums in diverse PPP contracts, the ultimate supra power lies within local GCC institutions. International bodies are so to say facilitators of settling disputes between a local government and foreign private investor, all of which may later be entirely disregarded. To rephrase the last sentence, local institutions

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<sup>1234</sup> *International Investment Agreements Navigator*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited Nov. 10, 2018); Elkins, Guzman & Simmons, *supra* note 1226, at 823–24.

<sup>1235</sup> Ginsburg, *supra* note 980, at 111–13; Elkins, Guzman & Simmons, *supra* note 1226, at 814–23.

<sup>1236</sup> UNCTAD, UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME 14–20 (2018); UNCTAD, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 121–25 (2015); RODRIGO POLANCO LAZO, FACILITATION 2.0: INVESTMENT AND TRADE IN THE DIGITAL AGE 17 (2018); Kemal Dervis, *Global Power is Shifting: Is it the End of Multilateralism?*, WORLD ECON. F. (July 24, 2018), <https://www.weforum.org/agenda/2018/07/is-this-the-end-of-multilateralism>.

<sup>1237</sup> UNCTAD'S REFORM PACKAGE, *supra* note 1236, at 14–20; WORLD INVESTMENT REPORT 2015, *supra* note 1236, at 167-70; LAZO, *supra* note 1236, at 17.

remain essential to continue the efficacy of any decision obtained by an international body, as such decision must be enforced locally.<sup>1238</sup> The assets to cover the outcomes of these arbitral awards or foreign decisions are yet to be obtained domestically. Hence, without local institutional assurances in upholding and enforcing contracts and arbitral awards, an enormous sum of resources would have gone to waste and the process of enforcing such contracts is skewed.<sup>1239</sup> And so, consequently, international or foreign entities do not substitute for inept domestic institutions.<sup>1240</sup> The voyage to success is therefore two-fold: international enablement and local capacity.

The scenario and prominence of the recognition and enforcement of foreign judgments and arbitral awards is very much like an analogy to a marathon runner crossing the finish line. If that runner puts in all that colossal effort and runs a good 26 miles (42 kilometers) without crossing the finish line, they have not completed the race. Litigation, especially in contracts of an international nature, similarly, may be a lengthy process and the reward of its conclusion by the winning party is not reaped until execution of the actual decision.

There is no international police or other authority to enforce monetary damages globally. There are local authorities in the relevant host states that enforce such awards. And as a result, what is at stake is rather the host country's reputational cost of not complying with its contractual obligations, treaties. Commitment to upholding such enforcement is by state institutions living up to regulatory provisions. These regulations reflect the state agencies' obligations to recognize and enforce foreign judgments and arbitral awards. The consistent practice of these state

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<sup>1238</sup> TREBILCOCK & PRADO, *supra* note 280, at 200.

<sup>1239</sup> Elkins, Guzman & Simmons, *supra* note 1226, at 824.

<sup>1240</sup> TREBILCOCK & PRADO, *supra* note 280, at 200.

institutions, courts and other relevant enforcement bodies, is particularly what ordains and reinvigorates the country's reputation as a reliable enforcer of its contractual obligations.

The GCC States in this study have all committed to enforcing foreign judgments and arbitral awards. The three countries' general obligations are founded on their international commitments in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and ICSID, of which all of these states are parties to and members of.<sup>1241</sup> These two multilateral treaties essentially oblige their parties and members to commit to recognizing and enforcing foreign arbitral awards. In addition to these international commitments, the three states have moreover internalized and implemented these guarantees in their domestic legislations. Kuwait has implemented such obligation in its Civil and Commercial Procedures Law.<sup>1242</sup> The Saudi Law of Arbitration Article 52 provides, "Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable." Similarly, UAE Federal Law

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<sup>1241</sup> Kuwait acceded to the New York Convention on Apr. 28, 1978, Saudi Arabia acceded on Apr. 19, 1994, and the U.A.E. acceded on Aug. 21, 2006. *Contracting States*, N.Y. CONVENTION, <http://www.newyorkconvention.org/countries> (last visited Nov. 11, 2018). Kuwait also acceded to the ICSID Convention on Feb. 2, 1979, Saudi Arabia acceded on May 8, 1980, and the U.A.E. acceded on Dec. 23, 1981. *Database of ICSID Member States*, ICSID, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last visited Nov. 11, 2018).

<sup>1242</sup> Law No. 38 of 1980, art. 199, Civil and Commercial Procedures Law (Kuwait) ("The provisions and orders issued in a foreign country in Kuwait may be executed under the conditions prescribed in that country for the execution of the provisions and orders issued in Kuwait. The provisions and orders issued in favor of a Kuwaiti natural or juridical person are required to be executed on funds belonging to a Kuwaiti natural or juridical person. (This paragraph has been replaced by Law No. 38 of 2007). The order of execution shall be made before the Court of Cassation in the normal circumstances of the case. The order may be ordered only after the following has been ascertained: a. The judgment or order issued by a competent court in accordance with the law of the country in which it was issued. B. The litigants in the case in which the foreign judgment was issued were assigned to attend and were duly represented. (C) The judgment or order has obtained the power of the matter ordered in accordance with the law of the court which has rendered it. (D) It does not conflict with a provision or order issued by a court in Kuwait and does not contain anything contrary to public morals or public order in Kuwait.").

No. 6 of 2018 on Arbitration illuminates some procedures with regards to enforcing foreign arbitral awards.<sup>1243</sup>

Non-compliance with enforcement of foreign arbitral awards however is real and happens in several occasions, which is dangerous. And what is at stake in many instances with regards to these large infrastructure projects is billions of dollars of losses or damages after delays of project implementation serving the public. While jurisdictional sovereign immunity waivers allow foreign bodies to hear cases, they are upheld unless the consent to such jurisdiction is disputed. Arbitral bodies and local state judiciaries are rather more stringent on execution of awards on state assets, as jurisdictional waiver does not automatically apply to execution proceedings.<sup>1244</sup> The complexity of enforcement delves into the nature of assets, whether commercial or state-owned to serve the public interest. The latter being more difficult to execute against, due to sovereign immunity as explained, of which the first is not covered by. The issue of distinction is evidently a burden of proof battle in litigative proceedings.

In July 2014 the Permanent Court of Arbitration in arbitrations constituted under the Energy Charter Treaty in the Hauge rendered three awards against the Russian government brought by the shareholders of Yukos, once Russia's largest oil and gas company.<sup>1245</sup> In 2006,

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<sup>1243</sup> Federal Law No. 6 of 2018, art. 55 (U.A.E.) (“1. A party looking to enforce an arbitral award shall submit a request for its confirmation and enforcement with the chief justice of the Court, together with the following: (a) The original award or a certified copy thereof; (b) A copy of the Arbitration Agreement; (c) An Arabic translation of the arbitral award, attested by a competent authority, if the award is not issued in Arabic; (d) A copy of the minutes of deposit of the award in Court. 2. The chief justice of the Court or whoever he delegates from among its judges shall order the arbitral award confirmed and enforced within sixty days of submission of the request for its confirmation and enforcement, unless it finds one or more of the grounds for setting aside the award under section 1 of Article 53 of this Law.”).

<sup>1244</sup> Article 19 of the UN State Immunities Convention addresses “State immunity from post-judgment measures of constraint” and in Article 20 further provides, “Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.” See Alexis Blane, *Sovereign Immunity as a Bar to the Execution of International Arbitral Awards*, 41 N.Y.U. J. INT’L L. & POL. 453, 464 (2009).

<sup>1245</sup> *Final Awards Issued in 3 Arbitrations Between Former Shareholders of Yukos and the Russian Federation*, PERMANENT COURT ARB. (July 18, 2014), <https://pca-cpa.org/en/news/final-awards-issued-in-3-arbitrations->



Yukos went bankrupt following several tax redress procedures by Russian authorities, some of which appeared to have political motivations.<sup>1246</sup> Three former Yukos' shareholders filed a series of claims against Russia for unlawful expropriation and arbitrary, unfair and discriminatory treatment. The tribunal found that the claims were indirect expropriation and the Russian government breached its obligations under the Energy Charter Treaty.<sup>1247</sup> Russia was ordered to pay 50 Billion US dollars to Yukos' shareholders, which were the largest awards in the history of investment arbitration.<sup>1248</sup> After the awards were rendered, several enforcement proceedings were being pursued when Russia decided to put up a fight and not compensate the claimants as determined by the awards.<sup>1249</sup> Enforcement proceedings were brought in France, Belgium, the United Kingdom, and the United States.<sup>1250</sup> French Courts, for instance, allowed enforcement proceedings while a setting aside procedure is pending to later uphold the sovereign immunity invoked by the Russian Government and reject execution of the award.<sup>1251</sup> Claims to enforce

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between-former-shareholders-of-yukos-and-the-russian-federation/; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award (July 18, 2014); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award ¶ 108(4) (July 18, 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award (July 18, 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf>.

<sup>1246</sup> Stanley Reed, *Dutch Court Overturns \$50 Billion Ruling Against Russia in Yukos Case*, N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/21/business/international/yukos-russia-50-billion-ruling.html>.

<sup>1247</sup> *Hulley v. Russia*, Final Award; *Yukos v. Russia*, Final Award; *Veteran Petroleum v. Russia*, Final Award.

<sup>1248</sup> Lena U. Serhan, *Arbitration Unbound: How the Yukos Oil Decision Yields Uncertainty for International Investment Arbitration*, 95 TEX. L. REV. 101, 110 (2016).

<sup>1249</sup> The Russian Government resisted enforcement by adopting a series of measures including retaliatory seizure of foreign assets located within Russian territories, and the even introduced legislations to allow its constitutional court to overturn international awards issued against the Government to pay from its state assets. Fenghua Li, *The Yukos Cases and the Provisional Application of the Energy Charter Treaty*, 6 CAMBRIDGE J. INT'L & COMP. L. 75, 76 (2017); Serhan, *supra* note 1248, at 121.

<sup>1250</sup> Serhan, *supra* note 1248, at 111–19. This was especially leveraged by the Hague District Court Decision that concluded the PCA Tribunal had no jurisdiction to hear the case due to a dispute about the Russian Government's accession to the Energy Charter Treaty. See The Hague District Court - Chamber for Commercial Affairs, Case Nos. C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2, C/09/481619 / HA ZA 15-112, Judgment, ¶¶ 5.4-6.9 (Apr. 20, 2016), <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230>. This decision is still pending years of confirmation as it is subject to appeal and cassation. Borja Alvarez Sanz, *The Yukos Saga Reloaded: Further Developments in the Interplay between Domestic Legislations and Provisionally Applied Treaties*, 49 N.Y.U. J. INT'L L. & POL. 587, 604 (2017).

<sup>1251</sup> Serhan, *supra* note 1248, at 120.

these \$50 Billion equivalent awards are still an early battle being fought with numerous jurisdictions around the world deciding on how to proceed with executing the awards on Russian-owned assets in their court territories.

The *Sedelmayer v. Russia* case is another example of the complexity of the enforcement of arbitral awards. Frank J. Sedelmayer, a German citizen, was the sole owner of a company dedicated to the training of police and security personnel which entered into a joint venture with the Leningrad police department in 1991 in Russia. Following expropriation of his capital contribution in the joint venture, Sedelmayer initiated arbitration under the Germany-Russia bilateral investment treaty at the Stockholm Chamber of Commerce. In 1998, the tribunal rendered an award in Sedelmayer's favor, ordering Russia to pay \$2.35 million, including interest as compensation for his investment under the treaty.<sup>1252</sup> However, the Russian Federation was unwilling to voluntarily comply with the award. Sedelmayer sought enforcement of the award in different jurisdictions including Sweden and Germany based on the New York Convention.<sup>1253</sup> To successfully do this, Sedelmayer had to firstly convince the Swedish and German courts to recognize the award and determine that the award was enforceable. After what appeared to be an endless battle, the Swedish Supreme Court in 2011 concluded that state immunity of the Russian Government is not to be upheld and that Sedelmayer was rather entitled to execute the award on Russian owned property located in Sweden even where such property is designated for government or official use, not for commercial purposes.<sup>1254</sup> The Swedish Court

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<sup>1252</sup> Alen S. Alexandroff & Ian A. Liard, *Chapter 29: Compliance and Enforcement*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171, 1182–83 (Peter Muchlinski, Federico Ortino, and Christoph Schreuer eds., 2008); Wrang, *supra* note 1223, at 348; Blane, *supra* note 1244, at 468–69.

<sup>1253</sup> Alexandroff & Liard, *supra* note 1252, at 1183.

<sup>1254</sup> Wrang, *supra* note 1223, at 347–52.

did nonetheless engage in a discussion about commercial v. official use of property in its decision.<sup>1255</sup>

Germany also adheres to the doctrine of restrictive immunity.<sup>1256</sup> Therefore, the highest court of general jurisdiction in Germany – the Kammergericht ruled that Russia’s waiver of jurisdictional immunity through its investment treaty with Germany extended to enforcement immunity in the Sedelmayer case. In addition, the Court pointed to Article 10 of the German-Soviet BIT, which stated that any award rendered by an arbitral tribunal in deciding a dispute arising out of the treaty should be enforceable under the New York Convention.<sup>1257</sup> As a result, the German court recognized and certified the award as enforceable under the New York Convention. Then Sedelmayer moved to execute the award. Here, the German court relied on case law that distinguishes between jurisdictional immunity and proceedings pertaining to the enforcement and execution of the award and denied extending the waiver of sovereign immunity to the execution of the award against state assets.<sup>1258</sup> The German court determined only assets that were deemed commercial in nature would be subject to execution.<sup>1259</sup> Sedelmayer relentlessly continued filing cases to execute his awards in local German courts on the premise of locating Russian commercial assets in Germany not subject to sovereign immunity.<sup>1260</sup> It took Sedelmayer about 17 years to conclude this legal battle and succeed in winning yet only part of the compensation. Accordingly, and in light of such enforcement voyages, it ultimately appears

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<sup>1255</sup> The Swedish Supreme Court even relied on the UN State Immunities Convention in its reasoning. *Id.* at 350–52.

<sup>1256</sup> Restrictive immunity confers immunity only to sovereign activities which means if the purpose of an act done a foreign state was to pursue commercial benefit the courts where the enforcement of arbitral awards was sought may deny the immunity of that state and impose measures of constraint on the involved state property. Draft Articles on State Immunities, art. 10 at Commentary ¶ (b). *See also* Blane, *supra* note 1244, at 451, 459–61; Wrangé, *supra* note 1223, at 348.

<sup>1257</sup> Alexandroff & Liard, *supra* note 1252, at 1184.

<sup>1258</sup> *Id.*

<sup>1259</sup> *Id.*

<sup>1260</sup> *Id.*

that private claimants and creditors may be better off obtaining an explicit waiver of execution immunity in the contractual agreement or BIT otherwise embark on a journey of tracing state-owned commercial assets.

The cases above are an indication of the laborious nature of executing foreign arbitral awards that the private sector may be confronted with when engaging in infrastructure projects in a host state, should any differences between the parties arise. And therefore, confidence in GCC institutions upholding principles of party autonomy and waiver of their sovereign immunity from inception of the contractual relationship to its termination, is indispensable.

And whereas both the ICSID and New York Conventions provide for the parties and members' obligation to recognize and enforce foreign judgments, these two treaties have also upheld the primacy of prevailing local regulatory provisions, or municipal laws, to govern and prescribe the procedures for such enforcement and immunity from enforcement.<sup>1261</sup> In this context, amongst the biggest domains to exempt recognition and enforcement of foreign arbitral awards are public policy. The moreover added layer of complexity to this exception is that it has no clear limits. The only boundaries to the notion of public policy are basically those that are decided by local state authorities in each case individually. Article V(2)(b) of the New York Convention accepts the refusal of recognition and enforcement of foreign arbitral awards where that award is deemed contrary to the public policy of the country. This exception remains even where both treaties restrict their signatories from reviewing arbitral awards by their local courts. This review does not apply to public policy, it is rather the review of the contents of the award

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<sup>1261</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. III, IV, & VII, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States arts. 53-55, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

that is restricted. Lines as to what content is and where public policy fits in are thin and contentious. The issue of enforcement therefore is actually largely subject to state local court discretion.<sup>1262</sup> Deferral to the primacy of state court supremacy in interpreting its version of public policy was even stressed in the Draft Articles of Jurisdictional Immunities of States and their Property paving the way to the later adopted UN Convention providing:

The article in no way seeks to add to or detract from the existing jurisdiction of the courts of any State, nor to interfere with the role of the judiciary in any given legal system in the judicial control and supervision which it may be expected or disposed to exercise to ensure the morality and public order in the administration of justice needed to implement the arbitral settlement of differences. Only in this narrow sense is it correct to state that submission to commercial arbitration by a State entails an implied acceptance of the supervisory jurisdiction of a court of another State otherwise competent in matters relating to the arbitration agreement.<sup>1263</sup>

While the GCC States reverberate their commitments towards party autonomy and waiver of government entities' sovereign immunity in their relationships with private sector participants in the countries' infrastructure projects, the range of perpetuating such waiver is critical. The role of the state's use of public policy as a tool to by-pass its contractual commitments is but a reflection of the countries' institutional capacity in sensibly sustaining international principles when they so infringe on the notions of public policy. Once again, the grounds for international dispute settlement mechanisms are acknowledged in the three GCC States as previously discussed, it is the subsequent commitment towards recognizing and enforcing foreign judgments and arbitral awards and the local role that is in question here.

All GCC States have acknowledged the public policy exception, or what is also referred to as public morals, as a ground for local courts to assess when recognizing and enforcing

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<sup>1262</sup> Van Harten & Loughlin, *supra* note 1119, at 136.

<sup>1263</sup> Draft Articles on State Immunities, art. 17 at Commentary ¶ 9.

foreign arbitral awards.<sup>1264</sup> Again, this exception in and of itself is not a problem as it has been recognized by the aforementioned international instruments and adopted by many countries around the world. In fact, there is a growing number of acknowledgments of the public policy exception worldwide.<sup>1265</sup> And public policy is no stranger to either legal system, civil or common law.<sup>1266</sup> The challenge is in understanding what this exception entails. Needless to say though, public policy may certainly serve positive functions for a country's society, such as meeting its particular sustainable development needs in preserving cultural and indigenous elements of ways of life that include certain communal properties, nature preserves, and indigenous education.<sup>1267</sup> Public policy is often referred to in the domain of the country's right to regulate.<sup>1268</sup> The problem that remains nevertheless is the reasonable extent of such exception and the investor's legitimate expectations. Extending the exception too far might lead to investment protectionism of a country in its relationships with foreign states and enterprises.<sup>1269</sup> One approach to address this extent is to list at least categories that may fall under the public policy exception such as public health and the protection of the environment, yet some categories like public order and morals

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<sup>1264</sup> Kuwait Civil and Commercial Procedures Law, art. 199 ("It does not conflict with a provision or order issued by a court in Kuwait and does not contain anything contrary to public morals or public order in Kuwait."); U.A.E. Law on Arbitration 2018, art. 53 ("The Court shall, on its own initiative, set aside the arbitral award if it finds that: . . . (b)The arbitral award is in conflict with the public order and morality of the State."). Saudi Law of Arbitration, art. 55(2)(b) provides that no execution of arbitral awards shall be permissible unless, "The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued."

