ASSESSING INVESTMENT POLICIES OF MEMBER COUNTRIES OF THE GULF COOPERATION COUNCIL

Stocktaking analysis

prepared by the MENA-OECD Investment Programme

and presented at the Conference entitled:

"Assessing Investment Policies of GCC Countries: Translating economic diversification strategies into sound international investment policies"
On 5 April 2011 in Abu Dhabi

Organised in co-operation of and hosted by
the Ministry of Economy of the United Arab Emirates

TABLE OF CONTENTS

FOREWORD

This report, "*Assessing Investment Policies of Member Countries of the Gulf Cooperation Council*", was prepared by the MENA-OECD Investment Programme.

The study has been conducted based on selected indicators relating to investment policy and promotion, following the methodology of the *Business Climate Development Strategy* (BCDS) of the OECD Private Sector Development Division. It builds on the self-assessment compiled in the *Country Progress Reports* prepared for the 2009 Marrakech Ministerial Conference and the preliminary assessment conducted by the MENA-OECD Investment Programme in preparation for the Investment Working Group meeting in December 2010.

The report is a stocktaking exercise based on analysis of official laws and regulations, in particular primary investment legislation (i.e. investment laws), and secondary legislation (e.g. companies law) when available. Sources also comprised official country information and reports from recognised independent entities. This report therefore is based on publicly available information, is not exhaustive and will need to be submitted to the governments of the GCC countries for verification, additions and updates. It constitutes a preliminary assessment of the investment policies of the GCC countries and would require to be expanded and validated to provide for policy recommendations.

This assessment also benefitted from consultations with the private sector. Such consultations were conducted in March 2011 through a questionnaire on the perspective of international investors and private sector representatives. More generally, it exemplifies the feedback from foreign investors having invested or in the process of investing in one or several countries party to the Gulf Cooperation Council.

The report was conducted by the MENA-OECD Investment Programme, Private Sector Development Division, OECD Directorate for Financial and Enterprise Affairs. The BCDS indicators, which were used as benchmark for this assessment, were developed by the MENA-OECD Investment Programme. The analysis was conducted by Sophie Wernert, Policy Analyst (lead author), Moritz Schmoll, intern (economic overview), and Ania Thiemann, Economist (revision of the economic overview), under the supervision of Marie-Estelle Rey, Policy Analyst and Project Coordinator, and Alexander Böhmer, Head of the MENA-OECD Investment Programme.

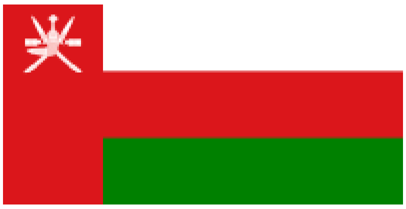
The **MENA-OECD Investment Programme** was established in 2005 and comprises of 18 economies from the Middle East and North Africa (MENA) region. It aims at improving the investment and business climate in the MENA region and to enhance regional economic integration through policy-dialogue and capacity-building. It manages five thematic working groups (investment, SME, tax, competitiveness and corporate governance) and several networks (Women's Business Forum, Responsible Business Conduct Forum and Business Council), all co-chaired by MENA and OECD countries.

Bahrain

Population: 1,234,596
GDP growth (CAGR* 2000-2010): 5.9%
GDP per capita (PPP): 24,026
HDI* (2010): 0.801
Literacy rate (age 15 and above): 91% (2008)
Median age: 30.4

Kuwait

Population: 3,328,136
GDP growth (CAGR 2000-2010): 5.7%
GDP per capita (PPP): 41,494
HDI (2010): 0.771
Literacy rate (age 15 and above): 94% (2007)
Median age: 26.4

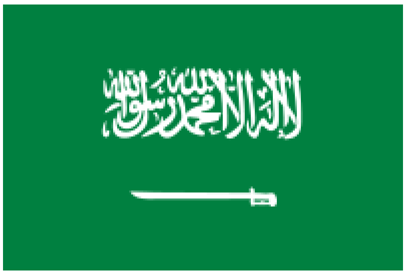


Oman

Population: 2,694,094
GDP growth (CAGR 2000-2010): 5.2%
GDP per capita (PPP): 28,989
HDI (2010): n.a.
Literacy rate (age 15 and above): 87% (2008)
Median age: 23.9

Qatar

Population: 1,699,435
GDP growth (CAGR 2000-2010): 10.6%
GDP per capita (PPP): 88,261
HDI (2010): 0.803
Literacy rate (age 15 and above): 93% (2007)
Median age: 30.8



Saudi Arabia

Population: 27,136,977
GDP growth (CAGR 2000-2010): 3.2%
GDP per capita (PPP): 22,840
HDI (2010): 0.752
Literacy rate (age 15 and above): 86% (2008)
Median age: 21.6

United Arab Emirates

Population: 4,975,593
GDP growth (CAGR 2000-2010): 5.5%
GDP per capita (PPP): 37,564
HDI (2010): 0.815
Literacy rate (age 15 and above): 90% (2005)
Median age: 30.2

Sources and references:

*CAGR= Compound Annual Growth Rate. It describes the average annual growth of a value over a certain period of time.
*HDI = Human Development Index. The index measures levels of "human development". It is composed of figures on Gross National Income (GNI) per capita, life expectancy and education.

1. Population: Figures are 2010 (in the case of Kuwait, 2008) national census results or estimates from national statistical offices (with the exception of UAE: CIA World Factbook 2010 estimate).
2. GDP growth: Own calculations based on World Bank WDI (2006-2009) and IMF 2010 projections.
3. GDP per capita: Figures have been obtained by dividing the IMF Gross domestic product of 2009 based on purchasing-power-parity (PPP) in current international dollars, by the population figures.
4. HDI: UNDP Human Development Report 2010.
5. Literacy rate: World Bank WDI.
6. Median age: CIA World Factbook 2010.

I. INTRODUCTION: ECONOMIC AND FDI OVERVIEW AND DIVERSIFICATION POLICIES

1. After an eventful decade, the GCC economies are at a crossroads

A. Introduction

The recent political events in the Middle East and North Africa (MENA) occurs at a time when most GCC economies were showing clear signs of recovery, after the financial and economic crisis in 2008-09 had hit them relatively hard in comparison to other MENA countries as a result of their strong integration with international financial markets and their high dependency on hydrocarbon exports. The only two MENA economies with a negative real GDP growth rate in 2009 were Kuwait and the United Arab Emirates (UAE).

The near-term economic reverberations of the recent events are likely to be mixed across the region. On the one hand, political instability in much of the region has had negative ramifications for financial markets and foreign direct investment (FDI); on the other hand, it has also caused a surge in oil and gas prices, leading to increased trade and fiscal revenues for most of the GCC economies. Apart from the short-term consequences of the current political turmoil across the region, there are also a number of challenges that the GCC economies will be facing. In order to limit the impact of strong price fluctuation on their economies, the GCC states will have to further reduce dependency on oil and make the transition from a rent-based extractive to knowledge-based productive economies. Diversification efforts, which have been pursued for many years, will have to be further intensified. Second, unemployment of GCC citizens remains widespread, especially among young people and women. Consequently, finding ways to better exploit the human capital pool of the GCC economies should play a key role in future policy efforts.

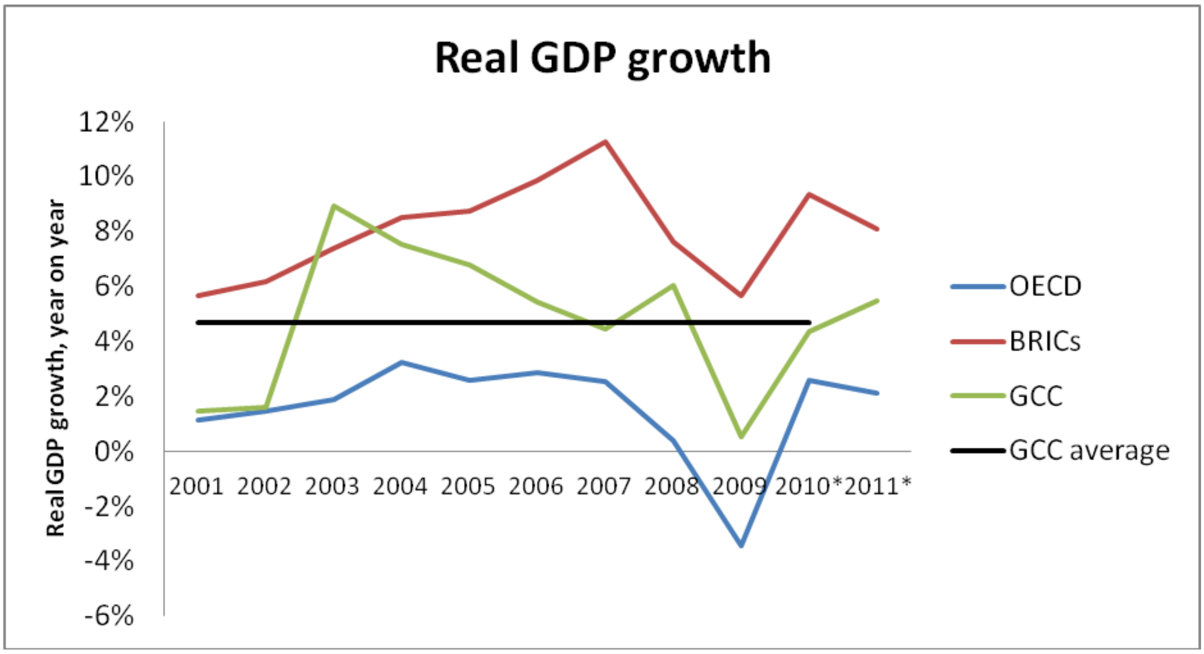
2. GDP and economic growth

Between 2000 and 2010 the GCC economies' real GDP grew at an annual average rate of 4.7%[1]. This is well above the OECD annual average growth rate of 1.5%, but below the combined average growth rate of Brazil, Russia, India and China, the so-called BRIC countries (8% year-on-year). The GCC nations are in line with the MENA regional average (4.5% average annual growth for the MENA region between 2000 and 2010), but owing to their much higher GDP-per-capita base, a comparison with developed (i.e. OECD) economies is more telling and reveals the economic dynamism that marked much of the past decade.

World energy prices played a key role in spurring the high growth rates of the past decade. From 2002 to 2008, the GCC economies experienced a prolonged oil boom that culminated in July 2008's

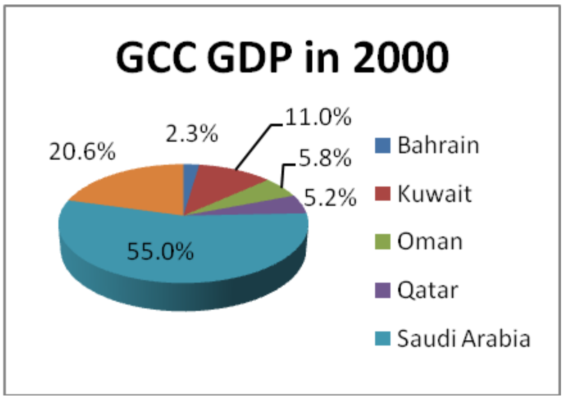
[1] World Bank World Development Indicators, IMF, World Economic Outlook, October 2010.

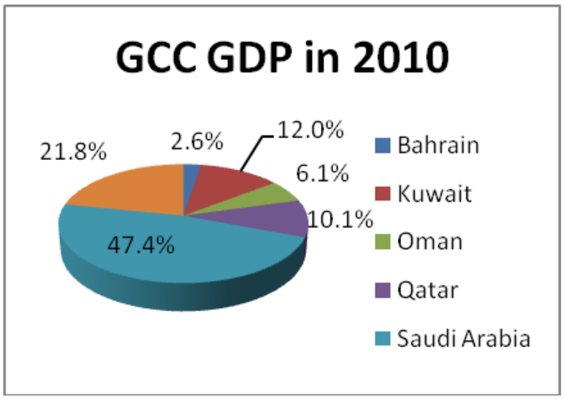
all-time-high of USD 147 per barrel. The subsequent crash of international oil prices then undermined fiscal revenues. It also reduced the public finance cushion which had enabled the region's governments to delay the impact of the worldwide financial and economic crisis and an already faltering global trade. The GCC's integration into global financial markets and its member countries’ dependence on hydrocarbon exports and trade, made their economies more vulnerable than most of the other less integrated but more diversified economies of the MENA region.



Source: World Bank WDI, *IMF projections

Despite the downturn which lasted from late 2008 and until early 2010, the six GCC member states still generated over 50% of the 19 MENA economies’ GDP[2]. Saudi Arabia produces the lion's share of the GCC GDP, thanks to its large population and the size of its economy and oil production capacities. However, the distribution of GCC GDP has been subject to substantial variations over the past ten years. Saudi Arabia’s annual average growth rate between 2000 and 2010 was with 3.2% below the GCC average, accounting for an increase in the share of total output of the five smaller member countries.





Source: World Bank WDI, IMF

[2] World Bank World Development Indicators

In 2010, the IMF's World Economic Outlook (10/2010) estimated that real GDP growth for the six GCC countries would be 4.3% for 2010, and forecast real GDP growth of 5.5% in 2011[3]. In 2011 the rate of growth is expected to be quite even among GCC members, with four countries posting growth rates of around 4.5%, and only two outliers. The first outlier is the UAE which is still suffering from the consequences of the 2009 Dubai debt crisis, which had a significant impact on the local real-estate market and the financial sector, and from the aftermath of the global recession which continues to affect trade and migration flows. The second, positive outlier is Qatar, which, according to the IMF, is expected to achieve a real GDP growth rate of 16% in 2010 and 18.6% in 2011[4]. Qatar's growth rates are mainly accounted for by an increased production and export capacity from its liquefied natural gas (LNG) facilities. In the long term, the GCC economies are expected to continue to grow at real average annual rates of 4.5-5% on average (the Economist Intelligence Unit forecasts 4.9% for the 2010-2015 period, and 4.5% for 2015-2020)[5].

2. Diversification remains a key challenge in the GCC

A. Motivations and actors of diversification in the GCC

All GCC member states are dependent on hydrocarbon exports ranging from 70% to 95% of all export revenues[6] depending on the country (for the GCC as a whole, the ratio amounts to about 80%)[7]. According to the Economist Intelligence Unit (EIU), hydrocarbons represented 39% of GCC nominal GDP in 2010[8]. Figures from the IMF (see below) demonstrate significant variety among GCC countries in terms of dependence on oil for growth and fiscal revenues. Bahrain and the UAE are the most diversified economies of the GCC in terms of GDP (13% and 22% of GDP respectively), but oil still accounts for 84% and 66% of fiscal revenues respectively. Qatar and Kuwait are the least diversified economies, as oil amounts to 52% and 39% of GDP respectively. In addition to this direct dependence, GCC economies also depend indirectly on oil revenues. Government contracts are major source of income for private sector activity in GCC economies. According to the EIU, government spending in public procurement increased annually by "double-digit" figures during the 2002-2008 boom[9].