<sup>1265</sup> WORLD INVESTMENT REPORT 2015, *supra* note 1236, at 140–41.

<sup>1266</sup> US Courts have acknowledged the notion of public policy. A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in common law, that a court may refuse to enforce contracts that violate law or public policy. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (referencing *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983); *Hurd v. Hodge*, 334 U.S. 24, 34 (1948)). US Courts have also concluded that courts cannot refuse to enforce arbitration agreements because of a state's public policy against arbitration, even if the policy nominally applies to any contract. There must be some additional limit on the contract defences permitted by section 2 of the Federal Arbitration Act. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011).

<sup>1267</sup> WORLD INVESTMENT REPORT 2015, *supra* note 1236, at 140.

<sup>1268</sup> UNCTAD'S REFORM PACKAGE, *supra* note 1236, at 14–20.

<sup>1269</sup> *Id.* at 14–20.

appear to be very broad and more difficult to interpret.<sup>1270</sup> The UAE took such an approach.

Article 3 of The Law of Civil Transactions, Federal Law No. 5 of 1985 (the UAE Civil Code)

provides:

Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari‘ah.<sup>1271</sup>

UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial

Arbitration documented some guidance on the extent of the public policy exception.<sup>1272</sup> It

provided:

The public policy defence should be applied only if the arbitral award fundamentally offended the most basic and explicit principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on part of the arbitral tribunal. Courts have also stated that to refuse to enforce an award on the ground that it violates public policy, the award must either be contrary to the essential morality of the State in question or disclose errors that affect the basic principles of public and economic life. Not every infringement of mandatory law amounts to a violation of public policy. Occasionally it was also required that the violation of public policy must be obvious.<sup>1273</sup>

Public policy can accordingly come in many forms. In *Kuwait Airways Corp v. Iraqi Airways Co & Anor*, the English House of Lords considered Iraq’s breach of international law through invading the State of Kuwait contrary to public policy and thus a ground preventing any recognition of Iraq’s seizure of Kuwaiti state property, in this case, aircraft vessels belonging to the Kuwaiti SOE, Kuwait Airways. The Iraqi laws that were claimed applicable at the time were

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<sup>1270</sup> WORLD INVESTMENT REPORT 2015, *supra* note 1236, at 140.

<sup>1271</sup> U.A.E. Civil Transactions Code, *supra* note 631.

<sup>1272</sup> What is known as international commercial arbitration is in its essence the core of investor-state disputes settlements. The procedures and enforcement mechanisms of applies to both types of disputes with the specificity of the latter involving the state as a sovereign and not mere commercial contractual relationships. Van Harten & Loughlin, *supra* note 1119, at 125–27.

<sup>1273</sup> U.N. COMM’N INT’L TRADE LAW (UNCITRAL), 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at 183, U.N. Sales No. E.12.V.9 (2012).

not acknowledged by the Court.<sup>1274</sup> The international breach was confirmed by the many UN Resolutions, like Resolution 662, considering the illegitimacy of the Iraqi Government's actions during the period of 1990-1991, even though the English Court intended to initially apply Kuwaiti Law on interpretations of public policy.<sup>1275</sup> The Court also confirmed precedent that no sovereign immunity shall be applicable to assets seized by the Iraqi government in this respect.<sup>1276</sup> The Court emphasized that the public policy exception is not constrained, yet diligence must be pursued in not expanding the principle beyond its limits.<sup>1277</sup>

Kuwaiti Courts have upheld the enforcement of arbitration decisions in different occasions.<sup>1278</sup> These Courts considered cases that are brought to them to annul arbitral awards as an exceptional procedure that the legislature has permitted.<sup>1279</sup> Nonetheless, public policy was consistently brought up to guarantee that contracts, reconciliation agreements, or arbitral awards do not violate public policy, which is referred to in Arabic as *Alnitham Alaam*, according to Kuwaiti Courts.<sup>1280</sup>

The Kuwaiti Court of Cassation in an arbitral award issued by the London Court of Arbitration and applying UK laws refused to enforce part of the award due to its violation of the public policy of Kuwait.<sup>1281</sup> The part of the award that violated public policy was the interest that

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<sup>1274</sup> Kuwait Airways Corp. v. Iraqi Airways Co & Anor [2002] UKHL 19 ¶¶ 113, 165–68, 174, 192.

<sup>1275</sup> *Id.* ¶¶ 167, 192.

<sup>1276</sup> *Id.* ¶ 110.

<sup>1277</sup> *Id.* ¶¶ 113–16, 140.

<sup>1278</sup> One case involved the Public Institution for Housing Affairs and a contractor that resorted to arbitration to settle their dispute. Court of Cassation Decision No. 668/2006, Feb. 10, 2008, Commercial, at 3 (Kuwait); Court of Cassation Decision No. 1112/2007, Nov. 13, 2007, Commercial/3, at 3 (Kuwait); Court of Cassation Decision No. 1065/2005, Feb. 18, 2007, Commercial, at 3 (Kuwait); Court of Cassation Decision No. 227/2004, Jan. 8, 2005, Commercial, at 3 (Kuwait); Court of Cassation Decision No. 423/2003, May 8, 2004, Commercial, at 3 (Kuwait); Court of Cassation Decision No. 80/1997, May 10, 1998, Commercial, at 3 (Kuwait).

<sup>1279</sup> Court of Cassation Decision No. 833/2006, Apr. 17, 2008, Commercial, at 3 (Kuwait); Cassation Decision No. 668/2006, at 3.

<sup>1280</sup> Court of Cassation Decision No. 1328/2010, Feb. 6, 2013, Commercial, at 3 (Kuwait); Court of Cassation Decision No. 981/2010, Feb. 1, 2010, Commercial, at 3 (Kuwait).

<sup>1281</sup> Court of Cassation Decision No. 1390/2009, Dec. 15, 2010, Commercial/5, at 3 (Kuwait).



was imposed on the litigant corporation to be paid on top of the principle amount awarded, 3 Million US Dollars.<sup>1282</sup> The Kuwaiti Court, when concluding that the transaction between the litigants as per the arbitral award was not of a commercial nature, rather of a civil type, applied commercial code provisions effective at that time that restricted the imposition of compound interest on principle amounts when such interest is applied to fixed or frozen interest, *mutajamid alfawa'ed*.<sup>1283</sup> The same commercial code provisions also restrict the total amount of interest to be imposed in a manner that exceeds the principal. The justification the Court stated of such public policy is its violation of *Sharia* principles, particularly, that the interest, *riba*, is of a characteristic that is “forbidden by *sharia*”.<sup>1284</sup> The Court of Cassation consequently and nonetheless still upheld the enforcement of part of the arbitral award and rejected the enforcement of the portion that imposed interest on the principal amount in the award. This, according to the Kuwaiti Court, is public policy that it retains a level of discretion to apply in rejecting arbitral award recognition and enforcement according to the New York Convention. In another similar case, the Court of Cassation confirmed that interest that exceeds the manner and quantity permitted according to the Kuwaiti Commercial Code was contrary to public policy (*alnitham alaam*) and the Court upheld the decision not to enforce the foreign judgment as a result.<sup>1285</sup> It is Kuwaiti public policy that is relevant in enforcing foreign judgments and orders,

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<sup>1282</sup> Cassation Decision No. 1390/2009, at 3. This does not mean this approach by the Kuwaiti Court is all that unfamiliar to other Arabic nations. Moreover, in other instances too where a country’s legal system acknowledges punitive damages, other countries, such as the UK, consider imposing damages of such a nature contrary to its public policy. *Guide to Enforcement*, ¶ 47, DIFC COURTS, <https://www.difccourts.ae/2012/04/25/guide-to-enforcement-open-for-consultation/> (last visited Nov. 20, 2018).

<sup>1283</sup> Cassation Decision No. 1390/2009, at 3.

<sup>1284</sup> *Id.*

<sup>1285</sup> Court of Cassation Decision No. 85/2010, Oct. 30, 2011, Commercial, at 3 (Kuwait).

according to the Court. Cases like this, evidently, are of importance precisely for the reasons constructed above.<sup>1286</sup>

While adjudicating in foreign tribunals, such as the London Court of Arbitration in this former case, and applying foreign laws, UK laws, Kuwaiti institutions and the country's regulations shall ultimately remain operational. And where compound interest on transactions of a similar nature are permitted in perhaps most jurisdictions around the world, Kuwait's contextual public policy touch upholds its *sharia* derived version of interest in this transaction specifically. Is this wrong? Not necessarily. It just must be considered by Kuwaiti authorities while understanding its implications in attracting foreign investment in its infrastructure projects.

Similarly, Dubai Courts in the UAE have undertaken their commitment to recognize and enforce arbitral awards, especially with the clarity provided with the new Federal Arbitration Law mentioned before.<sup>1287</sup> Dubai Courts, for instance have enforced semi-autonomous territory DIFC awards in Dubai Courts.<sup>1288</sup> Correspondingly, DIFC Courts have consistently recognized and enforced foreign arbitral awards whether conducted in Dubai or elsewhere.<sup>1289</sup> These Courts

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<sup>1286</sup> *Id.* at 3.

<sup>1287</sup> *DIFC Guide to Enforcement, supra* note 1282. It must be reiterated that obtaining DIAC Arbitration caselaw is more challenging due to non-publication for confidentiality purposes as pointed out before in this study.

<sup>1288</sup> *See DIFC Guide to Enforcement, supra* note 1282 (referencing *Property Concepts Fze v. Lootah Network Real Estate & Commercial Brokerage*, DIFC-LCIA Arbitration Award).

<sup>1289</sup> *See, e.g.,* Chenshan Liu vs Dubai Waterfront [2016] DIFC ARB 004, Arbitration Orders (July 29, 2018), <https://www.difccourts.ae/2018/07/29/chenshan-liu-vs-dubai-waterfront-2016-difc-arb-004/>; Pearl Petroleum Company Limited & Others v. The Kurdistan Regional Government of Iraq [2017] DIFC ARB 003, ¶ 39 (Aug. 20, 2017), <https://www.difccourts.ae/2017/08/20/pearl-petroleum-company-limited-others-v-kurdistan-regional-government-iraq-2017-difc-arb-003/>; Georgia Corp. v. Gavino Supplies [2016] DIFC ARB 005, ¶ 79, Judgment (Oct. 11, 2016), <https://www.difccourts.ae/2016/10/11/georgia-corporation-v-gavino-supplies-2016-difc-arb-005/>. DIFC Courts have also enforced DIAC Arbitration awards. *See* Edward Dubai LLC v. Eevi Real Estate Partners Limited [2015] DIFC ARB 002, Judgment (Dec. 13, 2015), <https://www.difccourts.ae/2015/12/13/edward-dubai-llc-v-eevi-real-estate-partners-limited-2015-arb-002/>. *See also* DIFC Arbitration Law, art. 42(1) (“An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44. For the avoidance of doubt, where the U.A.E. has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards the DIFC Court shall comply with the terms of such treaty.”).

have reiterated the high threshold necessary to refuse recognition and enforcement of arbitral awards based on public policy.<sup>1290</sup> DIFC Courts further confirmed this capacity even where no asset locale or domicile is established in DIFC jurisdiction.<sup>1291</sup> DIFC Courts held that it is not contrary to UAE public policy to recognize and enforce judgments in such manner, as DIFC Court recognition enables other courts in the emirate of Dubai to enforce the award or judgment on assets situated in their jurisdictions.<sup>1292</sup> The Court clarified:

There are good reasons for this. In the modern world of highly mobile financial resources it may be essential for an arbitration creditor to be in a position to levy execution on an arbitration debtor's assets introduced into a jurisdiction subsequent to the making of an order. Bank accounts may exist but at any point of time may have little or no credit balance.<sup>1293</sup>

As mentioned previously in *Pearl Petroleum Company Limited & Others v the Kurdistan Regional Government of Iraq* heard in DIFC jurisdiction to recognize and enforce the arbitral award, the matter was an issue of sovereign immunity and public policy when considering such enforcement.<sup>1294</sup> The DIFC Tribunal considered:

The issues which arise here were matters for the Executive or Legislature under Article 120 of the UAE Constitution because they concerned foreign affairs and questions of public policy (ordre public) or a matter for the UAE Supreme Court if there was any serious issue/ doubt under the Constitution as to the organ which should determine such questions, falls away once it is seen that waiver of immunity is a question to be determined by the judiciary as part of the contractual and procedural law of the DIFC.<sup>1295</sup>

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<sup>1290</sup> *Banyan Tree Corp. Pte Ltd v. Meydan Group LLC* [2013] DIFC ARB 003, Judgment, ¶ 43 (Apr. 2, 2015), <https://www.difccourts.ae/2015/04/02/arb-0032013-banyan-tree-corporate-pte-ltd-v-meydan-group-llc-4/>.

<sup>1291</sup> (1) *Egan* (2) *Eggert v. (1) Eava (2) Efa* [2013] DIFC ARB 002, Judgment, ¶¶ 40–44 (July 29, 2015), <https://www.difccourts.ae/2015/07/29/xx-1-x1-2-x2-v-1-y1-2-y2/>.

<sup>1292</sup> *Id.* ¶¶ 43, 61, 65. *See also* (1) *Fletcher I LLC (2) Fletcher III LLC v. (1) Florance Logistic Solutions (Fabien) LLC (2) Frayer Trading Agency LLC* [2015] DIFC ARB 002, Judgment, ¶¶ 54–62 (July 29, 2015), <https://www.difccourts.ae/2015/07/29/1-fletcher-i-llc-2-fletcher-iii-llc-v-1-florance-logistic-solutions-fabien-llc-2-frayer-trading-agency-llc-2015-arb-002/>.

<sup>1293</sup> *Egan et al v. Eava et al.*, ¶ 44.

<sup>1294</sup> *Pearl Petroleum et al. v. KRG*, ¶¶ 22–26.

<sup>1295</sup> *Id.* ¶ 24.

The discussions initially raised included the UAE's foreign policy and whether it recognized the Kurdistan Regional Government (KRG) as a legitimate state government, but the Tribunal eventually thought this was unnecessary to deliberate because of the presence of the immunity waiver.<sup>1296</sup> And what was at stake was the KRG's nonpayment of a large amount of 2 Billion US Dollars, in addition to other ongoing claims of amounts between 26.5 and 39.8 Billion US Dollars, concerning oil and gas concessions.<sup>1297</sup> The DIFC Tribunal confirmed its capacity to decide on the matter of the waiver from sovereign immunity.<sup>1298</sup> The Tribunal considered the Kurdistan Regional Government's jurisdictional waiver of its sovereignty by accepting the London Court of International Arbitration as the seat of arbitration and UK laws as applicable, as necessarily as well, a waiver of immunity from execution on its assets.<sup>1299</sup> The Tribunal, while considering the UN Convention on Jurisdictional Immunities of States and their Property, reiterated that waiver from execution while may be obtained contractually, could also be obtained from submissions of the KRG Government in this regards to competent courts.<sup>1300</sup>

This might have been a bit of a stretch by this Tribunal considering what has been discussed in this study previously about the importance of separating jurisdictional immunity from immunity against execution proceedings. Nonetheless, the DIFC Tribunal in this case took a very noticeable approach when engaging with identifying public policy, yet in a rather unique manner. The Tribunal, on the premise of the notion of public policy, considered that the KRG in its stalling and intentional extensive different litigations and procedures in addition to the

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<sup>1296</sup> The Iraqi Federal Government and Kurdistan Regional Government (KRG) have been in a tug and war situation and disagreement about not the KRG's autonomous territory in Iraq, which is grounded in the Constitution, but rather the KRGs ability to grant oil and gas concessions on terminals found in its territory. According to Iraq's Constitution, the country's natural resources are shared amongst the different Iraqi regions. *Id.* ¶¶ 6, 22–23.

<sup>1297</sup> *Id.* ¶ 3.

<sup>1298</sup> *Id.* ¶ 24.

<sup>1299</sup> *Id.* ¶¶ 29–32.

<sup>1300</sup> *Id.* ¶¶ 29–32.

capacity of its courts, Arbil Courts, the KRG's capital courts, would reject recognition and enforcement of the London issued award on the basis of public policy.<sup>1301</sup> This rejection would precisely be done because of the KRG's influence over its Courts.<sup>1302</sup> The DIFC Court hence stepped in and further confirmed the need to recognize and enforce the London award.

The DIFC Tribunal also clarified Dubai's Court of Cassation's stance in *Central Bank of Sudan v Africa Alpha Capital 1 Co Ltd* by that Court engaging with the issue of sovereign immunity. The Cassation Court heard the claim by the Central Bank of Sudan alleging to have engaged in its activities as an entity not separate from the state, and so no foreign awards or judgments issued against it should be recognized according to the Riyadh Convention, of which both Iraq and the UAE are party to, that regulates the enforcement of judgments and awards between certain Arab states.<sup>1303</sup> The Dubai Court did not consider this Convention applicable and rather believed that it was its role to engage in this matter. It eventually held that the Sudanese Central Bank would not enjoy sovereign immunity from creditors enforcing their judgment, as this Bank rather engaged in transactions that were of a commercial nature.<sup>1304</sup> Therefore, Dubai courts have chosen to uphold restrictive immunity by differentiating between governmental and commercial acts.

It is important to point out in light of the DIFC Court's previous holdings that it nonetheless asserts its autonomous judicial practice, even though it is guided by Dubai Court and UAE executive and legislative practice in issues that reflect public policy.<sup>1305</sup> One prime

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<sup>1301</sup> *Id.* ¶ 44.

<sup>1302</sup> *Id.* ¶ 44.

<sup>1303</sup> *Id.* ¶¶ 40, 64.

<sup>1304</sup> *Id.* ¶ 64.