---

[3] IMF, World Economic Outlook, October 2010

[4] Ibid.

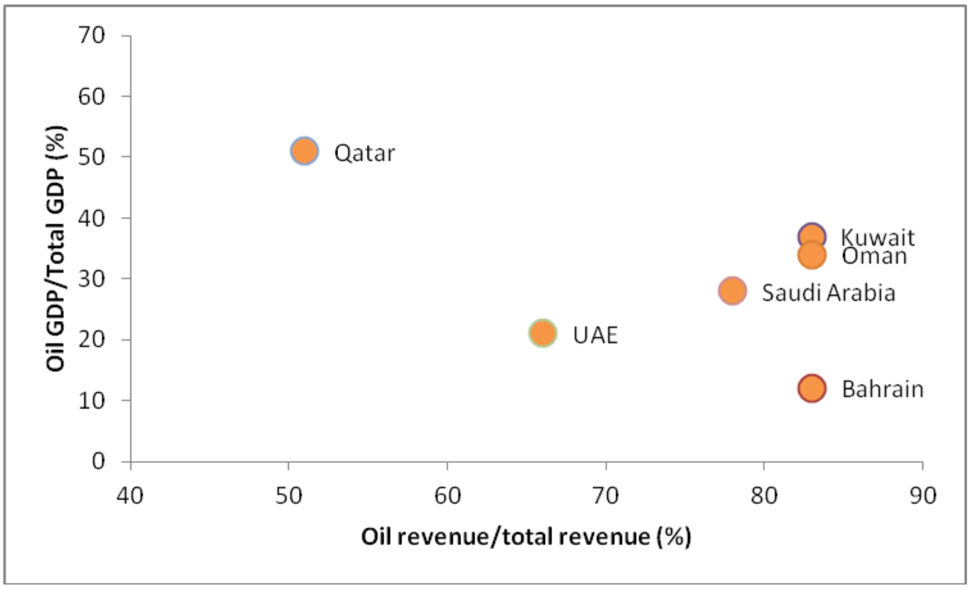
[5] Economist Intelligence Unit (2010), "The GCC in 2020: Outlook for the Gulf and the Global Economy"

[6] Economist Intelligence Unit Online Country Data (www.eiu.com)

[7] Economist Intelligence Unit (2010), "The GCC in 2020: Broadening the economy"

[8] Ibid.

[9] Ibid.



Source: IMF (2010), Regional Economic Outlook, Middle East and Central Asia 2010, October 2010

There are several reasons for oil dependent economies such as the GCC to push for economic diversification. Firstly, oil is a finite resource, and GCC economies will need to become less reliant on oil revenues in order to secure sustainable growth that will allow the same standard of living for future generations. Secondly, reducing the dependence on hydrocarbon exports will reduce the vulnerability of GCC economies to oil price fluctuations. Thirdly, the hydrocarbon sector is more capital-intensive than labour-intensive, and therefore does not contribute sufficiently to the creation of jobs. The motivation of GCC governments to implement diversification strategies varies according to the urgency in the need to address the aforementioned issues. Bahrain, whose oil reserves are expected to run out in 10 to 15 years[10], has made early and considerable efforts to build a strong non-oil sector. Countries like Kuwait or Saudi Arabia, whose reserves could last up to 100 years or more[11], have not the immediate pressure of securing the midterm viability of their economies. Also, if the oil price remains above USD 100 per barrel, it is possible that the urgency of the matter will be reconsidered. Nonetheless, a higher oil price would not resolve the problem of insufficient job creation, which is also why overall GCC governments remain committed to the objective of diversification.

Diversification strategies designed to guarantee a sustainable investment of oil revenues were not very widespread among policymakers of the region during the first oil boom in the 1970s. It was mainly during the 1990's and even more so during the new oil boom of 2002-2008, that GCC countries have developed clear long-term diversification strategies. Visions, such as Abu Dhabi 2030, Bahrain 2020 or Oman 2020 fix the long-term economic development objectives and the sectoral priorities for future diversification. In some countries, five year plans have then been developed to implement these strategies. The general orientation of future economic development and sectoral diversification is still decided by governments. Even the implementation can be state-led (although this rarely the case at present): many large and profitable GCC companies are still state-owned enterprises that have been set-up in a targeted manner using national funds drawn from oil exports. According to the EIU, in the GCC "the role of the private sector is expanding, but the government and

[10] US Department of State, Bureau of Near Eastern Affairs, Background Note Bahrain, 20 January 2011

[11] US Energy Information Administration (http://www.eia.doe.gov/)

public-sector enterprises retain overarching importance in determining growth strategies, prioritising projects and financing growth."[12]

However, the Carnegie Endowment for International Peace states that the role of the private sector in diversification efforts of the past decade has increased: "Unlike the 1970s oil boom, the private sector played a more active role in the 2002–2008 boom. The non-oil growth in the GCC countries was driven by a newly emerging private sector. The private sector evolved from a merely rentier private sector into a sector run by competent entrepreneurs who find themselves forced to compete more aggressively in order to win contracts and ensure business access"[13]. The real estate boom in the UAE was also mainly private sector driven, i.e. supported by private sector developers that were financed by private banks and insurances.

If international oil prices remain above USD 100/barrel, that could lead to governments (including through their sovereign wealth funds) playing an important role in prioritising projects and sectors again. However, across the GCC, the non-oil sector is forecast to grow faster than the oil sector (at an average annual rate of 5.1% between 2010 and 2020 versus 3.3% for the oil sector) [14]. In the non-oil sector, the private sector plays a more prominent role, which is why it is more likely that the private sector will benefit more from the growth in the non-oil sector than its public counterpart.

B. Past and current diversification efforts

a. Main sectors of diversification

Hitherto, significant diversification efforts have been focused on extending the petroleum product value chain and investing in energy intensive industries. Petroleum related sectors (petrochemicals, fertilisers, plastics) and energy intensive industries (steel, aluminium) have therefore expanded and prospered, owing to the region's natural competitive advantages in this sector. In the petrochemicals sector the Saudi Arabian Basic Industries Corporation (SABIC) was ranked by Fortune Global 500 as number one petrochemical producer in Asia, and fourth in the world[15]. According to a report of the multinational audit and advisory firm, KPMG International, SABIC will become the world's top petrochemical company by 2015[16]. In addition to petrochemicals, several GCC countries have specialised in energy-intensive industries, such as the production of aluminium, which can be used in the local construction, transportation and manufacturing industries or directly exported to Asian and European markets. The Emirati Dubal and the Bahraini Alba are among the world's top ten aluminium producing companies[17]. Dubal's exports make up 45% of Dubai's total non-oil exports[18]. At the moment, further smelting plants are planned in Oman, Qatar, Saudi Arabia, and the UAE.

---

[12] Economist Intelligence Unit (2010), "The GCC in 2020: Broadening the economy"

[13] Carnegie Endowment for International Peace (2009), "The Oil Boom in the GCC, 2002-2008: Old Challenges, Changing Dynamics"

[14] Economist Intelligence Unit (2010), "The GCC in 2020: Broadening the economy"

[15] http://money.cnn.com/magazines/fortune/global500

[16] KPMG International, "Global M&A: Outlook for Chemicals, December 2009

[17] www.aluminiumleader.com

[18] Sheikh Hamdan bin Rashid al Maktoum, Deputy Ruler of Dubai, UAE Minister of Finance and Chairman of Dubai Aluminium (DUBAL), www.uaeinteract.com

The other major diversification efforts have taken place in the sectors of construction and real estate. The demographics and economic growth of the region and deliberate diversification strategies have triggered a strong demand for housing, office space, infrastructure and tourism development projects. After the subprime mortgage crisis in the US in 2008-09, and following a real-estate bubble in the GCC region, the real-estate market experienced a sharp decline in GCC countries. The decline affected Dubai severely as a result of the losses incurred by the government-owned investment company, Dubai World, which had several real-estate projects in its portfolio. Subsequently, Dubai World was unable to meet its debt repayment schedule, and had to be bailed out by the emirate of Abu Dhabi. With the exception of Oman, where domestic demand has remained strong, the real-estate sector has been dealt a blow across the GCC, with housing prices falling between 10% in Bahrain to about 40% in the UAE[19]. Many development projects in the sector, especially in the UAE, have been put on hold[20]. In 2010, the real-estate and construction sector started to recover.

b. Additional examples of diversification

The GCC countries are strategically situated on the most important trade routes linking Europe to Asia. The region has strong historical ties with South and East Asian countries which remain the GCC's most important trade partners. In 2008, Asia accounted for 51% of the GCC's trade[21], and its share is expected to increase further[22]. Japan, India, China and South Korea import fuels, petrochemicals, plastics and metals from the GCC and export high- or low-end consumer goods, machinery and food to the Gulf.

Two other sectors representing successful examples of diversification in the GCC are finance and telecommunications. The telecommunications sector has proven to be dynamic and several large operators have expanded to neighbouring GCC and MENA countries. For example, since 2003 the Kuwait-based mobile operator Zain has expanded into Jordan, Bahrain, Iraq, Lebanon, Morocco, Saudi Arabia and Sudan. Its Emirati competitor Etisalat operates in 18 economies in the MENA region, Sub-Saharan Africa and Asia. Both companies are among the 500 largest companies in the world in terms of market capitalisation[23]. The financial sector has played an increasingly important role as well. Depending on the country, finance and insurance represent between 6% (UAE) to 26.6% (Bahrain) of total GDP[24].

C. Perspectives for diversification in the GCC

It is likely that in the next decade economic diversification will continue to be directed to petroleum-related and energy-intensive industries where GCC countries have a comparative advantage. The challenge here is to move further downstream in the value chain towards producing more sophisticated goods such as plastics, packaging and rubber. The real-estate crisis has made GCC governments and investors more cautious and risk averse, but there is evidence that large government spending, a looser credit situation, and strong domestic demand will continue to fuel

[19] Samba, GCC 2010 Outlook, February 2010.

[20] Ibid.

[21] Samir Pradhan, "Asia's Booming Ties with the Gulf", Feature Essay, Global Asia Volume 4, Number 2, summer 2009.

[22] Economist Intelligence Unit (2010), "The GCC in 2020: Broadening the economy".

[23] Financial Times (2010), FT Global 500 2010

[24] Samba, "GCC – Increasingly Diversified Economies", latest available data, real GDP except for UAE (nominal).

rapid growth in infrastructure, real estate and tourism. For example, Qatar's recent award of the FIFA Football World Cup 2022 alone will, according to MEED Business Intelligence, result in USD 60 billion worth of investments in these sectors[25]. Other related sectors are also projected to grow. The GCC's comparative advantage in Islamic finance can be valuable as this segment is expected to continue to expand across not only the Arab world but other economies where the local populations are predominantly Muslim. The telecommunications market is saturated in the smaller GCC states, but still has growth potential in Saudi Arabia and Oman, as well as abroad.

Trade with Asia is expected to increase further[26]. By 2020, China is forecasted to be the GCC's main partner for both imports and exports[27]. Major investments in the expansion of ports and airports (especially in the UAE) will support this increase. A major opportunity to diversify GCC economies through trade is regional integration. At present, intra-GCC trade represents less than 10% of total GCC trade[28]. USD 100 billion worth of rail projects designed to facilitate movement of goods and people inside the GCC are currently being developed[29]. The "Qatar-Bahrain Friendship Bridge", what would become the largest causeway in the world (45 km length), was put on hold in the summer of 2010, but "as an important component of the World Cup bid in FIFA's evaluation report, the scheme will now be given renewed impetus"[30]. The Gulf Railway project, a 2200 km railroad network, plans to link all GCC member states by 2017. Such rail projects have often been delayed, and it could be that the tense political situation in some GCC states puts them back on hold once more. However, there has is also been progress with tenders put out in the UAE[31] and Qatar pushing the development of its infrastructure in view of the World Cup. If completed, all these projects are expected to considerably boost intra-GCC trade.

In the past years, GCC governments invested in tertiary education and created linkages with universities abroad. Branches of renowned universities from North America and Europe have opened in several GCC member countries. In the UAE, the emirate of Abu Dhabi is developing a zero-carbon city called Masdar City, which will be home to a knowledge and technology cluster for renewable energies collaborating closely with the Massachusetts Institute of Technology. However, today the GCC still spends only 1% of its GDP on research and development (R&D)[32], compared to 2.5% in the OECD[33]. Therefore, rapid diversification into knowledge-based, high technology and high value-added sectors seems so far rather unlikely. The chart below demonstrates that high technology exports out of the GCC remain low in international comparison. The time and investment needed to improve the quality of human capital and the education and research infrastructure are likely to make medium- and high-tech manufacturing "a longer-term initiative"[34]. However, there are some fields where synergies and comparative advantages could appear. For example, GCC countries could play a role in

---

[25] MEED Press Release, "World Cup success kicks off $60bn projects boom in Qatar", 9 December 2010

[26] Economist Intelligence Unit (2010), "The GCC in 2020: Broadening the economy"

[27] Ibid.

[28] The Cooperation Council for the Arab States of the Gulf Secretariat General (2010), "GGC – A Statistical Glance"

[29] Frost & Sullivan, "Strategic Insight on the GCC Rail Sector", 1 February 2011

[30] Ibid.

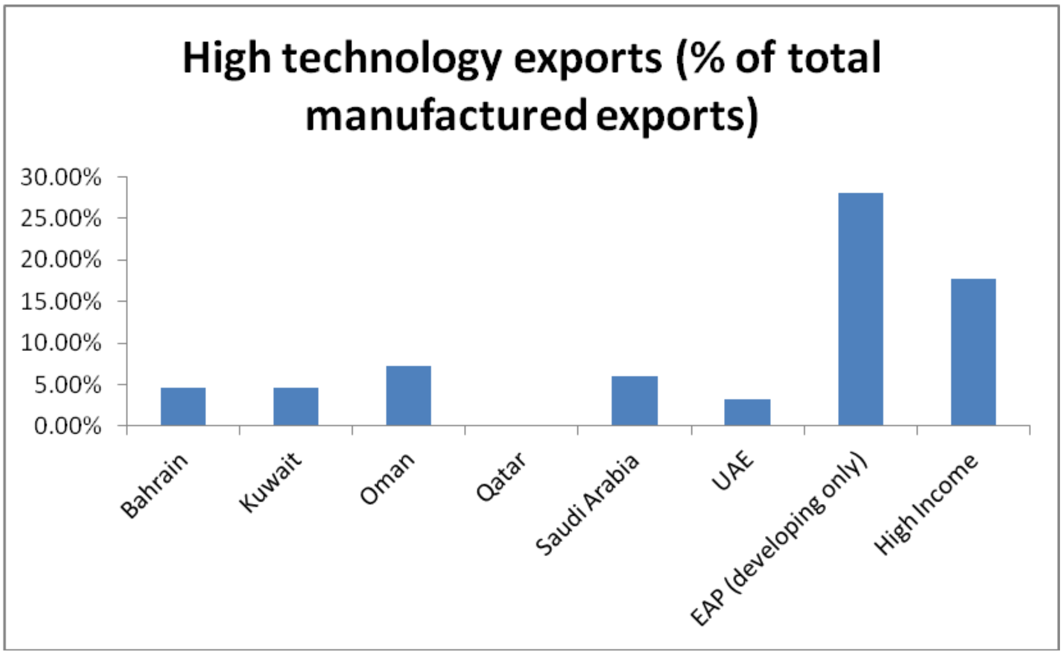
[31] http://www.thenational.ae/news/uae-news/national-rail-project-under-way-soon

[32] Economist Intelligence Unit (2010), "The GCC in 2020: Broadening the economy"

[33] World Bank World Development Indicators (WDI)

[34] Ibid.

developing advanced seeding and irrigation technology needed to develop agriculture in the hostile climatic surroundings of the Arab Peninsula, a key sector given the simultaneous increases in GCC food demand and international prices.



Source: World Bank WDI (data is from 2008, Bahrain, Kuwait and Saudi Arabia from 2007; EAP = East Asia & Pacific)

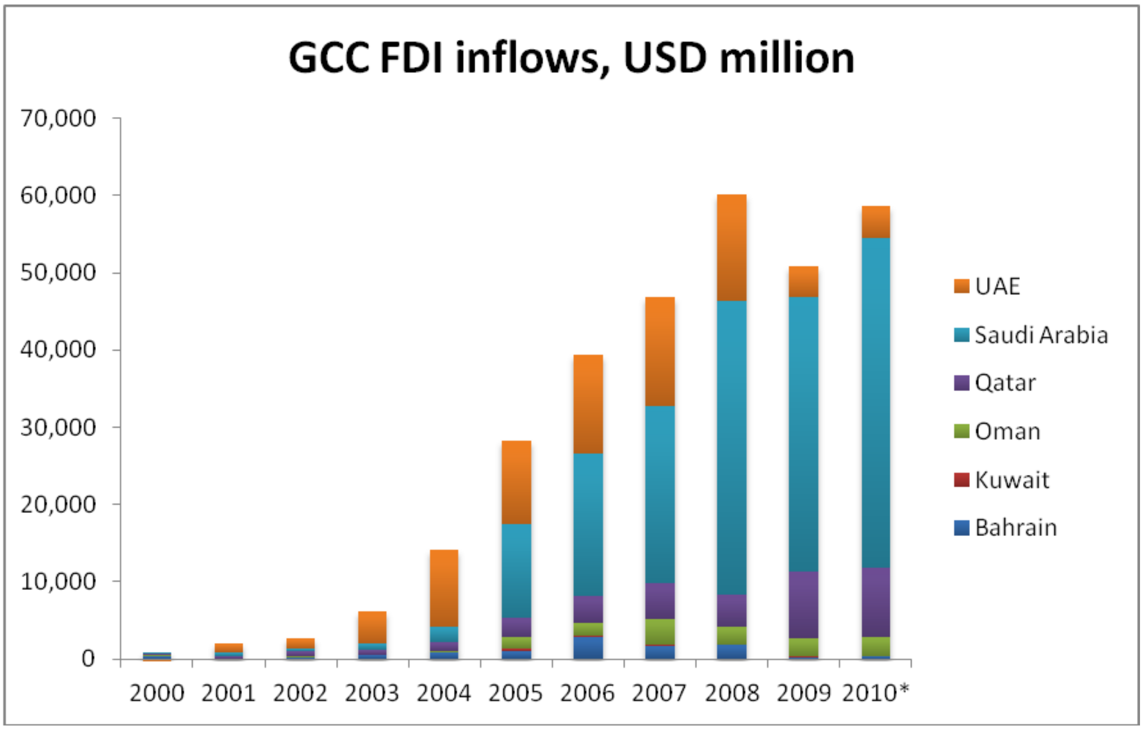
D. FDI trends and diversification potential

Foreign direct investment (FDI) can play a key role in implementing diversification strategies. Under certain circumstances, FDI can bring technical know-how in addition to capital to economies which do not have the ability or local capabilities to develop certain sectors on their own. Studies have showed that in poorly diversified economies (such as the GCC countries), FDI has a stronger positive impact on growth than in highly diversified economies[35]. This means that GCC countries stand to benefit from FDI.

During the boom in oil prices of 2002-2008, there was a growing interest among foreign investors to access and invest in the high-potential Gulf markets. Indeed, between 2000 and 2010, FDI inflows to the GCC economies were multiplied by over 150, totalling an estimated USD 60 billion in 2008, up from USD 391 million in 2000[36]. The international financial crisis caused a drop of 15% between 2008 and 2009 to USD 50.8 billion. The UAE was hit hardest with a decrease of over 70% year on year (from USD 13.7 billion to USD 4 billion), mainly as a consequence of the Dubai debt crisis. Qatar, on the other hand, managed to secure further investment into the expansion of its liquefied natural gas (LNG) production facilities, thus explaining large parts of the substantial 112% increase in Qatar's FDI inflows in the midst of the global recession. In 2010, the International Arab Export Credit Guarantee Corporation estimated that the GCC would recover and attract a total of USD 58 billion of FDI in 2010, representing 68% of total MENA FDI inflows in 2010.

[35] Dalila Nicet-Chenaf and Eric Rougier, "FDI, Diversification and Growth: An Empirical Assessment for MENA Countries", Bordeaux University, June 2008.

[36] UNCTAD (2010), World Investment Report 2010

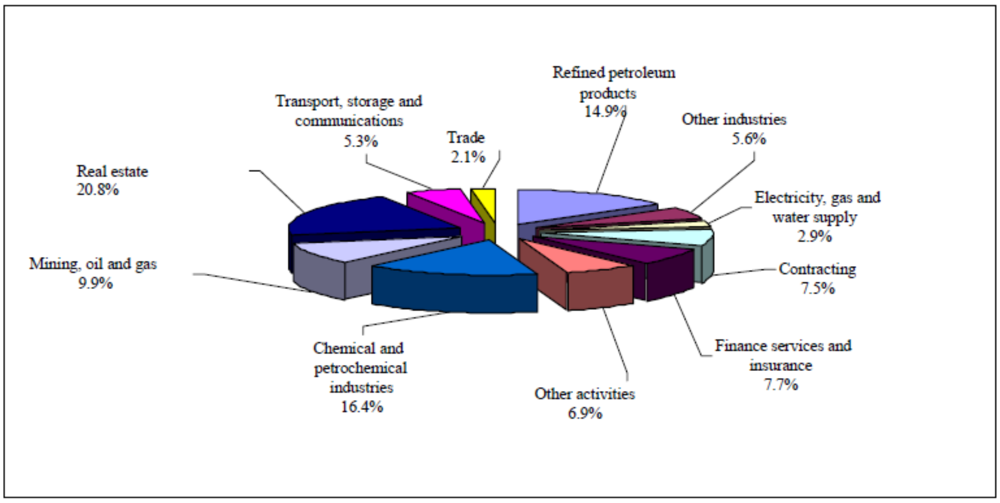


Source: UNCTAD (2000-2009), *Arab Investment and Export Credit Guarantee Corporation (estimates)

A variety of reasons explain this overall increase in FDI inflows between 2000 and 2008. First, from 2003, fast-rising oil and gas prices increased the profitability of investments in the hydrocarbon sectors. Second, between 2006 and 2008 diversification efforts aimed at attracting investment into sectors such construction, finance, or manufacturing also played a major role in increasing FDI. Third, in a few countries such as Qatar, investment climate reforms, in particular the lifting or easing of restrictions on foreign ownership facilitated access to GCC markets (this aspect will be treated in more detail in the following chapters). The establishment and expansion of free economic zones with no limits on foreign ownership created further opportunities for investors. Fourth and finally, in 2008, the GCC members created a common market with free capital and labour movements which has paved the way for increased intra-GCC FDI flows[37].

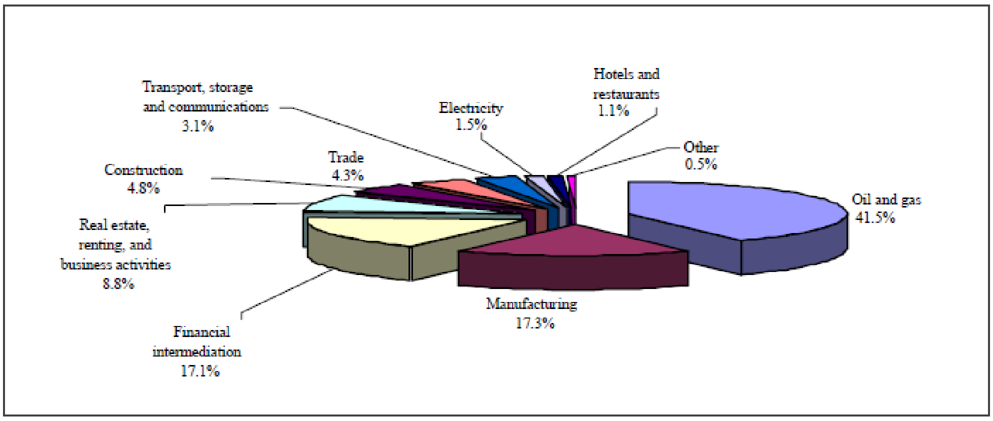
[37] United Nations ESCWA, “Foreign Direct Investment Report 2009”

FDI inflows to Saudi Arabia by sector, 2008



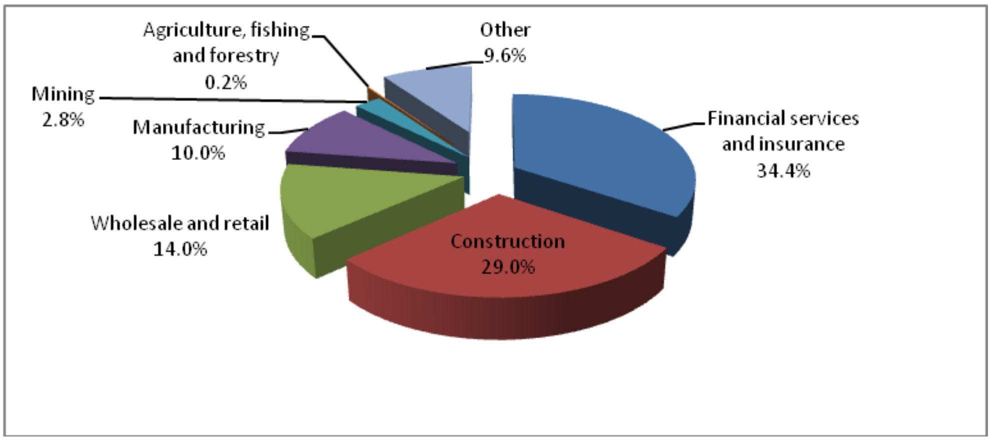
Source: United Nations Economic and Social Commission for Western Asia (ESCWA) (data from Saudi Arabia General Authority for Investment)

FDI inflows to Oman by sector, 2007



Source: United Nations Economic and Social Commission for Western Asia (ESCWA) (data from Central bank of Oman)

FDI inflows to UAE by sector, 2006



Source: United Nations Economic and Social Commission for Western Asia (ESCWA) (data from Ministry of Economy survey)

Although in the past GCC member states have been perceived as a “safe haven”, recent protests in Bahrain, and increasingly vocal manifestations of discontent in Oman may affect investor perceptions of the GCC. This may incite investors to put on hold projects, or even withdraw FDI during 2011. In the medium term, inward investment flows are expected to increase again[38].

According to the Economist Intelligence Unit, FDI will continue to be directed primarily at the construction, oil and gas, finance, petrochemicals, metals and mining sectors. The combination of the competitive advantages of the GCC economies in the hydrocarbons sector and in energy-intensive industries, coupled with the large projected government spending on infrastructure projects, such as urban transportation systems, waste water management, electricity and other utilities, are likely to draw international investors, provided that the local business climate continues to improve. Further sectors have a high potential for the future, such as health, leisure and the media[39]. Here too, the investment climate will be key: if it improves strongly, i.e. if horizontal and sectoral restrictions are lifted, this could attract even more foreign direct investment and spur higher growth in the non-oil sector.

3. The GCC needs to address human capital issues

A. Education

In order to address the diversification challenge, GCC member countries need to accelerate their move from a rent-based economy to a competitive and productive knowledge-based economy producing goods and services with a high value-added. This goal can only be achieved through building an efficient educational system. In the past decades, GCC countries have made great progress in terms of literacy, school enrolment and gender parity, but the quality of education is still insufficient.

At the beginning of the 1970’s, roughly at the time of independence for four of the six GCC countries (Bahrain, Kuwait, Qatar, UAE), between 30% and 60% of the GCC population was still illiterate[40]. Today adult literacy is above 90% (compared to an OECD average of 98.8% in 2008). The fact that the rate has not yet reached 95% or more can be attributed to the older generation, especially women, who were born and raised in times when primary education was not yet generalised. Current literacy rates for young people between 15 and 24 years old show that GCC member states will gradually catch up with OECD countries. The overall primary school enrolment rates increased from 60% to 87% between 1975 and 2008. Furthermore, the longstanding problem of gender parity in education has also been tackled. Indeed, gender parity has been achieved at the primary and secondary level. In GCC universities, female students even outnumber their male colleagues by 2:1. However, this discrepancy in secondary and tertiary education can also be attributed to the fact that women see education as a way to reach emancipation, whereas men often don't feel the same need or pressure. Moreover, government transfers go to male heads of households, so that the pressure for a man to achieve a good education is often lower than for a woman.

[38] Ibid.

[39] Economist Intelligence Unit (2010), “The GCC in 2020: Broadening the economy”

[40] OECD estimates based on World Bank WDI

Literacy rate (in %, 2008)		
Country	**15-24**	**15 and above**
Bahrain	99.8	90.8
Kuwait	98.4	94.4
Oman	98.4	86.6
Qatar	99.1	93.1
Saudi Arabia	97.0	85.5
United Arab Emirates	95.0	90.0
GCC Mean	**98.0**	**90.1**

Source: World Bank WDI 2010; Note: Where data was missing, the closest year was taken; the mean is not weighted.

Net Enrolment Rate in Primary Education			
Country	**1975**	**2000**	**2008**
Bahrain	71.0	95.8	97.8
Kuwait	66.2	82.7	87.6
Oman	24.7	81.3	68.3
Qatar	82.4	90.6	94.1
Saudi Arabia	41.6	59.7	84.5
United Arab Emirates	74.5	78.0	91.6
GCC Mean	**60.1**	**81.4**	**87.3**

Source: World Bank WDI 2010; Note: Where data was missing, the closest year was taken; the mean is not weighted.

Ratio of Enrolment, Female per Male (2008)			
Country	**Primary**	**Secondary**	**Tertiary**
Bahrain	0.98	1.04	2.53
Kuwait	0.98	1.03	2.14
Oman	1.01	0.97	1.15
Qatar	0.99	1.46	2.86
Saudi Arabia	0.96	0.85	1.65
United Arab Emirates	0.99	1.01	2.05
GCC Mean	**0.99**	**1.06**	**2.06**

Source: World Bank WDI 2010; Note: Where data was missing, the closest year was taken; the mean is not weighted.