<sup>1305</sup> Art. 41(2)(b)(III) of the DIFC Arbitration Law mentions that DIFC Courts may set aside arbitral awards when the public policy of the U.A.E. is conflicted with.

example of this common law jurisdictional nature is that it even differs from its Kuwaiti neighbor when it comes to interest and upholding *Sharia* principles. DIFC Courts have enforced foreign awards and explicitly executed compound interest to be calculated in this case on the Japanese long term prime lending rate compounded on a 90 day period of the principal amount.<sup>1306</sup> In another case, *Ginette Pjsc v (1) Geary Middle East FZE (2) Geary Limited*, the arbitral award's debtor claimed that the award was in conflict with Sharia principles and, by extension, UAE public policy, as defined by Article 3 of the UAE Civil Code for imposing interest on due payments.<sup>1307</sup> The award debtor asked the DIFC Court to set aside the arbitral award for interest of AED 5,498,339.14 to the date of the Award and AED 10,356 per day thereafter and refuse recognition or enforcement on the same ground.<sup>1308</sup> The DIFC Court consequently relied on judicial authority set by UAEs Supreme Court in this regard. And where the DIFC Court considered the transaction in question of a non-commercial nature, it applied the Supreme Court's reasoning concluding, "(iii) In non-commercial contracts, Article 76 need not apply and the Court or Arbitrator may apply any interest deemed appropriate in the circumstances." Article 76 of UAE Federal Law No. 18 of 1993 on Commercial Transactions provides:

A creditor is entitled to receive interest on a commercial loan as per the rate of interest stipulated in the contract. If such rate is not stated in the contract, it shall be calculated according to the rate of interest current in the market at the time of dealing, provided that it shall not exceed 12% until full settlement.

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<sup>1306</sup> *Georgia Corp. v. Gavino Supplies* [2016] DIFC ARB 005, ¶ 79, Judgment (Oct. 11, 2016), <https://www.difccourts.ae/2016/10/11/georgia-corporation-v-gavino-supplies-2016-difc-arb-005/>.

<sup>1307</sup> *Ginette Pjsc v. (1) Geary Middle East FZE (2) Geary Limited* [2015] DIFC ARB 012, Order, ¶¶ 10–11 (Apr. 7, 2016), <https://www.difccourts.ae/2016/04/07/ginette-pjsc-v-1-geary-middle-east-fze-2-geary-limited/>.

<sup>1308</sup> *Id.* ¶ 11.

The DIFC Court in *Ginette Pjsc v (1) Geary Middle East FZE (2) Geary Limited* consequently did not consider such interest contrary to the public policy of the UAE that applies *Sharia* principles as per Article 3 of its Federal Civil Transactions Code. The award as a result was enforced. This case simply contrasts with the Kuwaiti stance rejecting interest in a similar manner, even when both Kuwaiti and Emirati public policy and legal systems are influenced by *sharia* principles. The Commentary to Article 3 of the UAE Civil Transactions Code asserts that the Emirate’s public policy does not fall short of *Sharia* principles. The Commentary provides:

This article defines what will be deemed to be public order in a flexible manner, enumerating the several things that will be so regarded, and for the first time it links the concept of public order with the rules of the principles of the Islamic shari’ah in stipulating with regard to the rules relating to public order that they should not conflict with the definitive provisions and fundamental principles of the Islamic shari’ah.

In one enforcement of arbitral award case, a DIFC Court engaged in a discussion about public policy in the UAE and statutory institutional competencies, when claims about non-arbitrability of civil cases pertaining to financial services were raised. The reason for such claim was the existence of an ad hoc body concerned with financial services in the DIFC jurisdiction, the Dubai Financial Services Authority (DFSA). The DIFC Court nonetheless held that it is not against UAE public policy to uphold arbitration agreements even in light of a specialized agency.<sup>1309</sup> The DIFC Court seemed to uphold party autonomy as it referred to the UAE’s Federal Supreme Court’s interpretation of public policy as, “public policy is a set of guidelines for taking decisions and pursuing actions that are of fundamental concern to society.”<sup>1310</sup> And so

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<sup>1309</sup> Gauge Investments Limited v. Ganelle Capital Limited [2016] DIFC ARB 003/006, Judgment, ¶ 55 (June 8, 2016), <https://www.difccourts.ae/2016/06/08/gauge-investments-limited-v-ganelle-capital-limited-2016-difc-arb-003006/>.

<sup>1310</sup> *Id.* ¶ 55.

the DIFC Court considered the arbitral award as conforming with the fundamentals of the Emirati society.

Saudi Courts are, not surprisingly, expected to take a similar public policy approach to the Kuwaiti Courts when it comes to interest on contractual transactions of a similar standing, as the Kingdom primarily applies sharia principles that forbid *riba*.<sup>1311</sup> Thus, foreign entities while enforcing foreign judgments and arbitral awards are to anticipate a Saudi local institutional stance that could cost them millions of US Dollars if such interest is omitted from already final foreign awards and judgments. In one case, *Diwan Almathalim* in a commercial case extensively discussed the issue of interest and how *riba* is a violation of *Sharia* principles.<sup>1312</sup> This Court nonetheless enforced the arbitral award not by disregarding the issue of *riba*, but rather because the arbitral tribunal that issued the award has already engaged in examining the substance of imposing interest in the contractual agreement.<sup>1313</sup>

In another case, *Diwan Almathalim* refused to recognize and enforce an arbitral award in what appears to be public policy yet may also be confused with *sharia* principles that are equally applicable by the Saudi judiciary as law.<sup>1314</sup> The reasoning for not recognizing and enforcing the award was due to violations of *sharia* principles precisely by the lease contract in question including a physically non-existing structure, electronic panels, a practice prohibited by

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<sup>1311</sup> With regards to *riba*, see, e.g., Case No. 71/2/Q-1427H, Appeals Decision No. 626/AP/7-1432H, *in* 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1432 HIJRI, 1436 HIJRI, at 83-109 (Saudi Arabia); Case No. 334/7/Q-1431H, Appeals Decision No. 348/AP/7-1432H, *in* 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1432 HIJRI, 1436 Hijri, at 609-11 (Saudi Arabia); Case No. 4900/1/Q-1425H, Appeals Decision No. 395/AP/3-1430H, *in* 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1430 HIJRI, 1436 HIJRI, at 1245-46 (Saudi Arabia).

<sup>1312</sup> Case No. 71/2/Q-1427H, at 83-109.

<sup>1313</sup> *Id.* at 108.

<sup>1314</sup> Case No. 4248/1/Q-1429H, Appeals Decision No. 855/AP/12-1432H, *in* 1 COMMERCIAL COLLECTION PRINCIPLES AND DECISIONS OF YEAR 1432 HIJRI, 1436 HIJRI, at 41-46 (Saudi Arabia).



*sharia*.<sup>1315</sup> And while this seems to be of a smaller scale contract, it may guide in understating the local Saudi judicial reasoning in interacting with arbitral awards generally at least.

The international consensus on recognizing and enforcing arbitral awards adheres to universal standards as to the importance of upholding foreign arbitral awards and judgments when contractual parties choose to resort to arbitration or foreign adjudicative entities. Party autonomy must equally be upheld to its outcomes, i.e. enforcing the awards or judgments resulting from any disagreements.

Nonetheless, public policy has proven to be the ground that opens the door for countries' contextual characteristics. The balance between engaging with the international community and acknowledging global dynamics of diverse contractual parties is perhaps ultimately safeguarded by the notion of public policy to preserve a degree of state regulatory autonomy to administer its internal affairs and espouse its domestic values. The remnant challenge is balancing both international assurances pertaining to contract enforcement and domestic public policy. By displaying previous case law, this balance that the GCC States face is necessarily an intricate challenge. GCC judicial institutions are to consider implications of domestic public policy when engaging with foreign investors. Perhaps the domestic GCC judiciary should act with the mindset of operating as both a local state actor and international one. The judicial behavior would so reflect keenness about upholding local values as much as ensuring the country's global presence. The international principles do not stop at merely recognizing and enforcing foreign awards and judgments.

### Expropriation

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<sup>1315</sup> *Id.* at 41–46.

Infrastructure project success is contingent on a genuine partnership lasting throughout the life of the project. Countries may encounter a multiplicity of circumstances during the timeframe of their contractual relationships with the private sector. And living up to contractual promises in times of crisis is perhaps amongst the most onerous situations any party would confront. The issue at the outset is, single-minded state actions with regards to a project may avail the government's weakness to uphold promises when such are not in its favor. The government as a sovereign must nevertheless maintain its services to the public and preserve its very survival both of which are indorsed in the name of public interest.<sup>1316</sup> Contractual sanctity is fundamental, but consensus also exists affirming that this principle should not entirely confine a governmental counterpart from acting with a public interest incentive, provided the process is fair and the private partner is adequately compensated.<sup>1317</sup>

One of the rather biggest challenges a private investor in long-term concessions may face is the issue of expropriation. A pivotal undertaking is when a country's government promises fair market facilitation and to restrain itself as a market regulator, i.e. Gulf 2030 and 2035 visions, then expropriates or nationalizes a utility or service for the public. The level of risk the private sector hence bears in PPP projects are nothing short of being significant, and this must be accounted for in advance when tailoring PPP agreements and sharing and managing risks between the contractual parties.<sup>1318</sup> Expropriation is but one element of such risks. And from a regulatory viewpoint, states often regulate expropriation in their relationships with other nations through BITs or international investment agreements (IIAs), of which private investors benefit

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<sup>1316</sup> Hans Christiansen, *The OECD Principles for Private Sector Participation in Infrastructure*, in PUBLIC INVESTMENT AND PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 923, at 157–58.

<sup>1317</sup> *Id.* at 157–58.

<sup>1318</sup> See discussion *supra* Ch. II of this study, Risk Allocation.

from.<sup>1319</sup> This is especially true and in high demand in countries where predictability of governmental actions is questioned.<sup>1320</sup>

Expropriation according to UNCTAD refers generally to:

[Sic] Property-specific or enterprise-specific takings where the property rights remain with the State or are transferred by the State to other economic operators. Expropriations may consist of a large-scale taking of land by the State, made with the purpose of redistributing it, or specific takings where the target is a specific foreign firm (for example, a firm dominating a market or industry) or a specific plot of land (for example, to build a highway).<sup>1321</sup>

The major takeaway from comprehending expropriation, yet not so surprising, is that pure state public policy motivated actions, or those conducted in the name of public interest, fall outside the scope of what is referred to as expropriation.<sup>1322</sup> This means, these state measures are legitimate governmental actions and are by no means mandatorily compensable for. These state police powers would nevertheless need to be fair.<sup>1323</sup> Pure public policy and public interest state actions would consequently reluctantly be taken for granted by the private partner without a battle. Public policy comes back to haunt international standards continuously as seen in this study to leave the door ajar for states to act with certain domestic peculiarities. This is the state's liberation from losing its entire sovereign identity. And so, as previously pointed out,

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<sup>1319</sup> U.N. CONF. TRADE & DEV., EXPROPRIATION: UNCTAD SERIES OF ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at xii, U.N. Doc. UNCTAD/DIAE/IA/2011/7, U.N. Sales No. E.12.II.D.7 (2012) [hereinafter UNCTAD SERIES: EXPROPRIATION]; Ginsburg, *supra* note 980, at 107–08.

<sup>1320</sup> Jose Alvarez, *The Once and Future Foreign Investment Regime*, in LOOKING INTO THE FUTURE: ESSAYS IN INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 611–12, 615 (Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane & Siegfried Wiessner eds., 2010); Ginsburg, *supra* note 980, at 108–09; ROBERT HOWSE & PETRUS VAN BORK, POLITICAL RISK INSURANCE AS A TOOL FOR SUSTAINABLE INVESTMENT POLICY IN THE LEAST-DEVELOPED COUNTRIES: MIGA AND BEYOND 4 (2018).

<sup>1321</sup> The term expropriation is also often used interchangeably with other terms such as nationalization and takings. Nationalization at least would refer to a more larger-scale taking from the government of private property of which could be and thus retain state control over this sector or broader economic activity. UNCTAD SERIES: EXPROPRIATION, *supra* note 1319, at 5–6.

<sup>1322</sup> *Id.* at xiii, 2, 78–105. *See also* Methanex Corp. v. US, UNCITRAL/NAFTA, Final Award, Part IV, Chapter D, ¶ 7 (Aug. 3, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>; Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, ¶¶ 103-106 (Dec. 16, 2002).

<sup>1323</sup> UNCTAD SERIES: EXPROPRIATION, *supra* note 1319, at xiii, 78–79; *Methanex*, ¶ 7; *Feldman*, ¶¶ 103-106.

expropriation is not prohibited. It is rather contingent on certain requirements, including fair compensation. The US 2012 Model BIT Agreement for instance provides:

Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment] (1) through (3).<sup>1324</sup>

Simply put, while no state is banned from measures that equate to expropriation, the action must nonetheless be fair. The US Model BIT Agreement reflects international best practice on expropriation.<sup>1325</sup> Recent 2017 UAE-Rwanda BIT embodied identical language,<sup>1326</sup> as has Kuwaiti BITs,<sup>1327</sup> and Saudi Arabian similar agreements, as well.<sup>1328</sup> And countries across the globe furthermore maintain this standard, such as the TPP Agreement, which adopted an analogous substance.<sup>1329</sup>

Expropriation in the previous UNCTAD and BITs meaning is not always all that clear.

There are certainly grey areas. Accordingly, there are different forms of expropriation. This state

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<sup>1324</sup> 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, art. 6 [hereinafter 2012 U.S. MODEL BIT], <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

<sup>1325</sup> UNCTAD SERIES: EXPROPRIATION, *supra* note 1319, at 1 (“States have a sovereign right under international law to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons. In order to be lawful, the exercise of this sovereign right requires, under international law, that the following conditions be met: (a) Property has to be taken for a public purpose; (b) On a non-discriminatory basis; (c) In accordance with due process of law; (d) Accompanied by compensation.”).

<sup>1326</sup> *See* Agreement Between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, Rwanda-U.A.E., art. 8, Nov. 1, 2017 [hereinafter U.A.E.-Rwanda BIT], <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5665>.

<sup>1327</sup> *See, e.g.*, Agreement between the Government of the Kyrgyz Republic and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, Kuwait-Kyrgyz, art. 7, Dec. 13, 2015 [hereinafter Kuwait-Kyrgyz BIT], <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5421>.

<sup>1328</sup> *See* Agreement between the Kingdom of Saudi Arabia and the Hashemite Kingdom of Jordan for the Encouragement and Reciprocal Protection of Investments, Saudi Arabia-Jordan, art. 10, Mar. 27, 2017 [hereinafter Saudi Arabia-Jordan BIT], <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5624>.

<sup>1329</sup> *See* TPP, *supra* note 148, art. 9.8.

measure may generally adopt either of two general forms, direct and indirect expropriation. *Direct expropriation* would refer generally to “open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host state.”<sup>1330</sup> As for *indirect expropriation*, it would refer to “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”<sup>1331</sup> The latter form of expropriation would include a change in law for instance. In the case of *Starret Housing Corporation v. Islamic Republic of Iran*, the Iran-United States Claims Tribunal held that measures that the host government takes against the foreign investor’s property would render the rights of the investor on the property “so useless” even if the title to the property remains in the hands of the investor.<sup>1332</sup> Other investor-state arbitration cases that supported this result with regards to especially indirect expropriation are, *S.D. Myers Inc. v. Canada* (2000), *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (2000), *Metalclad Corporation v. United Mexican States* (2000), and *Tecnicas Medioambientales Tecmed S.A. v. Mexico* (2003).<sup>1333</sup> Where direct expropriation

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<sup>1330</sup> *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000). It must be pointed that the *Metalclad* Tribunal did base its understanding of expropriation based on the previous NAFTA agreement, nonetheless, the language within this agreement is similar to that of other BITs and IIAs. UNCTAD defines direct expropriation as, “a mandatory legal transfer of the title to the property or its outright physical seizure. Normally, the expropriation benefits the State itself or a State-mandated third party.” UNCTAD SERIES: EXPROPRIATION, *supra* note 1319, at 6. See also Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV.- FOR. INT’L L.J. 1, 7 (2005).

<sup>1331</sup> *Metalclad*, ¶ 103.

<sup>1332</sup> *Starret Housing Corp. v. Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 154 (1983). See also Newcombe, *supra* note 1330, at 8.

<sup>1333</sup> *S.D. Myers Inc. v. Canada*, UNCITRAL/NAFTA, Partial Award (Nov. 13, 2000), 40 I.L.M. 1408 ¶ 283; *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000); *Metalclad*, ¶ 36; *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 115 (May 29, 2003).

correspondingly appears to be easier to identify, indirect expropriation may in many instances be contestable.

In ICSID case *Metalclad Corporation v. The United Mexican States*, the arbitral Tribunal considered the actions of the Mexican Federal Government including its Municipality granting approvals to the Metalclad corporation to engage in economic activities in the country, operating landfills, then rescinding all approvals and ending the company's activity, tantamount to indirect expropriation.<sup>1334</sup> The Mexican Municipality in the Metalclad case denied the issuance of construction permits in the landfills with the justification that the economic activity would have detrimental environmental effects on the designated land. The Municipality's stance appears to coincide with the idea of acting in the name of the public interest to prevent undesired environmental effects. The problem here is rather the divergence of state actions between different government entities in Mexico itself. While the Mexican Federal Government approved Metalclad's anticipated economic activity, the Municipality of the same country decided otherwise. The private investor's legitimate reliance on the Federal Government's green light was consequently shaken. Kuwaiti authorities ought to consider this situation in reference to the previously displayed bureaucratic situation in this study about PARLT engaging in its functions with many other entities, which could cause confusion. Clarity is important, as state action should be concerted. The ICSID Tribunal in *Metalclad* eventually did not consider the Mexican authorities to be acting within their legitimate regulatory authority capacity, i.e. for public interest reasons, rather, their actions were deemed acts of indirect expropriation.

When a state government decides to introduce new legislation, change the law, for instance, or any other regulatory intervention or institutional practice such as the imposition of

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<sup>1334</sup> *Metalclad*, ¶¶ 104–07, 112.

taxes and tariff adjustments, the status of the private investor may significantly be impaired. Moreover, in other cases and as a consequence of such state actions, it may further be impossible for the private corporation to sustain the economic activity in the host country. The actions of the government would therefore cause a material adverse impact on the private party. In the *Metalclad* aforementioned case, the Tribunal also pointed out that there was a new Decree that was issued by the Mexican Government related to the ecological designation of lands within the country.<sup>1335</sup> This Decree would have made Metalclad's landfill activity prohibited and thus impossible and would consequently equate to an act of expropriation in and of itself.<sup>1336</sup>

This regulatory intervention equating to indirect expropriation has been further grounded in international investment law case load. In *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica (Berkowitz v. Costa Rica)*, green lush Costa Rica was labelled "expropriator" for intending to preserve its beautiful parks. Once again, it appears that Costa Rica is pursuing but the noblest of public interest aspirations to preserve its sustainable environmental future for its present and future Costa Rican and global citizens to enjoy. This graciousness was not the issue in the arbitral award. It was rather about how fair, conforming with due process, and non-discriminatory Costa Rican authorities were with their private investor, Space International Investments et al, through their regulatory and administrative measures.<sup>1337</sup> The Tribunal considered Costa Rican governmental actions with regards to the lots in question to have led to situations where, "the practical and economic use of the properties was

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<sup>1335</sup> *Id.* ¶ 109.

<sup>1336</sup> *Id.* ¶¶ 109–11.