Overall, one of the main problems with the GCC educational system lies not in quantity but in quality. Despite high levels of per-capita income, dropout rates are high and GCC students and educational systems score relatively low according to international tests and benchmarks. The World Economic Forum evaluated the quality of primary school education and scored mediocre grades to the GCC countries, with the exception of Qatar. The ranking placed GCC member states near the ranking of Malaysia (which has a significantly lower GDP/capita than all GCC member states), and clearly lower scores than the best performing countries such as Finland[41]. The Trends in International Mathematics and Science Study (TIMSS) in 2003 tested Bahrain, Kuwait and Saudi Arabia which achieved scores of 401, 392 and 332 respectively, whereas countries such as Egypt, Mexico or the Republic of Korea (scoring 406, 429 and 574 respectively, 500 being the TIMSS scale average) all

[41] The World Economic Forum (2010), "The Arab Competitiveness Review 2010"

outperform their wealthier counterparts from the Gulf[42]. According to a World Bank flagship report on education in the MENA region, poor quality of education is caused by the fact that the GCC's wealth "is not the kind of wealth based on higher education and social capital associated with children's higher academic performance in school"[43]. In other words, the GCC's rise in wealth is accounted for by the presence of a rent-based economy and as a result has not had the same kind of positive impact on education as for example in industrialised non-rentier economies.

There is also a mismatch between the skills acquired in lower and secondary education or in post-secondly education and those required to be successful and competitive in a today's labour market. The World Bank report states that in the MENA region, and the GCC countries are no exception, education systems still practice a "traditional pedagogy" that does not endow the students with "higher-order cognitive skills such as flexibility, problem-solving and judgement"[44].

In post-secondly education, the skills mismatch is most visible. Figures from the *United Nations Educational, Scientific and Cultural Organisation* (UNESCO) data centre show that, depending on the country, between 55% to 72% of GCC university students choose education, arts and humanities, social sciences or general programmes[45] as their course of study. If Oman is taken out of the statistics, this range is reduced to 66% to 72% (comprising of Bahrain, Qatar, Saudi Arabia and the UAE; data for Kuwait is unavailable).The average percent of students studying the same subjects in the United States, the United Kingdom, France and Germany is between 50% to 55%. The labour market demand also does not appear to correspond to the number of humanities and social sciences graduates. This over-supply is related to employment options available for graduates. For purposes of rent distribution and unemployment reduction, the government employs large numbers of university graduates, usually students of humanities and social sciences, as civil servants. A career in civil service is for many GCC graduates more attractive than a career in the private sector in terms of job security, working hours and wages per hour. The motivation for nationals to join the private sector is consequently not very high.

B. Employment

In most of the GCC countries, there are no official labour statistics regularly monitoring employment indicators. Despite incomplete statistical information there is no doubt that the GCC economies will have to face great challenges in labour issues over the next decades.

Estimates from the Central Intelligence Agency (CIA) World Factbook demonstrate that several GCC economies suffer from high unemployment: for Saudi Arabia unemployment ranges from 10.8% (Saudi males only) to 25%, while for Bahrain and Oman estimates from 2005 and 2004, respectively, state that unemployment is around 15%[46]. However, it is useful to distinguish GCC nationals from non-nationals. Indeed, unemployment affects mostly nationals, and youth and women in particular. Consequently, even countries with lower unemployment rates such as Qatar, Kuwait or the UAE

[42] World Bank (2008), "The Road Not Travelled – Education Reform in MENA", p. 19

[43] Ibid., p. 20

[44] Ibid., p. 89

[45] UNESCO Institute for Statistics, Online Data Centre

[46] CIA World Factbook estimates

(4.2% total unemployment in UAE in 2009[47]), can have quite high unemployment levels when considering only nationals (14% unemployment among nationals in the UAE in 2009[48]).

Several factors can help explain this phenomenon. The aforementioned failures of the educational system which result in a skills mismatch play an important role. Furthermore, the unlimited availability of the comparatively cheaper expatriate workforce gives the private sector few incentives to employ more expensive GCC citizens. Finally, GCC citizens either do not want to perform certain jobs that are usually carried out by expatriates, or government support programmes provide them with a sufficient income.

Non-nationals are not directly affected by unemployment since their permit of residence is generally tied to their job. There are expatriates working in high value adding sectors and positions (mostly Westerners), but the vast majority of Gulf immigrants are low-skilled workers from impoverished areas of South and South East Asia. The latter suffer from the local sponsorship system, low workers rights as well as poor working and living conditions. The sponsorship system forces every immigrant worker (the vast majority) to have a local sponsor (a national citizen or institution); otherwise he cannot obtain neither an entry visa nor a permit of residence. The worker is unable to change jobs because his permit of residence is tied to the contract with his employer, who is economically and legally responsible for the worker. Often, sponsors can withhold the workers' passports for the whole duration of the contract. International organisations, developed countries, and human rights groups have deplored observed abuses in the system by unscrupulous sponsors and condemned the sponsorship system as facilitating human trafficking and the use of forced labour. So far, Bahrain is the only GCC country that has abolished the system, in 2009. However, other member states are currently reforming their expatriate workers regulations, or in the process of considering reform.

The six GCC member countries have achieved significant results between 2000 and 2010. Fueled by the oil boom of 2002-2008, their economies have developed at an impressive pace. The private sector is evolving into a driver of growth. Sectors outside hydrocarbons have prospered and are conquering national, regional and international markets. However, the GCC is still over-reliant on fuel exports, which calls for increased diversification efforts in order to be better prepared for oil price slumps, such as the one that occurred between 2008 and 2009 amid the world economic crisis, and to create more and better qualified jobs for GCC citizens. The transition to a knowledge-based economy thriving on a highly skilled human capital requires improvements in the quality of educational systems and the functioning of labour markets. Furthermore, capital and know-how are needed for the acceleration of the diversification process. FDI can be instrumental but foreign investors need sound and stable investment climate, clear, predictable and non-discriminatory legislation, and as few barriers to entry as possible. Therefore, improving the investment climate is a measure that can help promote sectoral diversification.

[47] United Arab Emirates National Bureau of Statistics

[48] Ibid.

II. PRESENTATION OF THE ASSESSMENT METHODOLOGY

The study is based on the methodology of the Business Climate Development Strategy (BCDS), developed by the MENA-OECD Investment Programme in the Private Sector Development Division of the OECD Directorate for Financial and Enterprise Affairs. It is an innovative approach to assessing the national business environment.

This report covers selected indicators of the investment policy dimension of the BCDS. It is a preliminary assessment that would need further elaboration and country validation to lead to policy recommendations.

1. The BCDS methodology

The **Business Climate Development Strategy (BCDS)** was designed to support governments in the MENA region in the process of formulating and implementing priority reforms specifically related to improving the business climate.

The BCDS is based on **OECD tools and instruments**, such as the *Declaration on International Investment and Multinational Enterprises,* the *Policy Framework for Investment,* the *Principles for Private Sector Participation in Infrastructure,* the *Policy Framework for Effective and Efficient Financial Regulation,* the *Anti-Bribery Convention,* the *Model Tax Convention,* the *Transfer Pricing Guidelines,* the *Principles of Corporate Governance* and the *Principles of Governance of State-Owned Enterprises*.

The BCDS follows an **indicator** approach. 240 indicators are classified within 12 dimensions and scored against OECD best practices.

The 12 dimensions are:

- Dimension 1: Investment Policy and Promotion
- Dimension 2: Privatisation and Public Private Partnerships (PPPs)
- Dimension 3: Tax Policy and Administration
- Dimension 4: Trade Policy and Facilitation
- Dimension 5: Better Business Regulation
- Dimension 6: SME Policy and Promotion
- Dimension 7: Anti-Corruption
- Dimension 8: Corporate Governance
- Dimension 9: Business Law and Commercial Conflict Resolution
- Dimension 10: Infrastructure
- Dimension 11: Human Capital
- Dimension 12: Access to Finance

A total of 240 indicators were defined. Each of the 12 dimensions is based on the assessment of between 15 and 25 indicators that measure a particular aspect of business climate policy meaning that, for the 12 dimensions assessed, there are a total of 240 indicators. The majority of the 240 indicators follow a 5-level assessment of policy development, with “1” denoting little or no domestic policy observed in the area, and “5” signifying policies that are in line with international good practices and that have been implemented. The sum of the 240 indicators and their assessment criteria form the overall BCDS Assessment Grid.

The main indicators for each dimension apply to “regimes” (*i.e.* policies, laws, institutions). The first indicators in each dimension measure whether a strategy or policy for the issue in question actually exists. If a legal framework is required, the next indicator assesses whether the appropriate laws or regulations have been passed by Parliament or issued by the government. The next indicators assess whether implementing institutions are in place. Finally, other indicators cover related subjects, including actual implementation of legislation and the existence of government programmes to facilitate citizens' use of a service.

The BCDS Assessment Grid is assessed by different stakeholders (ministries and government agencies, private sector representatives, and independent local consultants). On completion of the assessment grids, the OECD conducts an analytical review of the responses, backed up by in-depth interviews for all dimensions and making use of secondary sources within and outside the OECD. The initial findings and key recommendations are then presented in series of workshops with stakeholders on the various dimensions.

The detailed analysis provided for each indicator, together with the scoring system, made it possible not only to formulate specific recommendations for each dimension, but also to identify strategic, cross-cutting recommendations, common to several policy areas. These findings call for the strengthening of core areas of governance reform, enhanced transparency, predictability, and inclusive policy making, among others.

To sum up, the BCDS is designed to support the governments in the process of identifying, prioritising and, finally, implementing priority business climate reforms. It assesses policies in favour of businesses, be they local, regional or international, and determines actions that may improve the business climate and help the implementation of relevant reforms.

2. The BCDS investment policy dimension and the stocktaking study

The present stocktaking study on assessing investment policies of the GCC countries builds upon the BCDS dimension on investment. This dimension is inspired by many of the principles and elements contained in the OECD instruments and policy tools designed to assist governments in developing and promoting stable, transparent, and predictable business environments for international investment.

The main instruments and tools which this dimension uses to analyse investment policy include:

- the *OECD Declaration on International Investment and Multinational Enterprises*, the *Guidelines for Multinational Enterprises*, and the *National Treatment Instrument*;
- the *Policy Framework for Investment* (PFI) and the “Investment Policy” chapter of the associated *PFI User’s Toolkit*;
- the *Checklist for Investment Incentives*;

- the *OECD Code of Liberalisation of Capital Movements*;
- the *Investment Reform Index* (IRI) developed by the OECD Private Sector Development Division for the countries of Southeast Europe (SEE);
- the OECD Investment Committee's *recommendations on transparency and incentives*.

To conduct the stocktaking study, a number of indicators were selected:

- Restrictions to National Treatment;
- Approval Procedures;
- Admittance of Foreign Business Personnel in Support of FDI;
- Transfer of FDI-Related Capital;
- Land Restrictions;
- Guarantees in case of expropriation;
- International Investment Agreements;
- International arbitration to resolve investor-State disputes.

Based in these selected indicators, the report analyses official laws and regulations, in particular primary investment legislation (i.e. investment laws), and secondary legislation (e.g. companies law) when available. Sources also comprised official country information and reports from recognised independent entities. This report is therefore based on publicly available information, is not exhaustive and will need to be submitted to the governments of the GCC countries for verification, additions, updates and validation. It is a preliminary assessment of the investment policies of the GCC countries and would require to be expanded and validated to provide for policy recommendations. At this stage, no scores were allocated to the analysed indicators, as it would require further consultations with the government and private sector representatives, though a questionnaire on the perspective of international investors and private sector representatives was sent and analysed within this study.

Finally, this stocktaking study has been conducted within the framework of the activities of the **MENA-OECD Working Group 1 on Investment Policies and Promotion**. This Working Group, currently co-chaired by Japan and Jordan, helps MENA countries develop efficient and transparent investment policies and effective investment promotion strategies and activities through multi-stakeholder dialogue, experience-sharing and capacity-building in the region, with support from OECD countries and other partners.

III. ASSESSMENT OF INVESTMENT POLICIES – FDI LAW AND POLICY OF GCC COUNTRIES

The benefits of private investment are widely recognised. They include the expansion of productive capacity, job creation, income growth, technology diffusion, and enterprise development. Creating a business environment that is conducive to all forms of investment is an important policy challenge for all economies. The experience of OECD member governments has shown that clear legal and regulatory frameworks, underpinned by principles of transparency and non-discrimination, are instrumental in attracting foreign investors and enabling domestic economies to benefit from their presence. Foreign investment is unlikely unless investors have a reasonable understanding of the environment in which they operate. Over the years, OECD member governments have sought to develop international "rules of the game" in the treatment of international investment by agreeing to instruments such as the Declaration and Decisions on International Investment and Multinational Enterprises.[49]

Investment laws and amendments in GCC countries

Country	Investment Law	Amendments
Bahrain	Related law: Commercial Companies Law – Decree Law No. 21 of 2001	Decision No. 6 of 2002 enacting Executive Regulation of Law No. 21 of 2001
Kuwait	Law Regulating Direct Foreign Capital Investment No.8 of 2001, replacing Foreign Investment Law No. 10 of 1999	Decision of the Council of Ministers No. 23 of 2003 Ministerial Decrees No. 1006/1 of 2003, 738/9 of 2008 and 66/2 of 2009
Oman	Foreign Capital Investment Law – Royal Decree No.102 of 1994	Royal Decree No. 92 of 1996 Royal Decree No. 56 of 2003 Royal Decree No. 32 of 2010
Qatar	Investment Law No.13 of 2000	Decree Law No.31 of 2004 Amendment Law No. 2 of 2005 Amendment Law No. 1 of 2010
Saudi Arabia	Foreign Investment Act – Royal Decree No. M/1 of 2000	Executive Rules of Foreign Investment Act of 2000 Royal Decree No. M/15 of 2000 (Regulation of Ownership and Investment in Real Estate by Non-Saudis)
United Arab Emirates	No federal law on investment Dubai: Investment Trust Law No.5 of 2006, Regulatory Law No.1 of 2004, Collective Investment Law No.1 of 2006, Collective Investment Law No. 2 of 2010	Dubai: Collective Investment Amendment Law No.6 of 2006, DIFC Amendment Law No.2 of 2007

[49] www.oecd.org/daf/investment/declaration

1. Restrictions to National Treatment

National treatment is defined as the commitment of a government to treat investments controlled by the nationals or residents of another country no less favourably than domestic investments in like circumstances. Foreign investors look for jurisdictions offering national treatment as it demonstrates a commitment to non-discrimination and signals a degree of predictability. OECD studies show that, no country unequivocally applies national treatment.[50] However, where exceptions exist and, therefore, circumscribe the scope of national treatment, these exceptions should be transparent and defined in law. Three main types of exceptions or restrictions to national treatment may be identified: general exceptions (*e.g.* protection of national security); subject-specific exceptions (*e.g.* intellectual property, taxation provisions in bilateral tax treaties); and country-specific exceptions (*e.g.* specific industries, such as financial services, transportation or oil and gas). [51]

The OECD Investment Committee's project on "Freedom of Investment, National Security and Strategic Industries" has, since early 2006, provided a forum for intergovernmental dialogue on how governments can reconcile the need to preserve and expand an open international investment environment with their duty to safeguard essential national security interests.[52] Discussions so far have revealed strong support for three principles of investment policy measures addressing essential security interests: transparency (i.e., regulatory objectives and practices should be as transparent as possible to increase predictability of outcomes); proportionality (i.e., restrictions on investment should not be greater than needed to protect national security); and, accountability (i.e., procedures for parliamentary oversight, judicial review, periodic impact assessments, and requirements that decisions to block investment should be taken at high government levels should be considered to ensure accountability of the implementing authorities).