<sup>1337</sup> *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, ¶¶ 245, 264-66 (May 30, 2017). These conclusions that have been drawn by the Tribunal are despite the fact that the Tribunal ultimately declined to impose its jurisdiction in certain issues raised by the claimants due to procedural matters related to the date the underlying investment agreement was effective, the CAFTA Agreement, in this case.

irretrievably lost.”<sup>1338</sup> The Tribunal nonetheless found that in certain other instances, the Costa Rican Government was not arbitrary in its expropriation procedures.<sup>1339</sup> In Costa Rica, the matter was its constitutionally-established fundamentals stressing that while private property is protected, the property’s service to public interest is equally preserved.<sup>1340</sup> This is similar to the constitutions of the GCC States in this study, where property has a somewhat socialist aspect.<sup>1341</sup> And these governmental gestures especially these days may not be all that evil. Some may label them protectionists, others as socialist, yet their intention is to further foster environmentally sustainable communities. This contextual approach is also rather universal, to a certain degree. This is in consideration of climate change policies yet the backlash against this global movement as well, which is very confusing.<sup>1342</sup>

GCC PPP related regulations have embodied provisions safeguarding expropriation. The Kuwait PPP Law contemplated expropriative-like practices to be accounted for in the PPP agreement being drafted between the parties when deciding on the risk allocation scheme, or risk matrix.<sup>1343</sup> This sort of risk would be assessed in the context of assessing the different contingent liabilities of both parties, and not surprisingly as a result, premiums of projects may go up when the level of risk to engage in the country’s economic activity is higher.<sup>1344</sup> And so, while it

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<sup>1338</sup> *Id.* ¶ 264.

<sup>1339</sup> *Id.* ¶¶ 252, 271.

<sup>1340</sup> *Id.* ¶¶ 43–44.

<sup>1341</sup> See discussion *supra* Ch. III of this study on regulatory frameworks in the Gulf.

<sup>1342</sup> See, e.g., Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), <https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html>; Steven Mufson, *Financial Firms Lead Shareholder Rebellion Against ExxonMobil Climate Change Policies*, WASH. POST (May 31, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/05/31/exxonmobil-is-trying-to-fend-off-a-shareholder-rebellion-over-climate-change/?noredirect=on&utm\\_term=.8893b2ee0c9c](https://www.washingtonpost.com/news/energy-environment/wp/2017/05/31/exxonmobil-is-trying-to-fend-off-a-shareholder-rebellion-over-climate-change/?noredirect=on&utm_term=.8893b2ee0c9c).

<sup>1343</sup> Kuwait PPP Law, art. 35 (“The Partnership Agreement shall include the following in particular: 9. The basis for risk allocation associated with changes in laws or unforeseen events or force majeure and the determined compensation, as per the circumstances.”).

<sup>1344</sup> Corbacho & Schwartz, *supra* note 923, at 97–100.



appears that private participation in infrastructure through PPPs could save some bucks on the short run, or value for money, it is not the case in especially high-risk countries with unpredictable governmental actions throughout the project life.<sup>1345</sup> The state government could bear the risk of expropriation, and this may be a large undertaking on the state. This is perhaps also expected according to previously mentioned international investment principles, yet PPPs offer the niche of risk sharing in such infrastructure projects. The PPP Manual of Kuwait recognized this dynamic and considered expropriation as a non-project related risk, but also separately addressed change of law as a separate risk.<sup>1346</sup> The Kuwait Investment Law has moreover secured the placement of expropriation in Kuwaiti regulations and pledged that resort to such action must meet international safeguards as mentioned above.<sup>1347</sup>

The Kuwaiti judiciary attempted to identify the state's authority to expropriate and asserted it's contingency on public interest.<sup>1348</sup> It is not clear judicial guidance, but in one of such cases, the Administrative Circuit ruled in favor of the government's expropriative actions in eliminating a category of permits to exercise certain commercial activities in Kuwait, which directly affected the claimant.<sup>1349</sup> This action was not deemed to necessitate any compensation

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<sup>1345</sup> HOWSE & VAN BORK, *supra* note 1320, at 4–5.

<sup>1346</sup> What falls under this category of risks according to the PPP Manual would include: political risks, such as expropriation, defaults on government contractual obligations, political instability, currency convertibility and transfer; regulatory risks, such as regulatory pricing risks; legal environment risks, such as risks arising from changes to the judicial system or policy changes such as changes in tax policy; lawsuits from relevant parties or arbitration procedures. KUWAIT PPP MANUAL, *supra* note 639, at 52, 178. The Manual also discusses elements of changes in laws that could be discriminatory in certain instances, of which the private partner should be protected against. *Id.* at 235–39.

<sup>1347</sup> Kuwait Investment Law, art. 19 (“No Investment Entity, licensed in accordance with the provisions of this Law, shall be confiscated pursuant to this Law nor be deprived of its property except in the public interest and only in accordance with the applicable laws and against compensation equivalent to the true economic value of the expropriated project at the time of expropriation, estimated in accordance with the economic situation prior to any threat of expropriation. The due compensation is to be paid as soon as the said decision is taken.”).

<sup>1348</sup> Court of Cassation Decision No. 901/2003, Dec. 13, 2004, Administrative, at 3 (Kuwait).

<sup>1349</sup> *Id.* at 3.

from the state, as it was justified by public interest.<sup>1350</sup> In another attempt of what appears to address indirect expropriation, Kuwait’s DLAL deliberated a situation where a new legislation was introduced while a public works contract was ongoing.<sup>1351</sup> In this situation, DLAL considered the new labor law that significantly changed work conditions and ultimately impacted the implementation of the ongoing public works project, a *force majeure* circumstance.<sup>1352</sup> This circumstance was substantiated by the nature of the administrative contract of which the government retains special powers, yet when such changes to the law cause an “egregious (*fadih*) loss that is unwarranted in transactions” the public entity must share some of the responsibility in compensating the private party.<sup>1353</sup> The loss must be egregious, as regular losses are part of the nature of commerce that entails incurring profits and losses alike.<sup>1354</sup> This situation that DLAL addressed, even though argued in the context *force majeure*, may more accurately fall under indirect expropriation.

And so, be it Kuwaiti institutional capacity in issuing the necessary permits and approvals for project implementation or sudden discriminatory legislative changes affecting certain projects, the Kuwaiti Government must foresee the costs of state actions not only on current infrastructure projects, but also future projects yet to come in terms of possible project costs and private sector confidence associated with the level of risk.

The Dubai PPP Manual similarly stressed that the contractual parties must address expropriatory risks in addition to events of changes to laws in their contract.<sup>1355</sup> The parties shall

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<sup>1350</sup> *Id.*

<sup>1351</sup> Advice No. 2/56, Sept. 16, 1961, at 3–4 (Kuwait).

<sup>1352</sup> *Id.* at 3.

<sup>1353</sup> *Id.* at 3-4.

<sup>1354</sup> *Id.* at 4.

<sup>1355</sup> Dubai PPP Manual at 206-07.

decide on their allocation accordingly as well. The newly enacted UAE Federal Foreign Direct Investment Law confirms this regulatory safeguard by ensuring, “A Foreign Direct Investment Project may not be expropriated in whole or part except for public interest and in exchange for fair compensation calculated at time of expropriation.”<sup>1356</sup>

Saudi Arabian Privatization Manual takes the other GCC States’ approach and identifies the importance of assessing governmental actions that may fall under the scope of expropriation under the auspices of the risk matrix in shaping the contractual relationship.<sup>1357</sup> The Manual considers the risk of change in law that mandates compensation as that of a particularly discriminatory nature and that causes adverse impacts on the private party.<sup>1358</sup> The Saudi Foreign Investment Law followed pursuit of the other Gulf States and ensured investor protection from expropriation.<sup>1359</sup> Furthermore, in one of the cases heard by *Diwan Almathalim* concerning an administrative contract, while the court considered the execution of the contract as obligatory to both of its contractual parties, the *Diwan* nonetheless held that the government entity in the contract arbitrarily decided to give the contractor a land other than that as agreed upon which resulted in making the contractor’s implementation of their contractual obligations impossible demanding just compensation to the contractor.<sup>1360</sup> This measure taken by the Saudi Arabian

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<sup>1356</sup> U.A.E. Foreign Direct Investment Law, art. 9(1).

<sup>1357</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, at 105.

<sup>1358</sup> *Id.*

<sup>1359</sup> Saudi Foreign Investment Law, art. 11 (“The foreign investor’s investments may not be confiscated, wholly or partially without a court judgment. Moreover, they may not be subject to expropriation, wholly or partially, except for public interest, in exchange for a fair compensation according to laws.”).

<sup>1360</sup> Case No. 51/T/1-1413H, *in* THE COLLECTION OF PRINCIPLES DECIDED BY THE COMMERCIAL AUDITING CIRCUIT OF *DIWAN ILMATHALIM* FROM 1407-1423 HIJRI (Saudi Arabia). *See also* Case No. 42/T/1-1413H, *in* THE COLLECTION OF PRINCIPLES DECIDED BY THE COMMERCIAL AUDITING CIRCUIT OF *DIWAN ILMATHALIM* FROM 1407-1423 HIJRI (Saudi Arabia). And in another case, the contractor deserved compensation for the government suddenly imposing on them the obligation to obtain permits while implementing the contract. Case No. 9/T/1-1413H, *in* THE COLLECTION OF PRINCIPLES DECIDED BY THE COMMERCIAL AUDITING CIRCUIT OF *DIWAN ILMATHALIM* FROM 1407-1423 HIJRI (Saudi Arabia).

government is perhaps tantamount to expropriation as the land originally agreed to hand over to the contractor was retrieved by the government entity and rather replaced by another land.<sup>1361</sup>

As displayed in Gulf regulations, expropriation could be interpreted as a risk that must be mitigated otherwise compensated for when it is too late to reinstate the normal course of project implementation.<sup>1362</sup> Some may refer to this category of risk as government-related risks, which is largely a World Bank approach.<sup>1363</sup> These could include regulatory risks, such as changes to laws and permits and license-related actions, and political risks like direct expropriations.<sup>1364</sup> The consequences of risk levels that are associated with countries, of which expropriation is one major example of, directly influence the country's capacity as a sovereign to host economic activity and investment instruments. In fact, even lenders as in banks that are willing to finance infrastructure projects in countries, are reluctant to take on what they perceive as political risk or choose to settle for that risk but with a higher price to be paid.<sup>1365</sup>

The degree of risk in engaging in economic activity in a country is by no means to be downplayed. The success of attracting investors to the country's market is often largely dependent on risk variables. To put this into play, markets used to be categorized based on the

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<sup>1361</sup> *Diwan Almatalim* in another set of precedents established the threshold in which the government entity in an administrative contract may act or introduce changes to the contract. Although this precedent appears to be closer to a contractual breach of the contract and government's right to change its clauses, expropriation in its essence implies a breach of contract by the government entity in certain conditions by not implementing the agreed upon provisions. In other instances, it is other governmental entities that cause expropriatory measures to other contracts. Nonetheless, as this may guide on the Saudi government's judicially affirmed responsibilities, the *Diwan* stressed the government's right to cause changes to contractual provisions, this change must nevertheless not lead to a situation where contractual clauses are fundamentally reversed, and the contractor appears "to be in the midst of a completely new contract", otherwise the government shall be obliged to compensate the contractor. Case No. 75/T/1-1413H, at 120-21.

<sup>1362</sup> HOWSE & VAN BORK, *supra* note 1320, at 3.

<sup>1363</sup> Geert Bekaert, *Market Integration and Investment Barriers in Emerging Equity Markets*, 9 WORLD BANK ECON. REV. 75, 77 (1995); *Guarantees Program*, WORLD BANK, <http://www.worldbank.org/en/programs/guarantees-program> (last visited Nov. 29, 2018).

<sup>1364</sup> HOWSE & VAN BORK, *supra* note 1320, at 3; Bekaert, *supra* note 1363, at 77.

<sup>1365</sup> DELMON, *supra* note 60, at 49.

level of development, yet the terminology has been replaced with more recent classifications. In relation to GCC countries, such classification has rather shifted to “frontier markets” or “emerging markets” based on the level of maturity of the market of which degrees of risk are accounted for to assess the volatility of such market. These classifications also include other factors like the level of maturity of capital markets and existing regulatory restrictions on purchasing and selling securities.<sup>1366</sup> Frontier markets would refer to the least developed of markets with very low per capita incomes that have not established proper capital markets and have higher levels of risks to enter the markets.<sup>1367</sup> Emerging markets would refer to markets that have made progress in developing their capital markets and defeating degrees of risks investors may confront and have a lower per capita incomes.<sup>1368</sup> Both these markets are juxtaposed against developed markets or industrial economies like that of the US, Japan, and the UK, where markets are very mature and risk levels are lower.<sup>1369</sup> The global benchmarks that assess the level of maturity of the market and categorize them accordingly include MSCI or Standard and Poor (S&P) Dow Jones Indices for instance.<sup>1370</sup> In this regard, the GCC countries have most recently varied from frontier markets to emerging. Nonetheless, ultimately, all of Kuwait, the UAE, and Saudi Arabia have been currently categorized as emerging markets.<sup>1371</sup> Kuwait, was the last to be

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<sup>1366</sup> Campbell R. Harvey, *The Risk Exposure of Emerging Equity Markets*, 9 WORLD BANK ECON. REV. 19, 42 (1995); Bekaert, *supra* note 1363, at 95–97.

<sup>1367</sup> *What is the Difference Between a Developed, Emerging, and Frontier Market?*, NASDAQ (May 11, 2012, 10:00 AM), <https://www.nasdaq.com/article/what-is-the-difference-between-a-developed-emerging-and-frontier-market-cm140649>.

<sup>1368</sup> *Id.*

<sup>1369</sup> Bekaert, *supra* note 1363, at 79–83, 95, 99–100.

<sup>1370</sup> Harvey, *supra* note 1366, at 28.

<sup>1371</sup> *MSCI Announces the Results of its Annual Market Classification Review*, MSCI, <https://www.msci.com/market-classification> (last visited Aug. 16, 2019); Mohieddine (Dino) Kronfol, *EM Index Inclusion Could Spell a New Chapter for GCC Bonds*, EMERGING MARKET BLOG (Oct 2, 2018), <http://emergingmarkets.blog.franklintempleton.com/2018/10/02/new-chapter-gcc-bond-emerging-market/>.

bumped up a tier to the emerging markets bracket only effective in September of 2019 in some indexes and in others effective in 2020.<sup>1372</sup>

Similarly, as well, investment instruments such as stocks or bonds are equally rated by credit rating agencies including Moody's, Fitch, and S&P, involving sovereign ratings that consider the level of risk in the country.<sup>1373</sup> The particular aim of these ratings are to reflect the level of confidence that financial commitments will be met, for the sake of this study, GCC governments' abilities to meet their financial obligations. The most common tiers of credit ratings from highest probability of meeting financial commitments to lowest include: AAA, AA, A, BBB, BB, B, CCC, CC, C, and D.<sup>1374</sup> Many factors may come into play to elicit these credit rating tiers, nonetheless, each category is thus in some way simply associated with the level of risk of doing business in the country. The GCC States are currently hovering around AA and A ratings.<sup>1375</sup> And not surprisingly because of the volatility of the energy markets, oil and gas

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<sup>1372</sup> S&P DOW JONES INDICES, *S&P Dow Jones Indices' 2018 Country Classification Consultation Results* (Dec. 5, 2018), [https://www.spice-indices.com/idpfiles/spice-assets/resources/public/documents/828959\\_spdji2018countryclassificationconsultationresults12.5.2018.pdf](https://www.spice-indices.com/idpfiles/spice-assets/resources/public/documents/828959_spdji2018countryclassificationconsultationresults12.5.2018.pdf); Press Release, Results of the MSCI 2019 Market Classification Review (June 25, 2019), [https://www.msci.com/documents/10199/238444/RESULTS\\_OF\\_MSCI\\_2019\\_ANNUAL\\_MARKET\\_CLASSIFICATION\\_REVIEW.pdf/f134c97c-73da-71c7-4b3c-d1f637c3eace](https://www.msci.com/documents/10199/238444/RESULTS_OF_MSCI_2019_ANNUAL_MARKET_CLASSIFICATION_REVIEW.pdf/f134c97c-73da-71c7-4b3c-d1f637c3eace).

<sup>1373</sup> Bekaert, *supra* note 1363, at 77.

<sup>1374</sup> According to S&P: AAA= Investment Grade: Extremely strong capacity to meet financial commitments; AA= Investment Grade: Very strong capacity to meet financial commitments; A= Investment Grade: Strong capacity to meet financial commitments, but somewhat susceptible to adverse economic conditions and changes in circumstances; BBB= Investment Grade: Adequate capacity to meet financial commitments, but more subject to adverse economic conditions; BB= Speculative Grade: Less vulnerable in the near-term but faces major ongoing uncertainties to adverse business, financial and economic conditions; B= Speculative Grade: Most vulnerable to adverse business, financial and economic conditions but currently has the capacity to meet financial commitments; CCC= Speculative Grade: Currently vulnerable and dependent on favorable business, financial and economic conditions to meet financial commitments; CC= Speculative Grade: Highly vulnerable: Default has not yet occurred, but is expected to be a virtual certainty; C= Speculative Grade: Currently highly vulnerable to non-payment, and ultimate recovery is expected to be lower than that of higher rated obligations, D= Speculative Grade: Payment default on a financial commitment or breach of an imputed promise; also used when a bankruptcy petition has been filed or similar action taken. *Understanding Ratings, S&P Global Ratings*, S&P GLOBAL, [https://www.spratings.com/en\\_US/understanding-ratings#firstPage](https://www.spratings.com/en_US/understanding-ratings#firstPage) (last visited Dec. 1, 2019).

<sup>1375</sup> Amany Zaher, *Top 5 Arab Countries with A Stable or Positive Sovereign Credit Rating Outlook*, FORBES MID. E. (Feb. 8, 2018), <https://archives.forbesmiddleeast.com/en/top-5-arab-countries-stable-positive-sovereign-credit-rating-outlook/>; *Credit Rating*, TRADING ECONOMICS, <https://tradingeconomics.com/country-list/rating> (last visited Dec. 5, 2018).

backed revenue payments, which is largely a feature of the GCC states, financial commitments accordingly may carry a level of risk, and the current sovereign ratings are impacted as a result.<sup>1376</sup> Some of this instability has been linked with current geopolitical escalations and their bearing on sovereign creditworthiness in addition to regulatory changes regarding labor policies that affect foreign workers and tax reforms.<sup>1377</sup> Needless to say though too, some regulatory reforms in the GCC business environment have led to a degree of stability in sovereign ratings.<sup>1378</sup>

These factors that affect the level of risk associated with the countries' markets also mean higher risk premiums and that could mean costlier projects for GCC countries.<sup>1379</sup> To be fair though, high risk for the private sector would also regularly equate to a higher return on investment, at least more likely than not.<sup>1380</sup> It is a choice principally contingent on the private party's willingness to engage in such an equation. The challenge that remains is facing the unexpected over a long period of project duration.