Based on best international practices, primary and secondary private FDI legislation should incorporate national treatment and clearly identify restrictions to national treatment in the form of general, sector-specific or country-specific exceptions. Discriminatory treatment of foreign investors compared to national investors in like circumstances should not be exercised on the basis of discretionary power. The lifting of restrictions to national treatment should be motivated by reciprocal commitments made through bilateral, regional, or multilateral agreements. Periodic review of restriction should also be conducted.

[50] OECD Policy Framework for Investment: User's Toolkit on Investment Policy: http://www.oecd.org/document/10/0,3343,en_39048427_39049329_39631818_1_1_1_1,00.html.

[51] OECD (2007), *OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies and Sectors*. The document contains preliminary findings on the FDI Regulatory Restrictiveness Index. It was updated in 2010 (http://www.oecd.org/dataoecd/32/19/45563285.pdf).

[52] Freedom of Investment at the OECD:
http://www.oecd.org/document/7/0,3343,en_2649_34887_37363207_1_1_1_34529562,00.html. See also OECD (2009), Guidelines for Recipient Country Investment Policies relating to National Security, and OECD (2010), Identification of foreign investors: A fact finding survey of investment review procedures.

This indicator examines whether the government has incorporated the principle of national treatment into the main investment laws and into primary and secondary legislation, and whether the government maintains restrictions to national treatment at the pre- and post-establishment stages. This indicator analyses whether a foreign investor can obtain clearly defined restrictions to national treatment in the form of general, subject-specific, or country-specific exceptions. This indicator also analyses how the government uses, defines and revises restrictions, and includes them in international agreements, such as free trade agreements.

This indicator analyses restrictions to national treatment through investment-specific laws and codes applicable in each GCC member country. However, foreign investment is also subject to laws and regulations governing areas like customs, export and imports, export promotion, competition, mergers and acquisitions, privatisation, but also sectoral laws. A fully thorough analysis of restrictions to national treatment would have to include a complete review of all applicable laws, regulations and procedures. It should be noted that the restrictions to national treatment compiled in this paper are only indicative and do not represent an exhaustive review.

Bahrain

Bahrain is the only GCC country without a fully dedicated investment law (UAE having sub-national investment laws, but no federal law). As a consequence, the regulating instruments (such as the Commercial Company Law of 2001) do not explicitly affirm the freedom of foreign investment and the national treatment principle.

The Commercial Company Law sets certain nationality requirements with regards to operation of companies and maintains governmental control over foreign capital companies (articles 61 and 345), in particular by requiring permission by the Ministry of Commerce and Industry to incorporate companies owned by foreign investors, and to exempt such investors from minimum and maximum capital requirements. There has been no recent change, which would restrict or adversely affect foreign investment.

The 2007 Trade Policy Review conducted by WTO identified activities only open to Bahraini nationals in the services sector, such as real estate, the media, transportation, oil supply and distribution, commercial agencies and small business services.[53] The report from the WTO Secretariat also identified activities restricted to Bahraini and GCC nationals, such as accounting. 51% Bahraini or GCC ownership is required, or a Bahraini intermediary is required, for activities such as trade and retail, medical services and pharmacies.[54] Finally, some investments defined by the Ministry of Commerce and Industry are prohibited for both foreign and domestic investors, such as mailing activities.

With regards to portfolio investments, GCC nationals may own 100% of listed companies, whereas, non-GCC nationals may only own up to 49% of Bahraini companies and 100% of foreign companies.[55]

[53] WTO (2007), *Trade Policy Review – Bahrain*, WT/TPR/S/185, at p. 19 *et seq.*.

[54] WTO (2007), *Trade Policy Review – Bahrain*, WT/TPR/S/185, at par. 29.

[55] United States Commercial Service (2009), *Bahrain – Country Commercial Guide*.

In addition, in furtherance with the Free trade Agreement between Bahrain and the United States which entered into force in 2006, certain restrictions to trade in services were negotiated and listed[56]. These so-called "non-conforming measures" include local presence or nationality requirements to provide certain types of services and activities (see the Bahrain schedule in Annex I and II of the FTA on non-conforming measures in services[57]). Although such restrictions shall not constitute Bahrain's official list of restrictions to foreign investment as they were identified on a bilateral basis in the context of negotiation of an FTA and therefore only applied to US investors, they constitute publicly available information on restrictions to foreign investment activities in Bahrain.

Kuwait

Law No. 8 Regulating Direct Foreign Capital Investment of 2001 does not affirm the principle of national or equal treatment. Although open to foreign investors, investment projects are subject to mandatory scrutiny prior to admission. Law No. 8 of 2001 (articles 2 and 3) subjects all foreign investments to prior examination and licensing by the Council of Ministers, which "*shall determine the economic activities and enterprises that the foreign investor is allowed to undertake within the State of Kuwait*".

Under article 17, foreign investors shall enjoy "*the coverage of the principles of equality and confidentiality of technical, economic and financial information connected with the enterprise, as well as preservation of investment initiatives*". It is unclear in that context what the scope of the term "equality" in the language of the law actually is.

A positive list of the economic activities open to foreign investments was published under the Council of Ministers Resolution No. 1006/1 of 2003, and amended by Council of Ministers Resolutions No. 738/9 of 2008, No. 1067/8 and 66/2 of 2009.[58] The banking sector is open to foreign investors since 2001 and nine foreign banks, six of which from other GCC countries, now operate in Kuwait.[59]

Law No. 8 of 2001 does not restrict foreign ownership for licensed investments. However, the Commercial Code of Kuwait limits ownership by foreign investors. Articles 23 and 24 of the Commercial Code provide that non-Kuwaiti citizens wanting to engage in commercial activities need

---

[56] Though the FTA does not contain an investment chapter, some service activities can be assimilated to foreign investment.

[57] For further information on those restrictions : http://www.fta.gov.bh

[58] Industries except for enterprises related to oil, gas exploration or production; construction, operation and management of infrastructure enterprise in the fields of water, power, drainage and communications; banks, investment corporations and foreign exchange companies which the Central Bank of Kuwait agrees to consider incorporation thereof; insurance companies which Ministry of Commerce and Industry agrees to incorporate; information technology and software development; hospital and medicines manufacturing; land, sea and air transport; tourism, hotels, and entertainment; culture, information and marketing except for issuance of newspapers and magazines and opening of publishing houses; integrated housing projects and zones development except for real estate speculation; real estate investment through foreign investor subscription to the Kuwait shareholding companies as per the provisions of law No. 20 of 2002; storage and logistic services; environmental activities.

[59] United States Commercial Service (2010), *Doing Business in Kuwait – A Country Commercial Guide for U.S. Companies 2009*, p. 46.

to have a Kuwaiti partner whose share in the business must not be less than 51%. It also stipulates that a foreign company may not establish a branch in the country and may not pursue commercial activities unless it has a Kuwaiti agent.

The Public Tenders Law of 1964 establishes that individuals or firms applying for public procurement tenders must be Kuwaitis, and, that foreign applicants may not tender, unless a Kuwaiti partner or an agent acts as an intermediary.

Although a member of WTO since 1995, Kuwait has not yet been subject to a trade policy review by the WTO Secretariat.

Oman

The Foreign Capital Investment Law of 1994 governs all matters concerning foreign investment in Oman. Under the Law, foreign investments are subject to differentiated treatment at the entry level, as they require prior approval: *"non-Omanis, whether natural or legal persons, may not conduct commercial, industrial, or tourist-related businesses, or participate in any Omani company without a license issued by the Ministry of Commerce and Industry"* (article 1). This requirement may be waived by way of special contracts or agreements with the government (article 3).

To receive a license, foreign investors must apply at the Ministry of Commerce and Industry and two conditions must be fulfilled:

- The paid-in capital of the company in which the investment is made is no less than RO 150,000 (approximately USD 390,000);[60]
- The foreign ownership of the company does not exceed 49%.

The Ministry may however, in case recommendations are made by the Foreign Capital Investment Committee, allow foreign ownership for up to 65%. In case a project has a paid-in minimum capital of RO 500,000 (approximately USD 1.3 million)[61] and contributes to the development of the national economy, 100% foreign ownership may be permitted upon approval by the Ministerial Cabinet. In addition, a decree of July 2004 lifted all foreign equity requirements for privatisation projects.

These requirements are not applicable to GCC nationals who may own up to 75%, and to United States investors (following the Free Trade Agreement of 2009) who are allowed to establish and fully own a business in Oman without a local partner except in certain sectors (see below).

The Instruction for Establishment of Omani companies requires that the non-Omani partner (except when from other GCC countries), who must represent no more that 70% of the shares, "*be a legal person with an experience of not less than five years in the same field of activity*".

As mentioned in the 2008 WTO Trade Policy Review, there is a negative list of activities and sectors open only to Omani investors. Such restricted sectors include: real estate, placement services, investigation, tourist guide, waterway and taxi transportation, printing and publishing, as

[60] Exchange rate as of March 2010.

[61] Exchange rate as of March 2010.

well as small business services.[62] Most professional services (engineering, architecture, law, accounting) are also excluded from majority foreign investors.[63] Such list is in line with the purported objective of the Omani government to increase foreign investments in manufacturing, information technology, tourism and higher education.[64]

Oman signed an FTA with the United States in 2006, which entered into force in 2009 and contains a chapter on investment, as well as on trade in services.[65] This FTA has identified restrictions to national treatment applicable to U.S. investors in Oman. These restrictions have been listed in the annexes I and II on investment and services non-conforming measures which provides for Omani nationality requirements in a dozen of activities.[66] This publicly available list applies only to the treaty partner, but gives an indication of the type of restrictions Oman requires.

Qatar

Law No. 13 of 2000 (Qatar's Investment Law regulating the Investment of Foreign Capital in Economic Activities), the Commercial Companies Law No. 5 of 2002, and the Commercial Agency Law No. 8 of 2002 regulate investment in Qatar.

Law No. 13 of 2000 does not explicitly affirm the principles of national treatment or non-discrimination of foreign investors.

Certain sectors are excluded for foreign investments. That is the case for banking and insurance (except for a special permission granted by the Council of Ministers), commercial agencies and trading in real estate (Decree Law No. 31 of 2004). Since 2006, international law firms may operate in Qatar.

The 2005 Trade Policy Review by the WTO Secretariat on Qatar's investment regime [67] evidenced a series of restrictions to national treatment, some of which were eliminated since then. This shows Qatar's efforts in liberalising certain sectors.

Under Law No. 13 of 2000, a company may be 100% foreign-owned in certain sectors, such as agriculture, industry, tourism, education, health, and natural resources, subject to prior government approval. In 2004, foreign investment was allowed in banking and insurance. In 2009-2010, Qatar opened several sectors to 100% foreign ownership in consulting and technical work services,

[62] WTO (2008), *Trade Policy Review – Oman*, WT/TPR/S/201, at paragraph 30.

[63] United States Commercial Service (2010), *Doing Business in Oman – 2010 Country Commercial Guide for U.S. Companies*.

[64] United States Commercial Service (2010), *Doing Business in Oman – 2010 Country Commercial Guide for U.S. Companies*.

[65] http://www.omanusfta.com.

[66] Legal services, real estate brokerage services, employment placement services, investigation and security services, retail photographic services, free-to-air radio and television transmission services, tourist guide services, news agency services, transportation services on Oman's internal waterways, maritime freight transportation (70% foreign ownership maximum), taxi transportation services, specific authorisation required for domestic air transportation services, restaurant services. http://www.omanusfta.com/documents/Annex_I_Oman_Schedule.pdf.

[67] WTO (2005), *Trade Policy Review – Qatar*, WT/TPR/S/144, at paragraphs 30 to 38.

technology and cultural services, as well as distribution services, and cultural and leisure services. Foreign ownership of investment is otherwise limited to 49% of invested capital in other activities (article 2). In addition, law No. 2 of 2005 restricts foreign ownership of publicly listed companies in Qatar to 25% (article 2 par. 4 of amended Law No. 13 of 2000).

There are no restrictions to the transfer of ownership of the investment which may be made to another foreign or domestic investor (article 10).

Foreign firms operating in Qatar (except when 100% foreign-owned) are required to import certain products through local agents. Preference is given to projects that use local raw materials and facilitate the transfer of technology and know-how in Qatar.

The Law on Corporate Income Tax excludes Qatari-owned firms from its scope, therefore subjecting only foreign investors to corporate income tax (up to 35% of net profits). Foreign companies may only be granted tax exemptions on a case-by-case basis.

Finally, participation in public procurement or tenders under QAR 1 000 000 (USD 275 000[68]) is restricted to local companies registered with the Qatar Chamber of Commerce.[69]

Saudi Arabia

The Foreign Investment Act of 2000 does not expressly affirm the principle of national treatment and non-discrimination for foreign investors. It allows foreign investors to make direct investments in all economic sectors except those listed in a negative list to be determined by the Supreme Economic Council (article 3). The negative list is regularly updated and has been reduced over the years, now comprising over a dozen sectors.[70] Recent reforms include, in 2010, the permission for foreign investors to invest in an exchange-traded fund of Saudi Arabian shares for certain financial services and in the petrochemical sector.[71] Also, government contracts on project implementation and procurement are regulated by a law issued in 2006 permitting wholly foreign-owned companies to bid for government contracts.

No ownership quotas are provided for under the Foreign Investment Act and secondary FDI legislation, aside from the prohibition of foreign ownership in activities listed in the negative list. The 2010 World Bank's *Investing Across Borders* report ("Investing Across Sectors" indicator) lists sectors where foreign ownership is either restricted or open, thereby noting that agriculture, construction and electricity hold no ownership requirements. Banking and insurance receive an index of 60.0, since foreign capital participation in the financial services sector is allowed to a maximum of 60%.

[68] Exchange rate as of 15 March 2011. QAR was pegged to USD in 1980.

[69] United States Commercial Service (2010), *Doing Business in Qatar – A Country Commercial Guide for U.S. Companies: 2010 Edition*.

[70] The list is available on the website of the Supreme Economic Council of Saudi Arabia. Excluded sectors are: oil exploration and production, military-related activities, security and detective services, real estate brokerage, tourist services in selected areas, employment services, printing and publishing (with exceptions), audiovisual and media services, land transportation services, health care, and fisheries. http://www.sec.gov.sa/getdoc/be8e7887-27b1-4bb7-9879-bd75f8ad9acf/list-of-types.aspx.

[71] UNCTAD-OECD (2010), *Report on G20 Investment Measures*, 4 November 2010.

Telecommunications are also relatively open according to the World Bank indicator (70.0 index on both fixed-line and wireless infrastructure and services).[72]

Saudi Arabia prohibits investments from foreign investors having been convicted in the past of financial or commercial violations in the Kingdom or elsewhere (article 6 of the Executive Rules).

Saudi Arabia ranks fourth from last on the OECD FDI restrictiveness index among the OECD members, adherents to the OECD Declaration on International Investment and G20 countries (after China, Iceland and Russia) with an index of 0.354 (closed = 1, open = 0). This means that Saudi Arabia has comparatively more sectoral restrictions and investment restrictive measures than most OECD and G20 countries.

Although a member of WTO since 2005, Saudi Arabia has not yet been subject to a trade policy review.

United Arab Emirates

According to available information, at present, national treatment of foreign investors is not stated in laws and regulations applicable to foreign investments in the U.A.E., either at the federal level or in any of the Emirates. The U.A.E. announced that a draft federal foreign investment law was currently being drafted, and Dubai and Abu Dhabi are also reported to be revising their laws taking into account the latest international standards in terms of national treatment.[73] Indeed, the new draft law would allow foreign investments to enjoy national treatment in specific economic sectors or sub-sectors identified by a Cabinet Decision.[74]

Foreign ownership of stocks is restricted, with rules varying in the different Emirates. 100% foreign shareholding is only allowed in designated free zones (see list in chapter V). Outside the free zones, all companies and projects must generally be at least 51% owned by a U.A.E. national or a locally-owned company, under the Federal Commercial Companies Law, the Commercial Agencies Law and the Federal Industry Law. According to the 2006 WTO Trade Policy Review, foreign investors may open branches which may be 100% foreign-owned under specific sponsoring and sectoral conditions. The opening may only be conducted through an intermediary (local agent). The foreign branch may only operate in selected activities after approval from the Ministry of Economy and Planning and the Economic Department of the relevant Emirate, and after acquitting an annual fee and securing a bank warranty for registration.[75]

Greater ownership is permitted for GCC nationals who are allowed to hold up to 75% of the equity of companies in the industrial, agricultural, fisheries and construction sectors; and up to 100% of the equity of companies in the hotel industry. GCC nationals are also permitted to engage in

[72] World Bank Group (2010), *Investing Across Borders*, at p. 146. Data available on http://iab.worldbank.org/Data.

[73] MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

[74] United States Commercial Service (2010), *Doing Business in the United Arab Emirates– 2010 Country Commercial Guide for U.S. Companies*.

[75] WTO (2006), *Trade Policy Review – United Arab Emirates*, WT/TPR/S/162, at paragraphs 31-32.

wholesale or retail trade activities, except in the form of companies, in which case they are subject to the Company Law.

Specific restrictions on FDI in the U.A.E. economy (outside the free zones) also include sectoral restrictions on entry, such as the energy distribution or the hydrocarbon sectors. Access of foreign investors to the financial sector is particularly restricted. Contrary to other countries in the region, such as Oman, the education sector is also subjected to foreign ownership restrictions. Some activities are only open to U.A.E. nationals: car services, agriculture, forestry, fisheries, placement services, investigation services, passenger and road transport. There is no positive or negative list, which would be publicly available to investors. Differential tax rates are being applied to profits of foreign banks.

The Commercial Agencies Law requires that foreign companies distribute their products in the U.A.E. only through exclusive commercial agents that are either U.A.E. nationals or companies wholly owned by U.A.E. nationals.

Conclusion

Four GCC countries have enacted a specific law relating to foreign and/or domestic investment. In Bahrain, the Commercial Code applies to foreign investors, and the U.A.E. in the process of drafting a federal foreign investment law for some years now. These two countries constitute an exception in the MENA region, as all other countries have an investment law or code.

None of the six countries analysed in this report explicitly affirm the principle of national treatment in their primary FDI legislation (while eight countries in the MENA region do so). However, most bilateral investment treaties (BITs) signed by GCC economies, as well as the GCC Economic Agreement with regards to other GCC nationals, contain a national treatment provision. On the basis of best practices, it is recommended to affirm the principle of national treatment in domestic legislation, as is the case in several countries in the MENA region. Exceptions needs to be clearly and transparently listed and can progressively be reduced according the national strategic objectives and the level of development. In that perspective, a good practice, which was identified in four GCC countries, is the existence of publicly available lists of sectors or activities open to foreign investment (positive list) or closed to foreign investment (negative list). Positive lists are available in Bahrain and Kuwait, whereas negative lists are available in Oman and Saudi Arabia. Qatar and the U.A.E. do not seem to have set up such a list.

Compared to other countries in the MENA region, the Gulf countries maintain a relatively high number of restrictions. However, in the recent years, most GCC economies have taken steps to modify or reduce restrictions to national treatment in their primary FDI legislation and selected rules applicable to foreign investors and therefore gradually opening up sectors to foreign investors. This is part of the national diversification policies which entail progressive liberalisation of international investment. It should also be noted that the global economic crisis has not triggered restrictive or protectionist reforms.

Several types of regulatory restrictions to national treatment persist in the GCC country legislation on foreign investment. Most frequent types include:

- Sector-specific restrictions (e.g. oil and gas, banking and insurance, electricity, media, transportation, tourism, small business services…);

- Limitations to foreign ownership through shareholding quotas (typically limitations to 49% foreign ownership);

- Limitations to foreign ownership in land and access to real estate (see indicator 5 on land restrictions);

- Nationality requirements on selected activities or industries (e.g. prohibition of foreign investments in some sectors, required local intermediary);

- Agency, sponsorship and distributorship requirements (e.g. requiring a local intermediary to operate the investment project), quite typical for the Gulf region compared to others.

Some of the restrictions concern measures that discriminate against foreign-controlled enterprises but are motivated by reasons of public order and essential security interests, while others discriminate based on nationality, for strategic purposes such as the protection of domestic interests.

Restrictions on foreign ownership are still frequent in the Gulf region. Only Saudi Arabia does not limit foreign equity ownership for foreign investments. Oman, Qatar and the U.A.E. maintain general restrictions to foreign ownership thereby limiting foreign investments to 49% participation. Others limit such restrictions to selected industries.

GCC economies appear to resort to regulatory sectoral restrictions for different reasons such as protection of national security and interest, consideration of national development objectives and level of economic development, preservation of strategic sectors. The primary sector is subject to restrictions in sectors such as agriculture, fisheries, natural resources. It is reported that the MENA region is one of the most restricted for electricity distribution and renewable energy generation, as well as oil and gas.[76] Currently, service restrictions concern the services which are perceived as strategic areas for the economy or necessary to preserve national security and interests. Service restrictions mostly concern banking and insurance activities, media and telecommunications, transportation (road, air, rail, maritime), and regulated professions (lawyers, accountants, architects, investigators, tourist guides, private education).

The perception from the private sector indicates uncertainty relating to the lack of clarity in terms of ownership rights and sector participation.

It is recommended that GCC economies conduct policy reviews and assessments of their regulatory and practical restrictions to national treatment. Such reviews may be conducted on a voluntary basis, or prompted by negotiations (adherence to the OECD Declaration on International Investment, negotiations of free trade agreements containing services and investment provisions or pre-establishment investment treaties – these instruments requiring the negotiation of restrictions lists). Restrictions and their impact need to be properly evaluated according the national development objectives and in consultation with the private sector. Based on the review and impact assessment, a roadmap for policy reforms need to be adopted in consultation with all relevant stakeholders and should be accompanied by appropriate communication.

[76] World Bank Group (2010), *Investing Across Borders*, at. p. 26.

2. Approval Procedures

Governments have the sovereign right to regulate the entry of foreign investors and their investments into their jurisdictions. Entry regulation may include procedures for screening and approving all investments or sector-specific investments. The transparency and the predictability of these procedures send an important message to potential investors about the overall attractiveness of the investment environment. Approval procedures may involve case-by-case reviews of potential foreign investment projects by a specialised public authority in the host country – the investment promotion agency, a special investment committee, or the Ministry responsible for investment. Should the public authority deny entry, a foreign investor should have the opportunity to appeal the decision. The OECD's *FDI Regulatory Restrictiveness Index* cautions that obligatory screening and other discriminatory approval procedures may send an adverse message to the international investor community and may therefore limit inward FDI flows.

Based on international best practices, the majority of approval procedures should be defined by laws, regulations or administrative procedures and applied in accordance with pre-defined criteria on a non-discriminatory manner. In particular, approval procedures for FDI should not discriminate in favour of domestic investors. Appeals should also be permitted.

This indicator examines whether foreign investment is subject to approval procedures, whether these approval procedures and entry criteria are defined by law, publicly available and subject to update and regular revision. This indicator also mentions the Doing Business ranking for the indicator on starting a business.

It should be noted that this indicator is difficult to evaluate due to lack of clear information and the discrepancies between the official information available and the practice. Obstacles perceived by the private sector would therefore need to be taken into consideration. For example, it is difficult to assess the length of approval procedures and the possible delays without consulting with the private sector. Similarly, it is usually unknown whether decisions relating to approval procedures may be appealed.

<u>Bahrain</u>

According to the Commercial Company Law, permission by the Ministry of Commerce and Industry to incorporate companies owned by foreign investors and to exempt such investors from capital requirements is requested.

In 2004, the Ministry of Industry and Commerce created the Bahrain Investor Centre to handle investment registration and serve as a one-stop shop. It is reported by officials from the Ministry that commercial registration applications may be processed within 24 hours in most cases.[77] The 2011 Doing Business reports evaluates that 7 procedures and 9 days are necessary to start a business in Bahrain, well above the MENA average (8.1 procedures and 20 days) and close to the OECD average (5.6 procedures and 13.8 days).[78]

[77] United States Commercial Service (2009), *Bahrain – Country Commercial Guide*.

[78] For a list of these procedures: www.doingbusiness.org/data/exploreeconomies/bahrain/.

Kuwait

The 2001 Investment Law subjects foreign investments to prior examination and licensing by the Council of Ministers.

Long bureaucratic delays to set up companies and obtain licenses and approvals have been reported by foreign investors.[79] The 2011 Doing Business reports evaluates that 13 procedures and 35 days are necessary to start a business in Kuwait, well under the averages in MENA (8.1 procedures and 20 days) and OECD (5.6 procedures and 13.8 days).[80]

Oman

According to article 1 of the 1994 Investment Law, foreign investors must obtain licensing from the Ministry of Commerce and Industry to conduct business in Oman and to participate in Omani companies. Therefore, in practice, despite the creation of a one-stop shop to facilitate entry procedures for foreign investments, required approval procedures for purposes of establishing a company and obtaining industrial licenses must be solicited from the Ministry of Commerce and Industry. Depending on the investment project, approval may also be required from competent ministries and the Omani Chamber of Commerce and Industry. In addition, a residency permit or an investor's visa is required to open a bank account.

Long delays are reported in Oman to go through with approval procedures. In particular, discrepancies are reported between majority-owned Omani companies and foreign companies, in order to obtain all approvals.[81] The 2011 Doing Business report evaluates that 5 procedures and 12 days are necessary to start a business in Oman, which is above the averages in MENA (8.1 procedures and 20 days) and OECD (5.6 procedures and 13.8 days).[82]

Qatar

According to the 2000 Investment Law, full foreign ownership in most sectors (agriculture, industry, tourism, education, health, natural resources) is subject to prior government approval.

The 2011 Doing Business reports evaluates that 8 procedures and 12 days are necessary to start a business in Qatar, above the averages in MENA (8.1 procedures and 20 days) and OECD (5.6 procedures and 13.8 days).[83]

[79] United States Commercial Service (2010), *Doing Business in Kuwait – A Country Commercial Guide for U.S. Companies 2009*.

[80] For a list of these procedures: www.doingbusiness.org/data/exploreeconomies/kuwait/

[81] United States Commercial Service (2010), *Doing Business in Oman – 2010 Country Commercial Guide for U.S. Companies*. The report identifies discrepancies from 3 days for Omani companies to 3 to 11 months for American companies.

[82] For a list of these procedures: www.doingbusiness.org/data/exploreeconomies/oman/

[83] For a list of these procedures: www.doingbusiness.org/data/exploreeconomies/qatar/

Saudi Arabia

The 2011 Doing Business reports evaluates that 4 procedures and 5 days are necessary to start a business in Saudi Arabia, well above the MENA (8.1 procedures and 20 days) and OECD (5.6 procedures and 13.8 days) averages.[84]

However, in practice, lengthy procedures are regularly observed.[85] Commentators report that executive regulations adopted to implement the 2000 Investment Law contributed to the "*fragmentation*" of the FDI regulatory framework, causing implementation intricacies, sometimes contradictions with the spirit or provisions of the Law, as well as competition and lack of co-operation between administrations, to the detriment of investors and of effectiveness of procedures.[86]

SAGIA set up the Investors' Service Centre designed to provide licensing for investment projects, conduct approval procedures and coordinate with relevant ministries. Response to the license request must be provided within 30 days. Nevertheless, as pointed out by observers, "*the SAGIA license by itself is of little help without a commercial registration (CR) issued by the MoCI, on the basis of largely unchanged rules that SAGIA has little control over*".[87]

The OECD FDI Restrictiveness Index analyses statutory restrictions to national treatment pre- and post-establishment for OECD members and selected non-members. It includes Saudi Arabia as a G20 member. The 2010 FDI Restrictiveness Index[88] identifies a discretionary dimension to screening and approval procedures in all sectors. Other observers confirm these discretion and arbitrariness.[89]

United Arab Emirates

All foreign investments are subject to prior examination and licensing with conditions varying from one Emirate to another. Licensing procedures apply differently to local and foreign companies, but are publicly available and transparent, as underlined by the WTO Secretariat. Licences can be obtained only by domestic companies that are majority-owned by UAE nationals, or by 100% foreign-owned branches, which must appoint a local services agent or "sponsor".[90]

The 2011 Doing Business reports evaluates that 8 procedures and 15 days are necessary to start a business in the U.A.E., around the MENA average (8.1 procedures and 20 days) and under the OECD average (5.6 procedures and 13.8 days).[91]

---

[84] For a list of these procedures: www.doingbusiness.org/data/exploreeconomies/saudi-arabia/

[85] United States Commercial Service (2011), *Doing Business in Saudi Arabia: 2011 Country Commercial Guide for U.S. Companies*.

[86] For historical considerations on the drafting of the Saudi Investment law: Hertog S. (2010), *Princes, Brokers and Bureaucrats – Oil and the State in Saudi Arabia*, p. 143 et seq..

[87] Hertog S. (2010), *Princes, Brokers and Bureaucrats*, p. 164.

[88] http://www.oecd.org/dataoecd/32/19/45563285.pdf.

[89] Hertog S. (2010), *Princes, Brokers and Bureaucrats*, p. 160.