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<sup>1376</sup> *Navigating LNGs Choppy 'CS': Capacity Contracting and Credit*, 3 INFRASTRUCTURE FINANCE OUTLOOK REV., Q3, 2018, at 1, 7, <https://www.spratings.com/documents/20184/1634005/IFR+Finance+Outlook+Q3+2018+Review/53c313a0-7982-0f1c-ad7d-22226304b303>; Babu Das Augustine, *GCC's Credit Strength Expected to Weaken Further in 2017*, GULF NEWS (Jan. 16, 2017), <https://gulfnews.com/business/gccs-credit-strength-expected-to-weaken-further-in-2017-1.1962763>; Aarti Nagraj, *GCC Countries Face Further Credit Rating Downgrades*, GULF BUS. (Oct. 3, 2016), <https://gulfbusiness.com/gcc-countries-face-credit-rating-downgrades/>.

<sup>1377</sup> Rebecca Spong, *'Negative' Outlook for Gulf Sovereign Ratings in 2018, says Moody's*, ARAB NEWS (Jan 16, 2018), <http://www.arabnews.com/node/1226336/business-economy>; Jan Friederich & Krisjanis Krustins, *High Oil Prices do not Eliminate Risks to GCC Sovereign Ratings*, THE NAT'L (June 23, 2018), <https://www.thenational.ae/business/economy/high-oil-prices-do-not-eliminate-risks-to-gcc-sovereign-ratings-1.743166>; *GCC's 2018 Outlook for Sovereign Creditworthiness Remains Negative*, KUWAIT TIMES (Jan. 16, 2018), <http://news.kuwaittimes.net/pdf/2018/jan/16/p18.pdf>; Richard Soundardjee & Jaime Sanz, *GCC Sovereigns Must Keep up with Structural Reforms to Retain Strong Credit Ratings*, THE NAT'L (Dec. 17, 2017), <https://www.thenational.ae/business/gcc-sovereigns-must-keep-up-with-structural-reforms-to-retain-strong-credit-ratings-1.685115>.

<sup>1378</sup> Zaher, *supra* note 1375.

<sup>1379</sup> Harvey, *supra* note 1366, at 41; Bekaert, *supra* note 1363, at 99; HOWSE & VAN BORK, *supra* note 1320, at 6–7.

<sup>1380</sup> Bekaert, *supra* note 1363, at 89; Harvey, *supra* note 1366, at 28, 41. Javiera Estrada concludes that a definite correlation between higher volatility in emerging markets and higher risks is not all that accurate. Javiera Estrada, *The Cost of Equity in Emerging Markets: A Downside Risk Approach*, EMERGING MARKETS Q., Fall 2000, at 1, 6.

It is likely that private foreign investors would be reluctant to believe that local GCC courts would be inclined to rule in their favor with regards to expropriation-like practices in accordance with international principles.<sup>1381</sup> Rather, the notions of public interest may be stretched far enough by the local judiciary in favor of their Gulf governments. Clearly, investor-state dispute settlements as those conducted by ICSID and other forums may be risky for governments too when it comes to their expropriatory actions. The question is: do Gulf States really have a choice? The concern in this regard is what confidence will the local judiciary maintain when substituted by international adjudicative bodies.<sup>1382</sup> The consequential challenge that may also follow is the lack of local Gulf State incentives to boost the capacity of their local adjudicative bodies and rather simply replace them with the designation of international forums. The middle ground in the current Gulf status quo is that perhaps international fora may stimulate local capacity building to sensibly balance international principles with local public interest in a transitional phase of this sub-region.

On the contrary as well, international adjudicative bodies ought to remember that the investor-state relationship of which PPPs are one of are ultimately two-part, private investor on the one hand and state government on the other. This means while investor rights are certainly protected by the different international investment principles, including against expropriation, the same investors must experience the sovereign state's right to a certain degree of public interest, especially when such relates to public health, the environment, and security *ergo omnes*. Grounds have also been accepted to justify the state's right to regulate in the sphere of social and

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<sup>1381</sup> Ginsburg, *supra* note 980, at 113.

<sup>1382</sup> *Id.* at 122–23.



general welfare policies, which are not all that foreign to GCC States.<sup>1383</sup> In *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (LG&E v. Argentina)*, the Tribunal concluded that, “With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose.”<sup>1384</sup> This does not mean such state regulatory authorities are unfettered with no due regard to aforementioned safeguards of due process and non-discrimination. They would not however be compensable as expropriation.

And on this note, Benedict Kingsbury and Stephan Schill emphasize that a proportionality test is key in the dynamics between investor rights and the state’s sovereign right to regulate in the name of public interest.<sup>1385</sup> Some Tribunals have upheld such test in their analyses.<sup>1386</sup> And so, expropriation in its clearer direct version and tricky indirect form must be treated with a 21<sup>st</sup> century apprehension of the international community crying for internal regulatory safeguards that preserve such labor rights and environmental standards.<sup>1387</sup> Accordingly, while outcries to tame the concept of public interest are present, and understandable, the notion of expropriation must similarly be controlled.

The private investor is but a product of risk prone activity, i.e. business, as bitter or sweet this may sound. And in addition to commercial insurance coverage, political risk insurance may be an option to help mitigate implications of government actions through expropriation and

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<sup>1383</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 195 (Oct. 3, 2006); Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest- the Concept of Proportionality*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 75, 95 (Stephan W. Schill ed., 2010).

<sup>1384</sup> *LG&E v. Argentina*, ¶ 195.

<sup>1385</sup> Kingsbury & Schill, *supra* note 1383, at 77–79, 81–85, 88.

<sup>1386</sup> See *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11, Award, ¶¶ 416–17, 427 (Oct 5, 2012).

<sup>1387</sup> *LAZO*, *supra* note 1236, at 16.

beyond on the part of the private party.<sup>1388</sup> Both insurance schemes come at additional costs, but certain political risks necessitate these insurance policies as they are more difficult to manage keeping in mind that some risks not being susceptible to insurance coverage.<sup>1389</sup> The private party is up against many challenges that exceed expropriation of which international investment law principles attended to, yet both the government and investor must work jointly on addressing.

### National Treatment

When it comes to reemphasizing that the private sector pertinent to ongoing 2030 and 2035 development visions in the GCC is necessarily multinational, one of the single most important guarantees is that foreign investors in these infrastructure projects are treated as national investors would be.<sup>1390</sup> GCC institutions must uphold a business environment open to competition from all, in order to succeed with their visions and beyond. This means that Gulf rent-seeking practices that may have prevailed in the past and created a special local merchant-ruler connection may have to come to an end.

National treatment is a standard that ensures foreign investors receive the same care that is accorded to local investors.<sup>1391</sup> And thus, discriminatory behavior by GCC host governments

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<sup>1388</sup> There are certainly costs that come with such insurance packages, but the comparison to risk reparation might be costlier. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 226–28 (2d ed. 2012); HOWSE & VAN BORK, *supra* note 1320, at 7–9, 20; LAZO, *supra* note 1236, at 10. Further discussions about political risk insurance are to come when discussing other international investment law principles, especially the notion of full protection and security.

<sup>1389</sup> EURO. PPP EXPERTISE CTR. (EPEC), *TERMINATION AND FORCE MAJEURE PROVISIONS IN PPP CONTRACTS: REVIEW OF CURRENT EUROPEAN PRACTICE AND GUIDANCE* 59–60 (2013).

<sup>1390</sup> UNCTAD refers to the national treatment standard as, “perhaps the single most important standard of treatment embodied in international investment agreements.” UNCTAD, *NATIONAL TREATMENT*, at 1, U.N. Doc. UNCTAD/ITE/IIT/11(Vol.IV), U.N. Sales No. E.99.II.D.16 (1999).

<sup>1391</sup> DOLZER & SCHREUER, *supra* note 1388, at 204–05.

between the two different types of investors is challengeable.<sup>1392</sup> And in this context, what appears to be protectionist state attitudes by local preference of products or services are a problematic condition.

All GCC States explicitly protect foreign investors in accordance with the national standard treatment in their bilateral relations with other states.<sup>1393</sup> This entails protection of their Gulf corporations from being discriminated against abroad as well, and in order to guarantee this, in return reciprocally provide such protection to foreign investors engaging in economic activity in the GCC.

In *LG&E v. Argentina*, the Tribunal declared that discrimination may be established by the impact of the measure of a state government or intent behind the action itself.<sup>1394</sup> The Tribunal elucidated some criteria based on previous caselaw by providing:

In the context of investment treaties, and the obligation thereunder not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect. As stated in the *ELSI Elettronica Sicula SpA case (United States of America v. Italy)*, ICJ Report 1989 RLA 56 at 61–62 (20 July 1989), in order to establish when a measure is discriminatory, there must be (i) an intentional treatment (ii) in favor

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<sup>1392</sup> *Id.* at 203–04.

<sup>1393</sup> *See, e.g.*, Kuwait-Kyrgyz Republic BIT, art. 4 (providing for protections of both investors themselves and investments of foreign natural persons and entities under the national treatment standard that provide for conditions no less favorable than local governments would accord to their national investors). *See also* Agreement between the Government of the Republic of Iraq and the Government of the States of Kuwait for the Promotion and Reciprocal Protection of Investments, Kuwait-Iraq, art. 4, Dec. 6, 2013 [hereinafter Kuwait-Iraq BIT], <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5517>; Agreement between Japan and the Kingdom of Saudi Arabia for the Promotion and Protection of Investments, Saudi Arabia-Japan, art. 3, Apr. 30, 2013 [hereinafter Saudi Arabia-Japan BIT], <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5517>; Saudi Arabia-Jordan BIT, art. 4; Agreement between the Government of Colombia and the Government of the United Arab Emirates for the Promotion and Protection of Investments, U.A.E.-Colomb., art. 3, Nov. 12, 2017 [hereinafter U.A.E.-Colombia BIT], <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5668>; Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, U.A.E.-Mex., art. 3, Jan. 19, 2016 [hereinafter U.A.E.-Mexico BIT], <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5359>; U.A.E.-Rwanda BIT, art. 5.

<sup>1394</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 146 (Oct. 3, 2006); DOLZER & SCHREUER, *supra* note 1388, at 204.

of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.<sup>1395</sup>

The criteria above outline the condition encompassing the state government's deliberate will not to uphold a competitive business environment in the country when it invites multinationals to function, the GCC's incumbent plan. The Tribunal in this case considered Argentina's actions against gas distribution companies functioning in the country by adjusting their tariff schedules as unfavorable to such companies even where the Government did not intend to cause damage.<sup>1396</sup> The state measure was in itself deemed discriminatory.<sup>1397</sup> Arbitral Tribunal's in other instances did not consider the host government's intent to discriminate a relevant factor, such as in *Corn Products v. Mexico*. The Tribunal in this case concluded that discrimination is established by the very fact that Mexican sugar producers gained considerably by state policies of imposing taxes on foreign sugar producers and suppliers that had adverse effects.<sup>1398</sup> The outcome of the state policy was pertinent here and not the particular intent of the action.

Principally, the discrimination that serves as a challengeable ground must be of an unreasonable distinction, which is the threshold held by arbitral tribunals.<sup>1399</sup> This consequently means that not all distinctions between local and foreign investors may be labeled discriminatory. The *Feldman v Mexico* Tribunal further provided that "there are at least some

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<sup>1395</sup> *LG&E v. Argentina*, ¶ 146. See also *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)04/1, Decision on Responsibility, ¶¶ 117–19 (Jan. 15, 2008) (upholding the similar requirements or what it referred to as three-fold test to consider measures of a discriminatory nature thus violating the national treatment standard); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL/NAFTA, Award, ¶ 73 (Apr. 10, 2001), <https://www.italaw.com/cases/863>.

<sup>1396</sup> *LG&E v. Argentina*, ¶¶ 147–48.

<sup>1397</sup> *Id.* The Tribunal in this case though declined to agree with the Claimant that there was discrimination against them particularly.

<sup>1398</sup> *Corn Products v. Mexico*, ¶ 138.

<sup>1399</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, ¶ 170 (Dec. 16, 2002).

rational bases for treating producers and re-sellers differently, e.g., better control over tax revenues, discourage smuggling, protect intellectual property rights, and prohibit gray market sales, even if some of these may be anti-competitive.”<sup>1400</sup>

Nicholas DiMascio and Joost Pauwelyn offer deep insight into the non-discrimination principle in the international trade and investment regime.<sup>1401</sup> This principle is undoubtedly of utmost importance to both regimes.<sup>1402</sup> They further highlight the separate yet parallel regulation of both international trade and investment in terms of national treatment provoking a debate on the fragmentation of international law.<sup>1403</sup> Juxtaposing procurement policies with investment concessions when it comes to procuring goods as opposed to construction concessions that would be perceived as contributing to the economic development of the country, these authors simply put it:

For many domestic decision makers, foreign products always remain foreign, whereas foreign investments become local. As a result, there are generally fewer political pressures to discriminate against foreign investment, which is generally seen as ‘good,’ than there are to protect against foreign imports, which are generally seen as ‘bad.’”<sup>1404</sup>

This is a reason DiMascio and Pauwelyn further concluded that trade multilateralism might have been seen as essential, whereas less so in international investments regulations.<sup>1405</sup> Nevertheless, there seems to be more and more convergence appearing between the two disciplines in connection with national treatment standard, and one of such common factors

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<sup>1400</sup> *Id.*

<sup>1401</sup> Nicholas DiMascio & Joost Pauwelyn, *Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L. 48, 50–51 (2008).

<sup>1402</sup> *Corn Products v. Mexico*, ¶¶ 109–14. See also UNCTAD, NATIONAL TREATMENT, *supra* note 1390, at 1.

<sup>1403</sup> DiMascio & Pauwelyn, *supra* note 1401, at 48.

<sup>1404</sup> *Id.* at 56–57.

<sup>1405</sup> *Id.* at 57.

should be nationality.<sup>1406</sup> It must be noted that the national treatment principle is explicitly exempted from government procurement of goods in accordance with Article III 8(a) of the GATT 1994 Agreement.<sup>1407</sup>

While non-discrimination appears to be relatively self-explanatory when upholding the same criteria above, the challenging part perhaps is assessing what is referred to as “like” circumstances.<sup>1408</sup> In order to apply the national standard in situations where foreign investors claim they have been treated in an unfavorable manner in comparison with other local investors in GCC infrastructure projects, these investors must be in similar, or like, circumstances. The importance of this last criteria is understanding if there is any room whatsoever for state governments to give preferences to the local private sector to nurture its role in the future domestic economy.

Like circumstances have been interpreted as investors functioning in either similar sectors or businesses.<sup>1409</sup> The assessment is ultimately very circumstantial and depends on each case.<sup>1410</sup> As the *Pope & Talbot v. Canada* Tribunal rightly put it, “By their very nature,

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<sup>1406</sup> *Id.* at 89. Establishing the basis for violation of the national treatment standard necessarily entails firstly providing evidence about the foreign status or nationality. This may be more challenging than imagined. The ICSID Tribunal in *Hussein Nuaman Soufraki v. United Arab Emirates* concluded it had no jurisdiction (compétence-compétence (Kompetenz/kompetenz) to hear the claim brought by the Claimant Hussein Nuaman Soufraki according to the Italy-U.A.E. BIT in relation with a concession agreement of a Dubai port, because the claimant could not prove he was an Italian national. The Tribunal further affirmed that it rather relies on factual *prima facie* evidence pertaining to nationality provided by relevant governments, here the Italian Government, yet still retains an inquisitory role to establish the Claimant’s nationality especially when grounds for fraud or mistakes about obtaining the nationality are raised. *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for Annulment, ¶¶ 14-18, 60, 70-76 (June 5, 2007).

<sup>1407</sup> Anderson, *supra* note 149, at 46, 55.

<sup>1408</sup> DOLZER & SCHREUER, *supra* note 1388, at 206; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL/NAFTA, Award, ¶ 78 (Apr. 10, 2001), <https://www.italaw.com/cases/863>.

<sup>1409</sup> See *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, ¶¶ 170–82 (Dec. 16, 2002); *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)04/1, Decision on Responsibility, ¶ 120 (Jan. 15, 2008); *Pope & Talbot v. Canada*, ¶ 78.

<sup>1410</sup> As Lord Steyn states, “In law, context is everything.” *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 451 (Oct 5, 2012). See also *Corn Products v. Mexico*, ¶ 118; *Pope & Talbot v. Canada*, ¶ 75.

“circumstances” are context dependent and have no unalterable meaning across the spectrum of fact situations.”<sup>1411</sup> The Tribunal in this case factually determined that softwood lumber producers in Canada were not in like circumstances and thus no discriminatory nexus may be established between Canada’s rational policies and its treatment of local v. foreign producers.<sup>1412</sup> These circumstances differed with regards to both new entrants to the industry, which had to meet certain new criteria, and dissimilar provinces within Canada, such as British Columbia as opposed to other coastal regions.<sup>1413</sup> The conditions of these businesses functioning in Canada thus differed and state policy was upheld as non-discriminatory.

And while public interest is the state gateway to departing from certain international standards, such public interest justifications any GCC state may invoke in their infrastructure projects with a foreign entity are not to be taken at face value and may be costly when discriminatory. Tribunals have affirmed the role this public interest notion may serve to so to say deviate from the national standard in imposing local preferences like US policy on the use of local steel products by national and foreign contractors alike.<sup>1414</sup> The extent to which public interest may justify state measures are not solid and are rather dynamic dependent on the given circumstances.<sup>1415</sup>

Kuwaiti courts uphold non-discrimination in applying legal provisions and they have even emphasized the importance of being in like-circumstances. The principle of equal treatment according to the Kuwaiti Court of Cassation entails:

In its core, equal treatment between those who are in similar legal positions (statuses), and distinction in treatment between those in different legal positions;

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<sup>1411</sup> *Pope & Talbot v. Canada*, ¶ 75.

<sup>1412</sup> *Id.* ¶¶ 83–104.

<sup>1413</sup> *Id.*

<sup>1414</sup> DOLZER & SCHREUER, *supra* note 1388, at 207–08.

<sup>1415</sup> *Id.*

the meaning of the principle of equality in the law that all are equal before the law, no distinction between them or discrimination, as the rights and privileges provided by law in which persons directed by such laws benefit from its provisions that they resort to, based on unified rules provided by law with one protection on an equal level, and the obligations and duties imposed on them by law, everyone shall be subject to equally with no distinction for one person over the other.<sup>1416</sup>

The case actually related to Kuwait Airways Corporation and the claim related to the right of all other private sector aviation carriers to receive the same benefits preserved by law for Kuwait Airways in the same sector of private aviation carrier providers.<sup>1417</sup> The benefits included tariff and tax exemptions in addition to subsidies on fuel.<sup>1418</sup>

Kuwaiti DLAL also issued one of its legal advices affirming that a Kuwaiti corporation's benefit of income tax breaks and exemptions in the petrochemical industry in Kuwait extends to foreign partners.<sup>1419</sup> This situation existed when the foreign investment policies of Kuwait required foreigners to have a percentage of Kuwaiti partners in their business activities in the country. And thus, no discrimination in such like circumstances was permitted on the basis of nationality. The same Department, DLAL, also, nevertheless confirmed the application of Council of Minister's policy concerning preference given to local products at the time even where such locally produced products cost more.<sup>1420</sup> This affirmation related to the supply of the chlorine chemical required to manage and maintain a petrochemical refinery plant in Kuwait that would have been more cheaply supplied had a foreign manufactured product been accepted.<sup>1421</sup>

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<sup>1416</sup> Court of Cassation Decision No. 1222/2013, June 18, 2014, Administrative (Kuwait).

<sup>1417</sup> *Id.*

<sup>1418</sup> *Id.*

<sup>1419</sup> Advice No. 2/37/93-545, Mar. 13, 1993 (Kuwait).

<sup>1420</sup> Advice No. 2/12/87, Mar. 4, 1987, at 103–06 (Kuwait). *See also* DLAL Advice No. 2/18/94- 332: where preference, i.e. discrimination, in supply contracts was permitted and given to bids submitted in connection with local products that was not the lowest price, provided such bid does not exceed 10% of the amount of the lowest bid presented pertaining to supplying similar foreign products. Advice No. 2/18/94- 332, Feb. 14, 1994, at 494–96 (Kuwait).

<sup>1421</sup> DLAL Advice No. 2/12/87, at 105–06.



The 2016 Kuwaiti Public Tenders Law in this regard also upholds local preference when it even comes to subcontracting as previously discussed, yet with certain qualifying conditions.<sup>1422</sup>

The Kuwaiti PPP Law ultimately considers discrimination one of the essential elements within the risk matrix that both the public and private party must address while drafting their contract.<sup>1423</sup> The contractual relationships may certainly benefit from the BIT established investment protections mentioned above when the investor is a national of a party state.

Jurisprudence in the other GCC states has attempted to preserve non-discrimination in government procurement particularly as well. In a federal case in the U.A.E., the Appeals Court asserted the supremacy of the principles of transparency, non-discrimination, and fair competition between bidders in order to restrict the procuring authority (*Al idara*) with the end aim of preserving the rights of the individual consumers (the community) as much as the public authority itself.<sup>1424</sup> The general rule of the treatment of foreign investors according to the UAE Federal Foreign Direct Investment Law is, “Foreign Investment Companies licensed pursuant to the provisions of this Law by Decree shall be treated as national companies to the extent permitted by legislation in force in the State and international agreements to which the State is a party.”<sup>1425</sup> There is no precise case law by DFIC Courts and arbitrations that address the national treatment standard.

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<sup>1422</sup> Kuwait Public Tenders Law, art. 87 (providing that notwithstanding the applicable legal rules as per foreign direct investment of foreign capital, the public entity shall observe the foreign contractor’s adherence to purchasing no less than 30% of local products, and if such products are not available they may be purchased from local suppliers registered in supplier classification lists of the Agency). It also observes the foreign contractor’s adherence to contract out no less than 30% of the works of the prevailing bid to local contractors that are registered in the Agency’s contractors’ rosters in the different classifications dependent on the nature of the works or contractors that are registered and classified by Kuwait Municipality after the approval of the entity responsible for implementing the works.

<sup>1423</sup> KUWAIT PPP MANUAL, *supra* note 639, at 214–15.

<sup>1424</sup> Federal Court Decision No. 94 of 2005, issued Jan. 20, 2004, Civil Circuit, at 3 (U.A.E.) [hereinafter U.A.E. Federal Decision].

<sup>1425</sup> U.A.E. Foreign Direct Investment Law, art. 8.

All GCC State procurement laws have upheld non-discrimination as a core element any foreign investor should be treated in accordance with and may even further present a grievance about the procurement process in relation to its violation.<sup>1426</sup> Non-discrimination is a fundamental principle procurement processes of these States abide by.<sup>1427</sup>

The Saudi Arabian approach to national treatment includes the Regulation on Competitions and Public Purchases (2006), which discusses non-discrimination between public authorities and private parties, including foreigners on procuring practices. Yet, this law did not commit to completely omitting any exceptions as Article 47 of this Regulation, listed, *inter alia*, electronics, and medical products as preserved to local content requirements. This means non-discrimination principles would not apply. There is also the Regulation on Protecting/Preserving and Encouraging Local Products (1961) that embodies certain similar exceptions. These exceptions, to be clear, generally address the procurement of products or goods under the auspices of trade laws. And Saudi courts affirm the government's right to impose such local preference on contractors.<sup>1428</sup>

The Saudi Privatization Manual subjects any governmental actions in PPP contracts such as regulatory reforms to be assessed against the discrimination test. To be precise, these actions must not be of an "adverse discriminatory" nature.<sup>1429</sup> This test is similarly applied to Saudi state actions that could also equate to expropriation. Yet, Saudi Arabian in addition to the other GCC State judicial precedents although they discuss national treatment in some manner, it is not all that clear that a violation of this principle is particularly invoked and consequently addressed by

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<sup>1426</sup> See Kuwait Public Tenders Law, art. 77(2); Saudi Government Procurement Law, art. 3.

<sup>1427</sup> See Kuwait Public Tenders Law, art. 1; Saudi Government Procurement Law, art. 1.

<sup>1428</sup> Case No. 129/T/1-1413H, in THE COLLECTION OF PRINCIPLES DECIDED BY THE COMMERCIAL AUDITING CIRCUIT OF *DIWAN ILMATHALIM* FROM 1407-1423 HIJRI (Saudi Arabia).

<sup>1429</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, at 105.

the courts. The violations nonetheless may invoke other standards of international investment law.

### Fair and Equitable Treatment

If host government actions barely survive violations of the national treatment standard, they are likely not going to endure the fair and equitable treatment principle. This principle is perhaps the most frequently invoked and successfully reasoned standard in investor-state dispute settlements in terms of foreign investors prevailing in their claims against host governments.<sup>1430</sup>

The UAE stands out in terms of explicitly elaborating the fair and equitable treatment it so protects in its bilateral investment relations with other nations. Emirati BITs generally embody the following non-exclusive components that form a breach to the standard:

- a) Denial of justice in criminal, civil, or administrative proceedings;
- b) Fundamental breach of due process in judicial and administrative proceedings;
- c) Manifest arbitrariness; abusive treatment such as coercion, abuse of power, or similar bad faith conduct.<sup>1431</sup>

This approach is contrasted with the other GCC State BIT treaty provisions that undeniably protect the fair and equitable standard yet avail from generally referencing that this protection implies the meaning established in customary international law, recognized principles, and national legislations.<sup>1432</sup> This latter approach is even more so a Saudi adopted one

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<sup>1430</sup> DOLZER & SCHREUER, *supra* note 1388, at 159.

<sup>1431</sup> See U.A.E.-Colombia BIT, art. 5; U.A.E.-Rwanda BIT, art. 4.

<sup>1432</sup> See, e.g., Kuwait-Kyrgyz Republic BIT, art. 3. See also Kuwait-Iraq BIT, art. 3; KSA-Japan BIT, art. 4; KSA-Jordan BIT, art. 5.

consistently in the country's BITs. Kuwaiti BITs have a toned-down version of the Emirati BITs but go a step further than the Saudi approach does.<sup>1433</sup>

This standard has its historical roots that can be traced back to US treaty practice in what would be referred to as treaties on friendship, commerce, and navigation in the mid past century and has been introduced to many treaties ever since.<sup>1434</sup> And reference to customary international law to define the scope of this standard, has been further clarified by Tribunals such as in the case of *Glamis Gold v. United States*. The Tribunal in *Glamis Gold v. United States* explained that reference to customary international law to identify fair and equitable treatment refers to the minimum standard treatment of aliens.<sup>1435</sup> The important assertion the same Tribunal made was that the standard according to customary international law has actually evolved over time from the *Neer v. Mexico* case established minimum treatment back in 1926.<sup>1436</sup> The *Neer* case interpreted the minimum treatment of aliens as having to meet the threshold of being “egregious,” “outrageous,” or “shocking” to be considered in violation of the minimum standard.<sup>1437</sup> The *Glamis Gold v. United States* ultimately stressed that what may have been

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<sup>1433</sup> Kuwait does provide for a general reference to general principles established in international law that necessarily include customary international law, yet although the elaboration seems to address minimum standards an investor would enjoy in general, the *Kuwait-Kyrgyz BIT* for instance provided: “3. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures as regards the management, maintenance, use, enjoyment or disposal of investments in the territory of investors of the State of the other Contracting Party; 4. Once established, investments of investors of either Contracting Party shall not be subject to additional performance requirements which may be detrimental to their viability or adversely affect their use, management, conduct, operation, expansion, sale or other disposition.” *Kuwait-Kyrgyz BIT*, art. 3. *See also* *Kuwait-Iraq BIT*, art. 3 (sharing similar language).

<sup>1434</sup> DOLZER & SCHREUER, *supra* note 1388, at 159.

<sup>1435</sup> *Glamis Gold, Ltd. v. United States of America*, NAFTA, Award, ¶ 599 (June 8, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>.

<sup>1436</sup> *Id.* ¶ 612.

<sup>1437</sup> *Id.* ¶ 601. The *Neer v. Mexico* case described this minimum treatment as, “the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” *L.F.H. Neer & Pauline Neer (USA) v. United Mexican States*, 4 R.I.A.A. 60 ¶ 4, Oct. 15, 1926.

deemed outrageous back in 1926 may have evolved in terms of what we perceive of such term today. In any case though, the *Glamis Gold* Tribunal held that the *Neer* case standards shall serve as the minimum that is to be met.<sup>1438</sup> And as such, the fair and equitable treatment standard would be breached if, “an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards...” The Tribunal added that evolution of this minimum may not require “bad faith” in egregious acts, although it may be evidence and determinative of a violation of the standard.<sup>1439</sup>

The evolution of the standard by no means provides a platter of defined clarity, as the standard remains highly factually driven because of the very broad terms it entails.<sup>1440</sup> The *Gold Reserve Inc. v. Venezuela* Tribunal for instance relied on case law from *Saluka, inter alia*, to conclude whether Venezuela breached the fair and equitable treatment standard. According to the *Saluka* case, the host government:

implements its policies bona fide by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment...

Finally, it transpires from arbitral practice that, according to the “fair and equitable treatment” standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.<sup>1441</sup>

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<sup>1438</sup> *Glamis Gold*, ¶ 619.

<sup>1439</sup> *Id.* ¶¶ 616, 627.

<sup>1440</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 566 (Sept. 22, 2014).

<sup>1441</sup> *Saluka Investments BV (the Netherlands) v. the Czech Republic*, UNCITRAL, Partial Award, ¶¶ 307–08 (Mar. 17, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>. The *Gold Reserve Inc. v.*

The *Gold Reserve Inc. v. Venezuela* Tribunal in applying the meanings it has relied on about the fair and equitable treatment standard from established case law, found Venezuela's state actions in breach of this standard. At that period, then President Hugo Chavez in January of 2009 suddenly decided to enforce a new state mining policy where the government retrieved and was to lead all such activity by introducing laborious prerequisites in what the President referred to as a "strategic action plan for the Orinoco Oil Belt and Mining Arch", which directly affected the mining concession of the claimant, the Brisas Concession, after this concession has abided by all policies and permit requisites.<sup>1442</sup> The Ministry of Economy moreover revoked construction permits previously obtained by this concession based on ungrounded environmental impact justifications and with no due notice to the concessionaire, Gold Reserve, in addition to a similar act by the Ministry of Mines not extending the concession based on inconsistent justifications about certifications of compliance and with no due notice.<sup>1443</sup> The Tribunal acknowledged the State's right to protect its environment yet stressed, "However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions."<sup>1444</sup> These arbitrary actions and others of the Venezuelan Government were deemed to reveal "a lack of transparency, consistency and good faith in dealing with an investor" by the Tribunal.<sup>1445</sup> And while these state acts appear to invoke expropriation as a ground based on previous discussions in this study, the

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*Venezuela* Tribunal also relied on other case law such as *Tecmed v. Mexico* and *Metalclad v. Mexico* to ground its interpretation of the fair and equitable treatment standard. *Gold Reserve Inc. v. Venezuela*, ¶¶ 572–74.

<sup>1442</sup> *Gold Reserve Inc. v. Venezuela*, ¶¶ 577–615.

<sup>1443</sup> *Id.* ¶¶ 592, 602–07.

<sup>1444</sup> *Id.* ¶ 595.

<sup>1445</sup> *Id.* ¶ 591.

Tribunal rather considered the acts a breach of the fair and equitable treatment standard. This precisely shows the amplex of this standard.

These very loose meanings trigger curiosity about the level of foreign investor protections out there that GCC States must live up to in their infrastructure projects. One thing is for sure, the bar is high. Fair and equitable treatment is largely about legitimate expectations of the foreign private investor.<sup>1446</sup> This notion according to the *International Thunderbird Gaming Corporation v. the United Mexican States* Tribunal entails “where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct ...”<sup>1447</sup> The *Gold Reserve* Tribunal reiterates that “expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent.”<sup>1448</sup> The *Saluka* Tribunal though warns against wide interpretations that considerably favor legitimate expectations over balancing this notion with the host government’s right to regulate.<sup>1449</sup> This is where Kingsbury and Schill’s emphasis on the importance of proportionality is once again relevant.<sup>1450</sup>

There is no surprise that this standard appears to serve as an umbrella to cover any other arbitrary or discriminatory measures not referred to within the particular meanings of expropriation or national treatment. This is certainly a challenge host GCC governments will face while ensuring state measures are fair and provide the necessary due process. And so, even

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<sup>1446</sup> *Id.* ¶¶ 570–76.

<sup>1447</sup> *International Thunderbird Gaming Corp. v. the United Mexican States*, NAFTA, Award, ¶ 147 (Jan. 26, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf>.

<sup>1448</sup> *Gold Reserve Inc. v. Venezuela*, ¶ 576.

<sup>1449</sup> *Saluka v. Czech Republic*, ¶ 304. *See also* Kingsbury & Schill, *supra* note 1383, at 96.

<sup>1450</sup> Kingsbury & Schill, *supra* note 1383, at 96–98.

the Gulf judiciary must adhere to its fundamental role of not denying foreign investors justice when called upon. And whereas the UAE considers this judicial abstention a form of violation to the fair and equitable treatment standard, it could also fall under another international investment law standard known as denial of justice. The fair and equitable treatment may additionally more familiarly resemble estoppel.<sup>1451</sup>

It is worth pointing out that Kuwait awaits the outcomes of two investor-state arbitrations administered by the ICSID body. These two cases are: *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait* (ICSID Case No. ARB/17/8) brought by Italian company *Rizzani de Eccher S.p.A., et. al* against the Government of Kuwait in connection with a highway construction project based on both the Italy-Kuwait 1987 and Kuwait-Spain 2005 BITs,<sup>1452</sup> and *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait* (ICSID Case No. ARB/18/2) brought by the Egyptian Almasryia private investor against Kuwait in the tourism economic sector of Kuwait based on the Egypt-Kuwait BIT.<sup>1453</sup> And while no information is yet provided about these two cases as they are fairly recent and pending, the two will almost necessarily include claims pertaining to violations of the fair and equitable treatment standard in addition to any other claims that may be raised unless settled in advance. These are the only two cases thus far registered with ICSID, but with the country's recent enhanced engagement with foreign investors and somewhat questionable institutional conduct, the ground may be ripe for many more of these cases to come.

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<sup>1451</sup> DOLZER & SCHREUER, *supra* note 1388, at 160.

<sup>1452</sup> *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait*, ICSID Case No. ARB/17/8, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/8> (last visited Dec. 15, 2018).

<sup>1453</sup> *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/2> (last visited Dec. 15, 2018).



Nonetheless, in local Kuwaiti institutional practice, DLAL emphasized what is referred to as “the Theory of Prince Actions”,<sup>1454</sup> which resembles fair and equitable treatment violations. This Theory has been established in the precedents set by France’s Council of State, *Conseil d’État*, as the administrative disputes judicial body and legal adviser to the executive branch.<sup>1455</sup> As astounding as this term sounds, it is used to more commonly refer to adverse government actions and differentiate them from force majeure circumstances. According to DLAL’s legal interpretations, Prince Actions refer to a private or public measure issued by a contractual public entity that is unforeseen at the time of contract signature and causes specific damage to the private contractor in which others who this measure impacts do not endure such specific damage.<sup>1456</sup> This meaning and criteria for prince action theories is supported by judicial precedents in Kuwait as well.<sup>1457</sup> Consequently, for the Prince Action theory to be applicable, the following requirements must be met:

- a) The damaging action is caused by the contractual public entity.
- b) The action causes damage to the contractor that need not meet a certain threshold of egregiousness.
- c) The contractual public entity is supposed to not have been wrongful when taking such measure, as its responsibility is contractual with no wrongfulness.
- d) The measure issued by the public entity was unforeseen.

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<sup>1454</sup> Advice No. 2/1582, Aug. 20, 1972, at 25–26 (Kuwait).

<sup>1455</sup> Advice No. 2/3576, Apr. 9, 1980, at 25–26 (Kuwait).

<sup>1456</sup> DLAL Advice No. 2/1582, at 26.

<sup>1457</sup> Court of Cassation Decision No. 204 of 1990, Feb. 17, 1993, Commercial, at 3 (Kuwait); Court of Cassation Decision No. 189/2007, Apr. 27, 2010, Administrative, at 3 (Kuwait).

- e) The private contractor has endured specific damage that no others of whom such public measure impacts would share.<sup>1458</sup>

The situation in which DLAL analyzed referred to the legal interpretation of the contractual clause based on the international requirements for engineering practice that addresses certificates of payments in the Kuwaiti currency when volatility occurs in customs costs, to income taxes, or any other taxes, fees, or introducing new fees or burdens or taxes by the Kuwaiti Government that would consequently fall under the theory of Prince Actions.<sup>1459</sup> And what is rather provocative about the application of this theory is that no particular manifest egregiousness is required for the violation to be invoked according to DLAL's eventual interpretation, whereas force majeure must cause egregious losses to the private party.<sup>1460</sup>

Similar lines to that of Kuwait may be drawn about Saudi Arabia's investor-state arbitration engagement. There are currently three very recent pending claims against the government. The *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42) is a case brought by a French corporation pertaining to a real estate project based on the BIT between the two representative states;<sup>1461</sup> *Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/43) brought by Korean company Samsung against the Kingdom based on the Kingdom of Saudi Arabia- Republic of Korea BIT 2002 related to an electric power generation project;<sup>1462</sup> and *HOCHTIEF Infrastructure GmbH v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/18/14) brought by German corporations in relation with

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<sup>1458</sup> DLAL Advice No. 2/1582, at 26.