[90] WTO (2006), *Trade Policy Review – United Arab Emirates*, WT/TPR/S/162, paragraphs 27 et seq..

[91] For a list of these procedures: www.doingbusiness.org/data/exploreeconomies/united-arab-emirates/

Conclusion

Several GCC countries still maintain systematic screening, prior approval or licensing on foreign investment projects, i.e. Kuwait, Oman and the U.A.E.. Initial reports evidence that additional restrictions appear in practice or are not explicitly listed in primary foreign investment legislation. Differences in treatment between foreign and domestic investors or discretionary decisions seem to be observed in most GCC countries. Often it appears that resorting to local agents to carry out administrative procedures may help in speeding up the process (e.g. in Saudi Arabia).

Another conclusion shows that the effectiveness and transparency of procedures have been difficult to achieve in practice in GCC countries, even in cases where a dedicated centre was opened to facilitate registering of investments and to assist investors with approval and administrative procedures. Concrete examples of unexpected requirements or non-anticipated obstacles may be found in literature, and in the responses to the questionnaire sent to the private sector (see below chapter VII).

Lack of co-operation between governmental agencies, ministries and investment centres or authorities is also observed, thereby adding up to the complexity of investment procedures. No information is available on the possibility to appeal a decision related to the entry and operation of an investment.

Approval and screening procedures seem to be a strong obstacle for foreign investors willing to invest in the GCC. It is recommended that efforts conducted towards reforming investment policies in the GCC include the streamlining of administrative procedures towards clearer, more transparent and less discretionary decision-making. Procedures should be clearly enounced, non discriminatory at least among foreign investors, simplified and better co-ordinated between government bodies. The existence of one-stop shops, should they have the corresponding capacities and necessary authority, may facilitate approval procedures and encourage foreign companies, including SMEs, to invest in the country.

3. Admittance of Foreign Business Personnel in Support of FDI

Regulatory measures that can discourage FDI include constraints on foreign nationals either managing or working in affiliates of foreign companies. Stipulations that nationals or residents must form a majority of boards of directors may undermine foreign owners' control over their holdings and therefore make them more hesitant about investing. Similarly, if regulations restrict the employment of foreign nationals, investors may judge that they cannot make use of the necessary expertise to make their investment worthwhile.

Following best practices, the nationality of board members may not be restricted to nationals. Temporary entry should also be granted with limited restrictions or quotas to foreign personnel with specialised knowledge in support of the project.

This indicator examines whether the government imposes senior management quotas on foreign enterprises and whether temporary entry is granted to personnel with specialised knowledge in support of foreign enterprises active in noted sectors.

Bahrain

In an effort to diversify the workforce and promote local staff, the Bahraini government launched a "Bahrainisation" policy in 2002, and started restricting or limiting access of foreign workers in selected professions. In 2006, a mandatory tax was imposed to companies for each foreign worker employed, under the Labour Reforms Law.[92]

Kuwait

Visa and residency applications are reported as being difficult and variable in difficulty and length. Most visas and work permits require a local sponsor.[93] The State of Kuwait, particularly its Ministry of Social Affairs and Labour, has been pursuing a policy of "Kuwaitisation" of the workforce in the private sector with the passing of the 2008 "Kuwaitisation" Law. The details of this reform could not be found.

Oman

Foreign workers must obtain their visa, work permit and residency permit from the Ministry of Manpower and the Immigration office. The length of these processes is unknown.

The Omani Investment Law is silent as to the employment of foreign workers, especially at the director level. However, in 2003, reforms were introduced by the Omani government to strengthen

[92] United States Commercial Service (2009), *Bahrain – Country Commercial Guide*.

[93] United States Commercial Service (2010), *Doing Business in Kuwait – A Country Commercial Guide for U.S. Companies 2009*.

the participation of local workforce in the economy. The "Omanisation" plan, set up by the Ministry of Manpower, lists nine Ministerial decisions providing for minimum percentage of Omani workforce in the following sectors: IT, telecommunications, tourism, oil and gas, consultancy services, electricity, water, automobiles, sales, transportation, accounting, private education, industry and banks. Minimum percentage varies depending on the skills and responsibilities. For example, senior management in IT services shall be composed of 9% of Omanis, and 29% for accounting companies. Skilled employees in telecommunication firms shall be 80% Omani.[94] Those requirements may be waved when the employer proves that no Omani worker is available.

<u>Qatar</u>

A wide majority of the workforce in Qatar is of foreign origin. Although the Qatari government has attempted to regulate recourse to foreign staff and board members ("Qatarisation"), there is currently no provision in the investment law concerning local employment quotas.

<u>Saudi Arabia</u>

Local sponsorship requirements for business visas were lifted in 2005. A programme of "Saudisation" of the local workforce is in place, thereby requiring employers to prove that there are no qualified Saudis to fill in the position for which an expatriate is considered. In addition, lengthy work visa procedures for foreign workers are observed, despite the increased role of SAGIA as a one-stop shop.

<u>United Arab Emirates</u>

The Emirates have set up a policy of "Emiratisation" of the local workforce for several years. Part of that policy includes strict labour laws for the employment of expatriates, and establishment of quotas in certain sectors. The Federal Industry Law requires that industrial projects be managed by U.A.E. nationals.[95]

Conclusion

GCC countries are faced with a unique challenge, regarding the employment of their local workforce, having to deal with large proportions of foreign workers. Existing investment laws do not mention any quotas or restrictions for the admittance of foreign personnel in support of FDI. However, all GCC countries have implemented nationalisation policies with regards to their workforce, in support of skills and human capital development policies. As a consequence, quotas of skilled workers have been implemented, and some countries require that top positions in the project vehicle be of domestic nationality. However, employers may resort to foreign workers and

[94] Full list available at: http://www.manpower.gov.om/en/omanisation_sector.asp

[95] United States Commercial Service (2010), *Doing Business in the United Arab Emirates – 2010 Country Commercial Guide for U.S. Companies*.

expatriates in cases when domestic personnel is proven not to be available. Those policies, when implemented in a constraining manner, i.e. associated with financial sanctions, mandatory cessation of activities, etc., may deter foreign investors and create additional obstacles to attracting foreign investment.

4. Transfer of FDI-Related Capital

The ability to freely transfer investment-related capital, including repatriated earnings and liquidated capital, is important for investors willing to make, operate, and maintain investments in another country.[96] Governments may need to limit such economic freedoms in the event of unforeseen macroeconomic problems, such as a balance of payment crisis or overall economic crisis. Where appropriate, governments should periodically review measures designed to restrict the transfer of FDI-related capital so as not to adversely affect inflows of international investment, deter domestic companies from accessing international capital markets, or encourage inefficient and non-transparent practices such as transfer pricing. Undertaking international commitments, such as accepting the Articles of Agreement of the International Monetary Fund (specifically Article VIII which regulates international transfer of capital),[97] demonstrates the governments' commitment to liberalising transfers of FDI-related capital. Bilateral investment treaties (BITs) generally include provisions relating to the free transfer of capital related to an investment. In MENA economies, the membership to the 1980 Agreement for the Investment of Arab Capital between Arab States is also a relevant tool applicable to transfer of FDI-related capital in Arab States, as this agreement allows for free transfer of capital between Arab States.

Following identified best practices, transfers (in and out of the host country) of capital in support of FDI are not restricted and include transfers of profits; dividends; interests or other amounts derived from the investment; proceeds from the sale of the investment; payments resulting from expropriation; payments resulting from international arbitration. Restrictions to such transfers may be caused by bankruptcy or insolvency; dealing in securities; criminal reports of transfers of currency; or enforcement of court rulings. All restrictions are clear and publicly available. In addition, governments should undertake international commitments such as accepting Article VIII of IMF Articles of Agreement.

This indicator examines whether there are legal provisions and/or international commitments providing for the free transfer of FDI-related capital and under which conditions international transfers may be restricted.

Bahrain

The absence of any provision in the Commercial Code seems to imply that there is no restriction to the repatriation of capital, profits or dividends. That is confirmed by WTO's Trade Policy Review.[98]

---

[96] OECD, *PFI User's Toolkit, Investment Policy – Section on Non-Discriminatory Treatment for National and Foreign Investors*.

[97] Under Article VIII, Sections 2, 3 and 4, IMF members undertake not to impose restrictions on the making of payments and transfers for current international transactions, and not to engage in, or permit any of their fiscal agencies to engage in, any discriminatory currency arrangement or multiple currency practice, except with IMF approval. By accepting the obligations of Article VIII, Sections 2, 3 and 4, a country signals to the international community that it will pursue economic policies which will make restrictions on the making of payments and transfers for current international transactions unnecessary, and will contribute to a multilateral payments system free of restrictions.

[98] WTO (2007), *Trade Policy Review – Bahrain*, WT/TPR/S/185, at par. 32.

It is unclear whether free transferability applies to payments arising out of an expropriation or a final arbitral award.

Bahrain has accepted Article VIII of IMF Articles of Agreement (date not found). Bahrain has 19 BITs in force, a majority offering covered investors free transferability and convertibility of their capital.[99]

Kuwait

Foreign investors have the right to transfer their investments in full or in part to other foreign or national investors, or relinquish them to their national partners in case of partnerships (article 11 of Law No. 8 of 2001 Regulating Direct Foreign Capital Investment). The Law also specifies that foreign investors have the right to transfer abroad their profits, capital and compensation in case of expropriation (Article 12 of Law No. 8 of 2001). The law is silent regarding damages arising out of a final arbitral award or a judicial decision.

Kuwait has accepted Article VIII of IMF Articles of Agreement in 1963. IMF reports that Kuwait "*maintains an exchange system free of restrictions on payments and transfers of international transactions, other than certain security-related restrictions notified to the Fund pursuant to Decision 144-(52/51)*", i.e. for the preservation of national and international security.[100] Kuwait has 38 BITs in force, most of them offering covered investors free transferability and convertibility of their capital.[101]

Oman

The transfer of equity, debt, capital, interest, dividends, profits or personal savings abroad is not restricted in Oman. Article 11 of the Omani Investment Law of 1994 allows to "*transfer abroad the imported capital along with the profits accrued from the project*". Financial resources may be transferred out of the country except in cases where there is conflict with bankruptcy or insolvency laws, laws to security issues, criminal or penal laws, tax laws or other laws applying in this case.[102] It is unclear whether free transferability and convertibility apply to payments arising out of an expropriation or a final arbitral award.

In practical terms, it is reported that for transfer of capital abroad, Omani banks will request full proof and evidence of the origin of funds prior to transfer approval.[103]

Oman accepted Article VIII of IMF Articles of Agreement (date not available). In 2009, the IMF reported temporary restrictions on foreign currency facilities, in light of the economic crisis, which

---

[99] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

[100] IMF (2010), *Kuwait: 2010 Article IV Consultation - Staff Report*.

[101] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

[102] MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

[103] United States Commercial Service (2010), *Doing Business in Oman – 2010 Country Commercial Guide for U.S. Companies*.

the IMF recommended to phase out.[104] Oman has 22 BITs in force, most of which allowing covered investors to transfer their capital.[105]

Qatar

The 2000 Investment Law allows for the free transferability and convertibility of the widest range of FDI-related capital. According to its Article 9, "*foreign investors are free to make all cross-border transfers related to their investment without any delay. These transfers include investment returns, profits resulting from selling or liquidating investments or from the settlement of investment disputes as well as compensation in case of expropriation. Transfers can be made in any convertible currency at the rates prevailing on the date of the transfer*".

Qatar accepted Article VIII of IMF Articles of Agreement in 1973. The IMF reports that "*Qatar is an Article VIII country, but maintains security-related exchange restrictions that have been notified to the Fund*".[106] Qatar has 14 BITs in force, most of them offering covered investors free transferability and convertibility of their capital.[107]

Saudi Arabia

Saudi Arabia reports that there are no controls on liquidation of foreign direct investment.[108] Foreign investors "*have the right to reallocate their share as derived from the selling of equity, or from the liquidation surplus or profits generated by the facility, out of the Kingdom or to use by any other legal means*", and they are also entitled "*to transfer the required amounts to settle any contractual obligations pertaining to the project*", pursuant to Article 7 of the Saudi Foreign Investment Act and article 5 par. 5 of the Executive Rules. The Investment law is silent on other FDI-related proceeds such as payments arising out of an expropriation or a final arbitral award.

Saudi Arabia accepted Article VIII of IMF Articles of Agreement. Saudi Arabia has 10 BITs in force, most of them offering covered investors free transferability and convertibility of their capital.[109]

[104] IMF (2010), *IMF Executive Board Concludes 2009 Article IV Consultation with Oman,* Public Information Notice (PIN) No. 10/21.

[105] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

[106] IMF (2010), *Qatar: 2009 Article IV Consultation-Staff Report.*

[107] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

[108] MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

[109] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

United Arab Emirates

The U.A.E. report that foreign investors are entitled to remit abroad, in convertible currency, foreign capital invested, including returns, profits and proceeds arising from the liquidation of investment projects.[110] Under the draft federal Foreign Investment Law, guarantees are provided for free transfer of capital and returns. It is unclear whether those guarantees apply fully to profits, dividends, sales and re-sales, in addition to payments of compensation for expropriation and damages awarded by an arbitral or judicial decision.

The U.A.E. have accepted Article VIII of IMF Articles of Agreement in 1974. The IMF reports that the U.A.E. maintain "*no restrictions on payments and transfers for current international transactions. Since 2002, the dirham has been officially pegged to the U.S. dollar*".[111] The U.A.E. have 26 BITs in force, most of them offering covered investors free transferability and convertibility of their capital.[112]

Conclusion

All GCC countries report, to varying degrees, the free transferability and convertibility of FDI-related capital and their repatriation abroad. It is recognised in their domestic laws related to foreign investment when available (all GCC countries, except Bahrain and the UAE). All GCC countries are committed to international obligations, pursuant to the Articles of Agreement of the IMF, bilateral investment treaties, membership of the GCC which allows for full convertibility, and parties to the 1980 League of Arab States Agreement for the Investment of Arab Capital between Arab States which allows for full transferability.

These obligations are differently spelled out in the legislation, some economies clearly enforcing best practices by applying free transferability and convertibility to a large array of FDI-related capital, i.e. profits, dividends, sales and re-sales of shares, in addition to payments of compensation for expropriation and damages awarded by an arbitral or judicial decision. That is the case of the Qatari Foreign Investment Law.

In order to improve their domestic laws, and fully comply with and implement best practices, GCC countries could expressly include payments of compensation for expropriation, and damages awarded by an arbitral or judicial decision, which are less frequently listed, as comprised in freely transferable FDI-related capital.

Additional research would be necessary to examine in practice potential sources of difficulties in the repatriation process. The actual process of repatriating capital, in particular in cases of liquidation, but not only, requires clearance from various authorities, such as the tax administration and others. Several reports from the private sector have related cases of blocked transfers when repatriating FDI-related capital. However, it does not seem to be a major issue in the region, as confirmed by the private sector survey undertaken in the framework of the study (see chapter VII).