<sup>1459</sup> *Id.* at 25.

<sup>1460</sup> DLAL Advice No. 2/3576, at 25.

<sup>1461</sup> *MAKAE Europe SARL v. Kingdom of Saudi Arabia*, ICSID Case No. ARB/17/42, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/42> (last visited Dec. 15, 2018).

<sup>1462</sup> *Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia*, ICSID Case No. ARB/17/43, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/43> (last visited Dec. 15, 2018).

Construction, development and expansion of an airport terminal based on the Germany-Kingdom of Saud of Arabia BIT 1996.<sup>1463</sup> These cases are pending.

And since Dubai has established its own adjudicative institutions that hear arbitral disputes like DFIC, other international dispute settlement bodies' logs may lack in cases brought against this Emirate as a respondent.<sup>1464</sup> There is particularly one pending case being facilitated by ICSID, *BM Mühendislik ve İnşaat A.Ş. v. United Arab Emirates*, concerning a construction project brought by a Turkish investor, *BM Mühendislik ve İnşaat A.Ş.* and it is not particularly clear if it is against the Federal UAE Government or local Dubai Government.<sup>1465</sup> Nonetheless it is worth noting that while the ICSID Tribunal in *Hussein Nuaman Soufraki v. United Arab Emirates* rejected the claim on the basis that it had no jurisdiction to hear the case (*compétence-compétence* (Kompetenz/kompetenz), the claim factually concerned a concession agreement regarding a Dubai port.<sup>1466</sup> In this claim, the Claimant argued that the Dubai Department of Ports and Customs allegedly cancelled this 30-year concession of which the claimant disputes after arguing to have relied on previously granted concessions by this Department and Dubai Crown Prince, Mohammed bin Rashid Al Maktoum.<sup>1467</sup> There are no concrete conclusions that may be drawn from this case as it contained mere claims briefly raised by the claimant at this point, but

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<sup>1463</sup> HOCHTIEF Infrastructure GmbH v. Kingdom of Saudi Arabia, ICSID Case No. ARB/18/14, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/14> (last visited Dec. 15, 2018).

<sup>1464</sup> The ICSID database for instance only provides for the following activity in relation with the U.A.E.: Impregilo, S.p.A and Rizzani De Eccher S.p.A. v. United Arab Emirates, ICSID Case No. ARB/01/1, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/01/1> (last visited Dec. 4, 2019) (noting where the proceeding discontinued at the request of the Claimants and the case actually concerned the Federal Government in Abu Dhabi); *BM Mühendislik ve İnşaat A.Ş. v. United Arab Emirates*, ICSID Case No. ARB/17/20, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/20> (last visited Dec. 16, 2018); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Case Details, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/02/7> (last visited Dec. 4, 2019) (noting where the ad hoc Committee issues a decision on the application for annulment of the award and consequently rejecting the Claimant's application for annulment).

<sup>1465</sup> *İnşaat A.Ş. v. U.A.E.*

<sup>1466</sup> *Soufraki v. U.A.E.*, ¶ 4.

<sup>1467</sup> *Id.* ¶ 4.

the simple facts may invoke violations to the fair and equitable treatment standard. And in this context, even DFIC Courts and arbitrations have not addressed violations to the fair and equitable treatment as of this moment.

The fair and equitable treatment should be well understood and reflected in GCC institutional practice in accordance with what has progressed with the standard on the international level. Institutional conduct to preempt costly litigation grounded on the violation of this standard is achievable by coordinated and harmonized government agency practice in the Gulf.<sup>1468</sup> GCC agencies interacting in such manner with private partners in infrastructure contractual agreements is key considering the broad nature of the standard. And some of the local judicial precedents, as many other local courts, would generally address general principles that cover equity, fairness, and justice, yet the international caselaw provided offers examples about state practice that may violate these principles in connection with investors. And where public interest remains relevant, it is important to recognize that due process, non-discrimination, and transparency do not run in an opposite direction from public interest, rather, state's use of public interest should proportionately safeguard these guarantees to offer the necessary balance.

### Full Protection and Security

To reiterate a previous statement made in this study, the geopolitical situation in the Gulf and more extensively the MENA region unsurprisingly poses some challenges in terms of

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<sup>1468</sup> U.A.E. Foreign Direct Investment Law, art. 9(2) (“Without prejudice to the provisions of Article 14 and other provisions of this Law by Decree, the right to benefit from any real estate allocated to the Foreign Direct Investment Project may not be cancelled, suspended or restricted except in event of a violation of the Licence conditions. A decision to cancel, suspend or restrict such right shall be issued by the Competent Authority in coordination with the Licensing Authority with notification to the Investment Unit. Such decision may be appealed to the competent court within 30 days from the date of notification of such decision.”). This provision embodies many of the due process elements necessary that governmental institutions would abide by in their interaction with foreign investors.

political stability.<sup>1469</sup> While Gulf kingdoms and monarchies may have been internally secure, relatively, the surroundings are hostile grounds.<sup>1470</sup> As mentioned, while Iraq struggles with internal armed conflicts, and Iran faces external sanctions for developing nuclear facilities, Yemen, the Saudi neighbor, struggles from one of the most alerting humanitarian crises.<sup>1471</sup>

Preventing armed conflicts or internal civil disturbances throughout a concession's life period is nothing but simply a possibility. It is more so about whether it is likely, less likely, or more likely that such circumstance occurs in a country.<sup>1472</sup> And this business obscurity does not add the assurance a private investor looks eagerly to partake in. And as previously stressed, sometimes, that is a risk an investor simply must take. Nonetheless, there are guarantees in place to mitigate the potential impact.

The international investment safeguard known as full protection and security has gradually increased as a field of discussion within the investor-state arbitration realm and in some sense has begun to mitigate the "exclusive" relevant importance the notion of fair and equitable treatment used to monopolize.<sup>1473</sup> Both bilateral and multilateral investment treaties have codified the notion of full protection and security in their provisions. The purpose of these provisions is to ensure protection is provided for investors, to better operate in the host state, as well as to the host state itself, in order to guarantee that outer boundaries of what it bears the

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<sup>1469</sup> WORLD INVESTMENT AND POLITICAL RISK REPORT 23-25 (2013) [hereinafter MIGA WORLD INVESTMENT AND POLITICAL RISK REPORT], [www.miga.org/Documents/WIPRI 3.pdf](http://www.miga.org/Documents/WIPRI%203.pdf).

<sup>1470</sup> *Id.* at 23–25, 36.

<sup>1471</sup> Daniel Nikbakht & Sheena McKenzie, *The Yemen War is the World's Worst Humanitarian Crisis, UN Says*, CNN (Apr. 3, 2018), <https://www.cnn.com/2018/04/03/middleeast/yemen-worlds-worst-humanitarian-crisis-un-intl/index.html>.

<sup>1472</sup> KUWAIT PPP MANUAL, *supra* note 639, at 225–26.

<sup>1473</sup> See MAHNAZ MALIK, THE FULL PROTECTION AND SECURITY STANDARD COMES OF AGE: YET ANOTHER CHALLENGE FOR STATES IN INVESTMENT TREATY ARBITRATION? 1 (2011). Discussions about full protection and security standard in this study have also been in reference to the author's previous research. See Nasser Alreshaid, *Revisiting the Notion of Full Protection and Security of Foreign Direct Investments in Post-Gadhafi Libya: Two Governments, Tribal Violence, Militias, and Plenty More*, 28 FLA. J. INT'L L. 63 (2016).

burden of providing are clear, and most importantly reasonable with some regulated form of discretion in line with its capabilities.

The Energy Charter Treaty of 1994 outlined this notion in Article 10(1), in a way that falls within the context of fair and equitable treatment, by providing that contracting parties' investments shall, "enjoy the most constant protection and security."<sup>1474</sup> And as for the level of protection provided, the US Model BIT for instance stresses that the standard entails, "the level of police protection required under customary international law."<sup>1475</sup> The Association of Southeast East Asian Nations (ASEAN) Comprehensive Investment Agreement of 2009 stresses that full protection and security would oblige states to take measures in a "reasonable way".<sup>1476</sup>

The Gulf States adopted similar BIT approaches in protecting this notion.<sup>1477</sup> The UAE-Rwanda BIT for instance provides that full protection and security shall include, "the Contracting Party's obligations to act as may be reasonably necessary to protect physical security of investors and covered investments that do not create additional obligations other than those which it offers to its own nationals and other aliens."<sup>1478</sup>

International arbitral tribunals have assessed the previous legal doctrines and applied them to cases where this notion was raised. With regards to the standard of liability on the state, full protection and security does not generally impose absolute strict liability, rather it stems from the requirement to take "reasonable" measures, which would better be identified in the context of "due-diligence."<sup>1479</sup> The *Elettronica Sicula SpA (ELSI) (United States v. Italy)* case by

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<sup>1474</sup> Energy Charter Treaty art. 10(1), Dec. 17, 1994, 2080 U.N.T.S. 95.

<sup>1475</sup> 2012 U.S. MODEL BIT, *supra* note 1324, art. 5(2/b).

<sup>1476</sup> ASEAN Comprehensive Investment Agreement art. 11(2)(b), Feb. 26, 2009, <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3095>.

<sup>1477</sup> *See, e.g.*, Kuwait-Kyrgyz BIT, art. 3. *See also* Kuwait-Iraq BIT, art. 3; KSA-Japan BIT, art. 4; Saudi Arabia-Jordan BIT, art. 5; U.A.E.-Colombia BIT, art. 5; U.A.E.-Rwanda BIT, art. 4; U.A.E.-Mexico BIT, art. 4.

<sup>1478</sup> U.A.E.-Rwanda BIT, art. 4(3).

<sup>1479</sup> Christoph Schreuer, *The Protection of Investments in Armed Conflicts*, 3 TRANSNAT'L DISP. MGMT. 1, 8 (2012).

the International Court of Justice (ICJ) enforced such a standard.<sup>1480</sup> The Court in this case underscored, “‘constant protection and security’ cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”<sup>1481</sup> A protest following the closure of the ELSI corporation plant and the dismissal of its 800 workers did not mean to the Court that the Italian authorities’ measures to fully protect this plant and sustain its production will always fall short of the full protection and security standard.<sup>1482</sup>

The *Asian Agricultural Products, Ltd (AAPL) v. Sri Lanka* of 1990 case also declared such a standard.<sup>1483</sup> *AAPL v. Sri Lanka* concerned escalated violence during the Tamil insurrection between the Sri Lankan forces and insurgents leading to the death of twenty of AAPL's employees and destruction of a shrimp farm. The Tribunal, nevertheless, could not establish whether the rebels or the Sri Lankan security forces were directly responsible for the damages, but they did determine that the state was in fact obliged to prevent them.<sup>1484</sup>

This same standard was reiterated in *Wena Hotels v. Egypt* before ICSID. In *Wena*, two of the investor's hotels were forcibly seized and the Egyptian government did not take appropriate measures to prevent the seizure, which was in fact committed by two employees of a state agency (EHC) using sticks, although not attributed to the state.<sup>1485</sup> The Tribunal explained:

The Tribunal agrees with *Wena* that Egypt violated its obligation under Article 2(2) of the IPPA to accord *Wena's* investment “fair. and equitable treatment” and “full

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<sup>1480</sup> *EletronicaSicula S.p.A. (ELSI) (United States of America v. Italy.)*, Judgment (July 20, 1989), 1989 I.C.J. Rep. 15, ¶ 108, <https://www.icj-cij.org/files/case-related/76/076-19890720-JUD-01-00-EN.pdf>.

<sup>1481</sup> *Id.* ¶ 108.

<sup>1482</sup> *Id.* ¶ 108.

<sup>1483</sup> *Asian Agric. Prods., Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 53 (June 27, 1990), 4 ICSID Rep. 246 (1997) (“The Tribunal declares unfounded the Claimant's main plea aiming to consider the Government of Sri Lanka assuming strict liability under Article 2.(2) of the Bilateral Investment Treaty, without any need to prove that the damages suffered were attributable to the State or its agents, and to establish the State's responsibility for not acting with ‘due diligence.’”).

<sup>1484</sup> MALIK, *supra* note 1473, at 5.

<sup>1485</sup> *Wena Hotels, Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶¶ 33, 34, 47, 48, 84 (Dec. 8, 2000), 41 I.L.M. 896 (2002).

protection and security.” Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions.<sup>1486</sup>

In *Tecmed v. Mexico*<sup>1487</sup> and *Noble Ventures v. Romania*,<sup>1488</sup> both tribunals decided that the Mexican and Romanian governments were not held responsible for demonstrations and protests by non-state actors since there was no sufficient evidence to the contrary.

These cases confirm the host-state's obligation to protect foreign investors and their interests in certain circumstances where even non-state actors may have been involved in threatening the security of the investment. In fact, in some cases, such as *Biwater Gauff v. Tanzania*<sup>1489</sup> and *AMT v. Zaire*,<sup>1490</sup> state actors or their subsidiaries could also be involved in such breaches.<sup>1491</sup> These cases mainly discuss the threat and actual damage posed by physical violence as opposed to the more controversial and recently debated theme of whether legal security too would fall under the auspices of full protection and security.<sup>1492</sup>

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<sup>1486</sup> *Id.* ¶¶ 84, 911–12.

<sup>1487</sup> *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 177 (May 29, 2003).

<sup>1488</sup> *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/1 1, Award, ¶ 166 (Oct. 12, 2005), <http://arbitration.org/sites/default/files/awards/arbr-2006-261-I.pdf>.

<sup>1489</sup> *Biwater Gauff (Tanzania), Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 730 (July 24, 2008).

<sup>1490</sup> *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, ¶ 177 (Feb. 21, 1997), 5 ICSID Rep. 11 (1997).

<sup>1491</sup> Schreuer, *supra* note 1479, at 4–5. In the case of *L.E.S.I. S.p.A. et ASTALDI S.p.A. c/ Ripublique algeriennedimocratique et populaire [LESI v. Algeria]*, the tribunal also considered the prevailing circumstances in Algeria. In that case, the Algerian authorities exerted their security efforts in the risky and isolated region of Wilaya do Bouira, clashing with certain terrorist organizations in relation to the notion of fair and equitable treatment. *LESI v. Algeria*, ICSID Case No. No ARB/05/3, Award, ¶¶ 165–80 (Nov. 12, 2008).

<sup>1492</sup> Schreuer, *supra* note 1479, at 5–8.



The Kuwaiti PPP framework treats circumstances that may fall under full protection and security as political risks or material adverse government actions.<sup>1493</sup> The PPP Manual actually defines these circumstances under force majeure-like events.<sup>1494</sup> These risks according to the PPP Manual are typically allocated to the public entity or government, as it is more capable of managing them.<sup>1495</sup> No such clarity exists in either the PPP Law or Manual of Dubai albeit force majeure is regulated.<sup>1496</sup> Although, the Saudi Privatization Manual takes a similar yet very brief approach to that of Kuwait and lists analogous events under force majeure.<sup>1497</sup>

And where confusion between certain events that may fall under full protection and security yet intersect with force majeure itself may arise, the U.N. International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) of 2001, in the chapter on “Circumstances Precluding Wrongfulness”,<sup>1498</sup> includes force majeure as one of such reasons, but adds clarity by stating:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

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<sup>1493</sup> KUWAIT PPP MANUAL, *supra* note 639, at 226, 231–32.

<sup>1494</sup> *Id.* at 226 (“c) war (whether declared or not), armed conflict (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, act of terrorism, sabotage or piracy, [in each case occurring outside the Country]; d) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience, [in each case occurring outside the Country].”). The Kuwaiti judiciary has well established interpretations of what would constitute force majeure where “the event is unforeseeable and impossible to prevent.” *See* Court of Cassation Decision No. 608/2013, Nov 10, 2014, Commercial, at 3 (Kuwait); Cassation Decision No. 189/2007, at 3.

<sup>1495</sup> KUWAIT PPP MANUAL, *supra* note 639, at 231.

<sup>1496</sup> Dubai PPP Manual at 42, 59, 116, 178, 205, 208.

<sup>1497</sup> SAUDI PRIVATIZATION MANUAL, *supra* note 654, at 106.

<sup>1498</sup> Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, art. 23, U.N. Doc. A/56/10, Supp. No. 10, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) [hereinafter UN Draft Articles on Responsibility of States for Internationally Wrongful Acts].

2. Paragraph 1 does not apply if: (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring.<sup>1499</sup>

In *Toto Costruzioni v. Lebanon*, the Tribunal noted the fact that the long delay in court proceedings due to ongoing terrorist attacks, a war with Israel, and internal battles, would relieve the Tribunal from exercising its jurisdiction over the claims.<sup>1500</sup> Force majeure is nevertheless not an absolute unrestricted defense. The *Autopista v. Venezuela* Tribunal defined three requirements for a successful claim on this ground. This included (1) impossibility, where the performance was made impossible to achieve, (2) unforeseeability, and (3) non-attributability, where the events were not attributable to the defeating party.<sup>1501</sup> This pertained to the events in Venezuela that involved riots and civil unrest to proposed toll increases. The Tribunal decided to reject Venezuela's claim of force majeure because the strong public resistance was not apparent at the time the Concession Agreement was signed.<sup>1502</sup>

Not surprisingly, political risk insurance is as fertile of a ground to protect against risks that the full protection and security standard attempts to protect as much as this insurance proves beneficial to protect against expropriation-related risks. Multilateral Investment Guarantee Agency (MIGA), a World Bank Group body, embarks on insuring investors in high-risk situations, including war, terrorism, and civil disturbances.<sup>1503</sup> The Agency does require civil disturbances to be associated with a “broad political or ideological objectives.”<sup>1504</sup> The level of

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<sup>1499</sup> *Id.* art. 23.

<sup>1500</sup> *Toto Costruzioni Generali S.p.A. v. Republic of Leb.*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 165-68 (Sept. 11, 2009).

<sup>1501</sup> *Autopista Concesionada De Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, ¶ 108 (Sept. 23, 2003).

<sup>1502</sup> *Id.* ¶¶ 116-19.

<sup>1503</sup> MULTILATERAL INV. GUARANTEE AGENCY [hereinafter MIGA], <https://www.migaorg/who-we-are> (last visited Dec. 18, 2018); *Products*, MIGA, <https://www.miga.org/products> (last visited Dec. 4, 2019).

<sup>1504</sup> MIGA, OPERATIONAL POLICIES 31 (2015) <https://www.miga.org/sites/default/files/archive/Documents/Operational-Policies.pdf>. The coverage according to

importance this insurance may have is even more noticeable when considering the fact that commercial lenders regularly expect the debt to be repaid even where force majeure events occur.<sup>1505</sup>

The international investment standards displayed above are not exclusively deliberated. There are other standards that exist and are well established that include, *inter alia*, most favored nation (MFN) provisions, access to justice or denial thereof, and umbrella clauses,<sup>1506</sup> yet the principles previously discussed were particularly pertinent to reach the anticipated conclusions this study seeks at this point.

The objective of discussing the different international standards that are accorded to investors operating in a country's local business activities is to show how GCC development plans and both regulatory and institutional structures confront awaiting practical challenges with the consequent proliferation of more long-term contractual agreements with the private sector. The local standards offer only a semi, or rather, partial, guarantee, but what is desired is Gulf State institutions being checked according to standards that are globally recognized. These

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these Policies could include: (“1.48 Coverage against civil disturbance shall include organized violence directed against the government of the Host Country that has as its objective the overthrow of such government or its ouster from a specific region, including revolutions, insurrections and coups d'etat; 1.49 (a) Coverage may also be provided against civil disturbance, which takes the form of: (i) riot: an assemblage of individuals who commit public acts of violence in defiance of lawful authority; (ii) civil commotion: events which have all the characteristics of a riot but which are more widespread and of longer duration without, however, attaining the status of civil war, revolution, rebellion or insurrection; or (iii) terrorism: events of terrorism and sabotage. (b) The violent acts or events referred to in this paragraph may be directed at the Host Government, at a foreign government or foreign investment, including the government of the investor's country or the nationality of the investor. 1.50 In all cases, the civil disturbance must have been caused or carried out by groups primarily pursuing broad political or ideological objectives. Acts undertaken to further labor, student or other specific interests and acts of kidnapping or similar acts directed against the Guarantee Holder shall not qualify for coverage as civil disturbance, but, if politically motivated, may be covered if the Board so decides under Paragraph 1.24(c) above.”).

<sup>1505</sup> DELMON, *supra* note 60, at 49, 128.

<sup>1506</sup> See DOLZER & SCHREUER, *supra* note 1388, at 183–94, 210–14. See also Kuwait-Kyrgyz BIT, art. 5; Kuwait-Iraq BIT, art. 5; Saudi Arabia-Japan BIT, art. 5; Saudi Arabia-Jordan BIT, arts. 4, 6; U.A.E.-Colombia BIT, arts. 4-5; U.A.E.-Rwanda BIT, arts. 3(4), 6; U.A.E.-Mexico BIT, art. 3.

standards are ultimately mutual, as the Gulf private sector would gain from their protections abroad similarly as well.

The contextual touches GCC Governments stroke on these standards are to be prudently considered. The States' right to regulate, preserve the welfare of their people, and protect the public interest are all acknowledged, it is rather the balance that must be achieved with further private sector engagement in the countries' development plans that will pose certain challenges these states must be prepared for.

## CONCLUSION

The arduous journey to finding the right identity can be illustrated by success journeys that span from the far east in Singapore to the US industrial revolution back in the mid to late 19<sup>th</sup> century.<sup>1507</sup> The Gulf region is by no means facing a simple transition from single source government led economies into more balanced ones based on multiplicity and plurality to achieve sustainable economic development. To do so, this study has engaged in discussing the necessary foundations that must be considered and what using PPPs as a tool entails.

The GCC future development visions of 2030 and 2035 have exemplified that they are nothing short of ambitious. They appeared to sound like the leaders of the states have finally grasped the secret to turning those pots full of gold into reality, just as leprechauns do. The plans have promised prosperous education, housing for growing populations to come, bridges to connect cities, renewable energy to light the streets and generate movement, in addition to transforming societies into knowledge-based digitalized ones. And while this rhetoric sounds like an ongoing campaign slogan, the political will has aspired to get the societies of the GCC on board this journey in the decade or two to come. The genie in the bottle is not available in the Arab deserts of the Gulf to grant wishes as so penned in these development plans and as such, the single-most important question is how to turn aspiration into authentication and not agitation.

All GCC economies have agreed on one thing that is necessary to achieve their development plans, partnerships with the private sector are inevitable. Whether reference was made about private sector leadership or enablement in the countries' infrastructure projects, this

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<sup>1507</sup> LIBRARY OF CONGRESS, THE INDUSTRIAL REVOLUTION IN THE UNITED STATES: TEACHER'S GUIDE PRIMARY SOURCE SET 1-2 (n.d.).

sector was promised to play a key role in the development plans and future economic features of the countries.

Infrastructure projects address states' different needs to serve the public. These needs range from better roads, bridges, and trains, to digital connectivity, renewable energy plants, and better schools. The manner in which infrastructure projects may be implemented differ. While the state government may take lead in both financing and managing these projects, i.e. traditional public investment, the private sector may assume both these roles and prove to be more efficient in eventual project delivery.

With the benefits potentially reaped by resorting to private finance of infrastructure projects in achieving momentous development plans in the midst of real fiscal challenges due to volatile oil prices, PPPs have gained interest amongst the GCC governments. Yet, this interest of private sector lead in infrastructure development must not be underestimated.

Private finance of infrastructure projects is far from being free. In fact, PPPs may be more costly than other means of delivering the same projects, as this study has displayed. Adequately understanding PPPs is absolutely critical in determining whether they are the suitable solution to implement future Gulf plans. Yet, contextually, private sector efficiency may overcome the obsolete productivity of Gulf governments in managing infrastructure projects by both delivering them on time and on budget. Nevertheless, in either chosen infrastructure delivery scheme, traditional or PPPs, the private sector must play a key role, in one more than the other.

There are different aspects to the success of engaging the private sector in the Gulf's infrastructure development plans. This study has rather focused on the regulatory and institutional foundations that are but ingredients to turn the 2030 and 2035 aspirations into

reality. And the features of the GCC are to be reflected in understanding the type of contextualized model that suits these countries.

Law and development studies have emphasized that both laws and institutions may play a vital role in achieving anticipated development schemes. In abstract though, this is easier heard than done. These studies also emphasize that while laws and institutions are attributes to the countries' development plans, they are elusive. A contextual approach to which types of institutions and laws may shape a country or region's future are the next step towards making a development plan attainable. Implementing a successful model so far-fetched, such as the north-south divergence in which countries aim to purely replicate economic development models like the Singapore model or otherwise, is pretty much doomed to failure. These comparative models may be exceeded, but this starts with the country asserting its realistic contextual approach by assessing its current capabilities.

Amongst the different features that the Gulf outlies, for better or for worse, its global peers in, is the specificity of its private sector. The historical roots and current status quo exemplify this sector's integration with the public sector by a proliferation of grey areas such as SOEs and the role of the government in appointing members of the ruling family or societal elites in an often-strategic political attempt. The rentier identity of the Gulf countries has shaped the strong role of the government as regulator, operator, and provider within the countries' economies. This identity has been promised to be overturned, or at least mitigated, by the States' development plans.

The Gulf development plans have illustrated the private sector's role in the countries' infrastructure plans and accordingly regulated such enablement by issuing the necessary regulatory frameworks. The three Gulf States in this study, Kuwait, Saudi Arabia, and the UAE

have attempted to regulate the provision of infrastructure through PPPs by issuing PPP laws and manuals to help construct the procurement and implementation of their infrastructure projects. And throughout this study, it has been emphasized that no single stand-alone law, such as a PPP statute, may accomplish the States' desires to enable the private sector to participate in their development plots. An amalgam of different guarantees is to be struck as has been generally done by the Gulf states in their investment laws, protections of private property, enforcement of contracts, *ergo omnes*.

The different regulations that have been issued to replicate the contents of the GCC's development plans are certainly a necessary step, yet, these all remain in the domain of the countries' promises to uphold values that aim at better enabling the private sector to participate in their development projects. With no practice, these promises are simply taken at face value, and this does not lead to fortifying any development plans.

The lack of material results that can be felt by private investors throughout development plans and regulatory initiatives makes institutions and their practice indispensable. Law and development studies reiterate that institutions are but the oxygen to the H<sub>2</sub> element that makes water possible. Roberto Unger emphasizes the divergence of both law making from law application functions,<sup>1508</sup> which in turn stresses the importance of institutional practice. Unger states:

Lawmaking and law application differ fundamentally, as long as legislation is seen to be guided only by the looser rationality of ideological conflict. Lawmaking and law application diverge in both how they work and how their results may properly be justified. To be sure, law application may have an important creative element.<sup>1509</sup>

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<sup>1508</sup> Unger, *supra* note 349, at 565.

<sup>1509</sup> *Id.*



The institutions this study has referred to are those bodies charged by a society with making, administering, enforcing, or adjudicating its laws or policies. As the Gulf countries face a growing pipeline of PPP projects, institutional practice to put the regulations into play is the test to see how capable the government could be in partnering with the private sector.

The potential problem with a country's institutional framework is the lack of clarity and collaboration when there are necessarily multiple institutions functioning in the country. And here the Gulf countries have differed in their institutional arrangements and lessons can be drawn accordingly. Whereas in Kuwait and Saudi Arabia for instance, there is a centralized PPP Unit to help coordinate PPP projects in the country, no such centralized unit exists in Dubai, the UAE.

The PPP Unit can play a major role to ensure the PPP process is standardized to the extent possible. Nonetheless, the lack of existence of a centralized PPP Unit does not mean Dubai's institutional framework in relation to PPPs is unsuccessful. The decentralized nature of the PPP institutional scheme in this Emirate appears to have driven each government agency responsible for procuring its infrastructure projects in the given sector to standardize its practice with the private sector and has even proved to be more harmonized such as the RTA that has a clear mandate in comparison with Kuwait's PARLT. The problem is the aspiration for standard cross-application amongst less glamorously performing government institutions in Dubai other than the RTA when centralization is not pursued.

Institutional clarity is key when it comes to the private partner understanding how the PPP process works. This process has complex components that include obtaining all necessary licenses, permits, and authorizations for instance, in addition to challenges related to interacting with ten different government agencies instead of one designated authority. Path dependence theories help stimulate conceivable changes to the institutional framework, yet some institutions

are more difficult to change than others because of the resistance to do so. The Gulf States must apprehend that multiplicity of institutions is back logged by the intricacy of collaboration. This obscurity demands more state efforts to provide consistent behavior amongst the different agencies while interacting with the private party to implement infrastructure projects. This is furthermore costlier in the midst of fiscal restraint.

This study dwelled on assessing state practice with regards to private engagement in infrastructure by focusing on one very important institution in the GCC, the judiciary. The way in which the Gulf judiciary interacted with such infrastructure projects had a predominantly civil law systematic touch, yet, Dubai partially decided to depart from such feature. The Gulf judiciary asserted the contextual supra powers the government retains when it comes to what it deemed administrative contracts. Public interest has been interpreted considerably broadly to enable the government to introduce provisions to its contractual agreements with the private party and act in a way it would have not been able to otherwise. And while the state must be allowed space to fulfill the welfare of its people, limits to such governmental actions must also be defined.

And since the capacity of the local GCC private sector may not be fully established to carry out many of the complex infrastructure projects, multinational corporations are necessarily a major player in visions 2030 and 2035. Foreign investments mean that locally established and enforced norms may cause difficulties. And here, Gulf contextualism must be eased by acknowledging that international standards would have to be acknowledged. The universal contextualism approach would ensure that Gulf monarchies are better connected with global rudiments where local private capacity in certain areas lacks the possible exclusivity to abide by purely local norms that empower a government grasp.

Upholding international standards reflects the anticipated institutional practice the Gulf States must adhere to for their visions to genuinely flourish. These standards are affirmed by the regulatory frameworks and the further bilateral and multilateral GCC State commitments. And while belief in a country's judiciary is critical, diverse contractual agreements so to say antagonize this conviction especially in developing nations with regards to the dearth of confidence in local courts. The absence of trust may stem from the bias courts are perceived to have in serving their government's interests, that is, the public interest. This public interest may be locally stretched as far as the eye can see.

The consequences of unbalanced expectations between the government and its private counterpart in terms of outcomes of disputes within a period exceeding thirty years' worth of project implementation necessitates the introduction of international adjudicative bodies to preserve impartiality and check sovereign state actions. Dubai has introduced such initiative through its DIFC domain particularly, yet the other Gulf States have other solutions like ICSID and similar forums.

Litigation is not the main goal of signing onto international investment standards, it is rather a wise government that proactively understands the perils of violating such standards and paying the high price later on. GCC government institutions must well understand the existing principles and help shape local institutional practice correspondingly while interacting with the private sector in their infrastructure projects.

This study has attempted to display an illustration of international principles that necessarily impact the conduct of local institutions. The standards associated with expropriation, national treatment, fair and equitable treatment, and full protection and security are all guarantees that state institutional practices have consequences. The conclusions also drawn are

that upholding international principles and designating international adjudicative bodies does not deprive local institutions of their role. These institutions are essential and can check the international system itself. One example that was provided was enforcing foreign judgments and arbitral awards and the public policy exception.

States rightly have a degree of leeway to assert their identity in enforcing values they hold firmly, which may even lead to the restriction of enforcing multi-billion-dollar awards. Thus, the interplay of local and international norms is real and an ongoing dynamic. GCC governments retain a significant role in meeting public needs. This study cannot stress more that the extent to which Gulf governments exercise their perceived sovereign rights are what would impact the legitimate expectations of private parties. Consistency is vital. The private sector is equally socially responsible and must adhere to the State's sovereign role to regulate in critical spheres such as health, security, and the environment, even where such state measures impact its performance. Present day consensus emphasizing the well-being element of development that trumps exclusive notions of GDP acceleration are undeniable.<sup>1510</sup> No contractual party is thus unbound. And risk in business is as undeniable as life or death is to humans.

This study stresses that GCC 2030 and 2035 visions premised on introducing the private sector as a major participant in the ongoing and future infrastructure projects is only as possible as local governance makes of it. Reputation is key in attracting a profit-savvy, largely risk averse private sector. This study asserted that ultimately, Gulf institutional practice must be recognizable, by upholding international investment standards when implementing infrastructure projects, notwithstanding institutional contextual characteristics, i.e. universal contextualism.

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<sup>1510</sup> GLOBAL COMPETITIVENESS REPORT 2017-2018, *supra* note 27, at 1.

This is a hefty structural undertaking that corresponds with the proportionately lofty aspirations of the GCC.

This study more boldly advocates that the roadmap moving forward for the GCC states about the role of the private sector in their economies through infrastructure projects entails certain ensuing considerations. GCC Governments must fundamentally comprehend that PPPs and other means of private participation in infrastructure are but a public contractual agreement that can be tailored to their specific needs and by no means achieves free results. The governments must simply break it down to what objectively achieves value for money, be it PPPs or a more traditional track. The details of the contractual agreements in both routes are what essentially matter while constructing public-private relations, not labels given to schemes.

Gulf State economies are unique when it comes to state-citizen relationships like many other countries around the world. This is a simple fact and is by no means expressly right or wrong. These governments must know when they need to preserve higher degrees of welfare and do so, and when they should let the market function. This is a state's right. Enabling the private sector to provide public services is not impeded by the government retaining certain essential sectors like health and education to provide itself. It is rather by allowing the private sector to function where it is most capable of doing so. The key is bolstering genuine competition that allows the private sector to operate services efficiently. Enabling the private sector is not a black or white solution. Expectations between the society and the private sector are necessarily often divergent. And so, governments must deliberate the permissible degree of private sector space contextually in providing lower cost education or healthcare for instance. This may be achieved by viability gap funding as discussed in PPP payment methods or more broadly subsidies and price ceilings where the private partner provides the service.

Private sector lead and engagement in the Gulf's ongoing and future infrastructure development projects does not consequently equate to a complete substitution for the role of GCC governments. In fact, Gulf Arab State Governments are expected to play an even stronger role with more private sector engagement through a proper regulatory and monitoring grasp on infrastructure projects that ultimately serves its citizens and residents. Unclear road maps mean potentially unexpected results in infrastructure projects. The private sector in public contracts like these, essentially delivers what the government communicates through its request for proposals during the tendering of the project. So, if the government does not know what it wants, neither does the private partner. Second-guessing is not an option when the public is at stake.

The line between state regulatory interventions, i.e. public interest, and actions equating to expropriation and unfair and inequitable treatment is often very thin. Gulf Governments must well understand the contrast between both and the costs of such in addition to, as a result, acknowledging that more foreign direct investment in long-term local infrastructure projects is likely accompanied by more of these problematic distinctions.

Lessons must be learned as to the variance that exists amongst the GCC States themselves. The clarity in mandates that many of Dubai's government entities offer, like the RTA, should be acknowledged to fill in gaps that similar entities in Kuwait have been struggling with. Likewise, the Dubai decentralized nature of a PPP unit may prove problematic as opposed to the more centralized model Kuwait and Saudi Arabia provide. Time will provide more concrete clarity on the performance of both models.

The adjudicative models that Dubai has provided thus far, and Saudi Arabia hints towards replicating in its promised NEOM mega city, indicates that it is more appealing in terms of a fair and independent mechanism. Local courts may have succeeded in emphasizing state supra

powers in the name of public interest in public contracts, but with more complex private sector engagement through PPPs, this approach will not attract the mutual acceptance from the contractual parties.

Where international adjudicative schemes, i.e. investor-state arbitrations, appear to promise more fair venues especially for foreign private investors, it is incumbent on these same international entities to equally understand the importance of GCC States, and other countries' sovereign role in meeting domestic public interest demands that in many instances relate to health, labor rights, and environmental protections. A balanced approach ensures these entities enjoy more legitimacy by sovereigns and civil society as well.

Understanding international investment standards should be considered to rather preempt disputes and shape institutional behavior by according government institutional practice to these international principles while nonetheless utilizing permissible public interest limits in PPP contractual relationships with the private sector. The dire need of apprehending these standards may be rather more evident in Kuwait where interagency coordination and the decision-making process have been more challenging. Introducing timelines for decisions to be taken within may be useful. And for Saudi Arabia, transparency could perhaps be strengthened more to reflect the processes.

On a more particular note, services offered by government entities must be digitalized. There has been some varying evidence across the Gulf countries heading towards this target, but more is still expected on a wide-scale basis. Access to information is indispensable and the level of transparency such E-Systems achieve is critical to ensure the environments government institutions are creating are clear, predictable, and systematic to the extent possible. Foreign

investors as local private parties would have access to such systems to come across investment opportunities and track the progress of projects, which is key for GCC citizens as well.

Technical capabilities must be furthered in government institutions in the GCC, especially PPP units. More interaction with private actors in complex projects should lead to more experience within the public sector in better screening projects to decide whether they are suitable to be implemented as PPPs and bring private finance and management. In addition to being able to recover costs on such public infrastructure, this inevitably includes assessing the impact on users, such as access in healthcare and education when introducing private engagement, which may make access to health less affordable and not focus on quality of education. The government must be vigilant and prepared to envision its objectives and communicate them well to the private sector. It remains the government's responsibility to provide for its people.



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