110 MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

111 IMF (2010), *United Arab Emirates: 2009 Article IV Consultation - Staff Report.*

112 Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

5. Land Restrictions

Investors need to be confident that their ownership of, or right to use, property is legally recognised and protected.[113] Secure, verifiable, and transferable rights including land registers and cadastral information relating to agricultural and other types of land and forms of property represent an incentive for investors and entrepreneurs. Property rights also entitle the investor to participate in the eventual profits that derive from an investment and reduce the risk of fraud in transactions.

A land title contains legal information about a parcel of land, such as the name(s) of the registered owner(s), historical title details, and registration number. Having land titling legislation in place, combined with a system of documented information, provides investors with added security that land purchased is not subject to claims for restitution. A cadastre is a comprehensive register of a country's real estate. It commonly includes details of ownership, tenure, precise location, dimensions, and the value of individual parcels of land. A foreign investor will seek cadastre information prior to undertaking investment in a new jurisdiction.

According to best practices, restrictions on foreign corporate ownership and registration of industrial real estate, rural land or residential properties should not exist or be strictly and clearly limited, for purposes of national development objectives. Administrative procedures for foreign owners should be no less expeditious than procedures for national investors. In addition, best practices on titling and cadastre require that titling legislation is transparent, nationalisation is possible under strict conditions and with fair compensation, and that cadastre and lien information are easily available at limited cost.

This indicator examines how land ownership rights are granted by national laws and whether land registration institutions exist. It examines whether foreign investors and their investments have the same rights as nationals to own and register land, and if not, whether the restrictions depend on the type of land (e.g. rural, residential property or industrial real estate) or its intended use. It looks at whether the administrative and compliance procedures for foreigners are more burdensome or costly than for nationals. Regarding titling and cadastre, the indicator examines whether there is a titling legislation in place, as well as backlogs of pending court cases over property titles, whether titling has been completed for urban and rural land, whether nationalisation rights are clearly defined, including fair compensation, whether there is a land cadastre and register of liens, regularly updated and easily available at limited cost.

Given the number of issues to examine and the difficulties to easily obtain information and data, this indicator is not thoroughly analysed in the framework of this study.

[113] OECD, *PFI User's Toolkit – Draft User Guidance on the PFI Investment Policy Chapter; Section on Effective Ownership Registration.*

Bahrain

As recalled by the Royal Decree of 2001, enacted in 2003, foreign investors (more precisely non-GCC nationals) are not allowed to own land, except in designated areas of the Kingdom. Prime Ministerial Resolutions of 2001 and 2003 dictates the areas for foreign investment. [114]

Kuwait

It is reported that non-GCC citizens may not own land in Kuwait.[115] No further information was otherwise found on the land ownership regime.

Oman

Property rights are very limited for foreign investors. Foreign nationals and enterprises may own real estate only in government-designated tourist areas (Sultani Decree No. 24/95 and Ministerial Decision No. 254/2004). The law permits full rights of inheritance according to the laws of the owner's country of origin as well as residency status for landowners and their immediate family members. GCC nationals, companies fully owned by Omanis or General Joint Stock Companies with majority Omani shareholders, are allowed to own land anywhere under certain conditions.

Qatar

Leasing rights are included in the 2000 Investment Law under the Chapter on investment incentives. According to article 5, foreign investors are allowed to lease land to establish their investment project for up to 50 years, renewable (subject to government approval) for another 50 years. Foreigners can own residential property for 99 years, extendable for a similar period, in selected housing projects and designated areas. The owner can transfer the property to his/her legal heirs.[116] A one-stop window to shorten approval processes for land leasing and housing ownership was established. However, foreigners are otherwise not allowed to own property.

Saudi Arabia

With the enactment of the 2000 Foreign Investment law, foreign investors became authorised to own land as required for the operation of their licensed investment project or the housing of the staff (article 8). Royal Decree No. M/15 of 2000 regulating ownership and investment in real estate by non-Saudis implements that provision. This decree opens real estate ownership to foreigners, with the exception of lands in the vicinity of Mecca and Medina, and apply more favourable rules for GCC nationals. The decree subjects any real estate ownership for the conduct of economic activity to

[114] WTO (2007), *Trade Policy Review – Bahrain*, WT/TPR/S/185, at par. 32, and footnote 27.

[115] United States Commercial Service (2010), *Doing Business in Kuwait – A Country Commercial Guide for U.S. Companies 2009*, p. 51.

[116] WTO (2005), *Trade Policy Review – Qatar*, **Error! Unknown document property name.**144, at par. 31.

prior approval by the licensing authority (article 1 of the decree). The purchase of real estate for investment purposes is subject to a minimum amount of SR 30 million (almost USD 8 million), and to a minimum of five-year ownership to limit speculation. Investors are permitted to rent their property. Conveyancing by a foreign national is subject to a 10% fee.

United Arab Emirates

There is no legislation governing land ownership at the federal level. Lands and natural resources are by principle governed by the ruling family in each Emirate. Reforms have been introduced to deregulate foreign land ownership, initially in Dubai in three exempted areas. In Abu Dhabi, a law on land ownership was adopted in 2005. Foreigners have been given the right, under the new law, to lease real estate in selected investment areas in Abu Dhabi for a limited duration. Other emirates have their own regulations and decisions governing land and property ownership.[117]

Conclusion

One specific characteristic of the Gulf region concerns its strict restrictions on access to land. The Saudi legal regime of foreign ownership of real estate property is the most open in the region, as it allows foreign ownership of land, but only for licensed projects, through approval of the licensing authority, with a minimum amount of the cost of the project, and except in identified areas with a religious significance. A series of limitations are therefore imposed. In other countries, ownership of land is strictly limited to zones designated by the government (Bahrain), touristic areas (Oman), or for housing purposes (Qatar). GCC citizens usually benefit from more favourable provisions. Such limitations, in particular those restricting foreign ownership of land to specific areas, have contributed to high rises in land prices, for example in Dubai.

[117] WTO (2006), *Trade Policy Review – United Arab Emirates*, WT/TPR/S/162, at paragraphs 28-29.

6. Guarantees in case of expropriation

When carrying an investment project, investors expect their right to property to be enforced, respected and maintained. In certain circumstances, however, governments may legitimately need to take private property for public purposes. For example, governments may need to acquire land to develop and locate infrastructure, such as roads and power stations. In environmental emergencies, they may need to resettle people whose property is located in irreparably contaminated areas. These takings of property refer to direct expropriation. However, there are cases of indirect expropriation where an action of a government has a similar effect of a direct expropriation. Indeed, "expropriation or deprivation of property could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State have a similar effect to expropriation or nationalisation and are generally termed "indirect", "creeping", or "de facto"expropriation, or measures "tantamount" to expropriation."[118] It has been observed that direct expropriation is incrementally less frequent in the practice of host States, whereas, based on the quantity of treaty claims engaged in recent years, indirect expropriation is rising. Some bilateral investment treaties refer to indirect expropriation and some tentative definition may be found in the recent treaty practice.[119]

Whether the expropriation is direct or indirect, four conditions are usually recognized for a lawful expropriation: public purpose, non-discrimination, due process of law (legality, i.e. in accordance with the procedures of the domestic legislation, and right of the affected investor to a prompt review of its case), and payment of a timely, adequate, and effective compensation.

Best practices show that proper safeguards in case of expropriation require clear legal and administrative guarantees against unlawful expropriation. Due process, non-discrimination, public interest motivation and fair market compensation should always be adhered to during expropriations, and international awards should be enforced.

---

[118] OECD (2004), *Indirect Expropriation and the "Right to regulate" in International Investment Law*, Working Paper on International Investment, Number 2004/4.

[119] Direct expropriation and indirect expropriation are defined, for example, in Morocco's free trade agreement with the United States (2006). Annex 10-B stipulates that article 10.6 of the FTA on expropriate, "*addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. The second situation (…) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure*". Annex 10-B then argues that: "*The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action*". Then, it is written that: "*Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations*".

This indicator examines whether expropriation is recognised in the legislation, whether the government maintains a policy of timely, adequate, and effective compensation for expropriation, whether indirect expropriation is covered, and whether there are independent judiciary channels to challenge decisions. This indicator is related, to a wider extent, to the capacity of the judicial system to address judicial challenges to expropriation measures.

Although relevant for the protection of international investors and the regime of expropriation in investment policies, this indicator does not examine how investment treaties signed by the GCC countries cover expropriation and protect property rights of foreign investors. Unless specified in the assessment below, all BITs signed by MENA countries could not, at this stage, be consulted, evaluated and compared with regards to their clauses relating to expropriation, despite the protective effect of these provisions on foreign investors. Further analysis is required.

Bahrain

Bahrain's Constitution protects property in general irrespective of the nationality of the owner. Article 9 (c) of the Constitution provides that "*private property is protected. No one shall be prevented from disposing of his property except within the limits of the law. No property shall be expropriated except in the public interest, in accordance with the law and provided that just compensation is paid*".

Kuwait

Chapter Three of the Law Regulating Direct Foreign Capital Investment of 2001 provides for "Secured Guarantees for Foreign Investment" (article 8). It stipulates that foreign firms licensed under the provisions of the Law may not be confiscated or nationalised and that expropriation "*may only be made in case of public interest*" and "*against a compensation equivalent to the enterprise's real economic value at the time of expropriation, (…)* [which] *shall be estimated according to the economic situation prior to any threat of expropriation*". The law does not clarify whether expropriation measures may be challenged before the domestic courts.

Oman

Article 11 of the Basic Law of the State (Constitution) provides that prompt and fair compensation must be provided in case of expropriation of property. Article 12 of the Foreign Capital Investment Law follows the constitutional standards and provides that projects may not be confiscated or expropriated except for public interest and with equitable compensation. Oman reports to follow international law standards for expropriation and compensation.[120]

[120] MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

Qatar

Article 8 of Investment Law No.13 of 2000 regulating investment of foreign capital provides that foreign investments shall neither directly nor indirectly be subject to expropriation unless such measures are for the public welfare and implemented in a non-discriminatory way and against a prompt and reasonable compensation. Compensation shall be equal to the real economic value of the investment at time of expropriation, and shall be paid without undue delay and be freely transferable.

There has been no known case of expropriation of foreign property in Qatar in the past 40 years, since the nationalisation of six international oil companies.[121]

Saudi Arabia

Article 11 of the Foreign Investment Act of 2000 guarantees equitable compensation in case of expropriation, and provides that the expropriation measure should originate from a court order. Article 5 par. 3 of the Executive Rules of the Foreign Investment Act prohibits "*any full of partial confiscation of investment without a court order or subjecting them to expropriation wholly or partly except for public interest and against fair compensation*".

United Arab Emirates

Under the Draft Foreign Investment Law, international investment guarantees include the prohibition of expropriation.[122] No further information is available at this stage.

Conclusion

All GCC countries constitutionally or legislatively protect property rights, including investors' rights, and set out conditions for their lawful expropriation, though no legislation contains the four required conditions (the most complete legislation being the one of Qatar and Saudi Arabia) which are the public purpose motivation, the due process of law, the compensation and the non-discrimination. Only Qatar explicitly covers indirect expropriation (i.e. governmental measures having an effect equivalent to an expropriation).

GCC domestic laws generally refer to the jurisdiction of administrative or judicial courts to adjudicate claims relating to expropriation measures, with a caveat for cases covered by international conventions (as would traditionally be the case for international investors subject to a bilateral investment treaty, for example). As it is assumed that a quite large number of BITs signed by the GCC countries contain expropriation and dispute settlement provisions, dispute cases related to

[121] United States Commercial Service (2010), *Doing Business in Qatar – A Country Commercial Guide for U.S. Companies: 2010 Edition*.

[122] MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

expropriation may be settled by arbitral tribunals through treaty claims from a foreign investor against the State.

The level and typology of compensation or indemnification varies in wording, but is in line with international customary law standards and to the practice of international investment disputes tribunals. It is sometimes unclear how compensation is evaluated in law, and whether standard language such as fair, just, equitable is applied uniformly in the GCC region. It is also mostly unclear how expropriation claims are addressed in practice, and whether local remedies are efficient.

No known dispute case of expropriation has been reported in recent years in any of the GCC countries. As private ownership is limited in the region, direct expropriation is unlikely to negatively impact foreign investors, which might not be the case for indirect expropriation.

7. International Investment Agreements[123]

International investment agreements (IIAs) promote cross-border investments by offering foreign investors minimum levels of protection based on international legal standards (*e.g.* against unlawful expropriation), and by making the rights and obligations of the parties more stable and predictable. Although the government loses some policy flexibility, risks and uncertainties faced by investors are reduced. Wide country coverage of IIAs is thus one of the elements underpinning an attractive investment environment.

IIAs can take various forms: bilateral investment agreements (BITs), free trade agreements (FTAs) with investment-related provisions, regional investment agreements and investment-related multilateral agreements. Traditionally, States have favoured the conclusion of BITs. However recently, preferential trade agreements have increasingly contained standard investment promotion and protection provisions. That is for example the case for the latest free trade agreements with the United States which contain investment liberalisation and protection provisions on the basis of the U.S. model BIT. Association agreements with the European Union and free trade agreements with the European Free Trade Association (EFTA) also contain provisions on investment promotion, but there are not binding.

Based on best practices, investment treaties should be negotiated, signed and ratified with trading partners as part of a targeted strategy to attract FDI. Those treaties should contain *inter alia* a definition of investment and investor; provide MFN and national treatment (for further liberalisation, also at the pre-establishment stage with minimal exceptions); provisions on investment protection; and investor-state dispute settlement. In addition, governments should meet periodically with their treaty partners to review the operation and implementation of their agreements. Finally, a model bilateral investment treaty should be drafted and used as a publicly-available basis for negotiation.

This indicator examines whether the government is pursuing international investment agreements as part of a targeted strategy to attract FDI and has actually signed and ratified investment agreements. It examines whether there is a model bilateral investment treaty (BIT) that the government uses to negotiate, which is publicly available, regularly reviewed and which contains key investment protection and promotion provisions in line with the national development objectives. It also examines whether the government meets periodically with its treaty partners to review the operation and implementation of its IIAs.

GCC countries have signed a number of BITs, most of them containing traditional investment protection provisions, as mentioned below. They are also parties to the 2001 Unified Economic Agreement between the Countries of the GCC which contains some investment provisions in its article 5 (transparency and stability of the investment climate, steps towards harmonisation of investment regulations, national treatment for all GCC natural and legal citizens). As members, they are also parties to all the free trade agreements signed with the GCC (for more details, see below chapter VI).

[123] For further analysis of international investment-related agreements in the MENA region, see MENA-OECD Investment Programme (2010), *Evolution of International Investment Agreements (IIAs) in the MENA region.* http://www.oecd.org/dataoecd/52/26/46581917.pdf.

The six GCC countries are also members of the League of Arab States. Therefore, they are parties to the 1980 League of Arab States Unified Agreement for the Investment of Arab Capital in the Arab States. This agreement represents, to date, the most comprehensive effort put forth by MENA countries to set up a regional and enforceable investment regime.[124] The Agreement contains provisions on national treatment, free transfer and expropriation, although subject to exceptions. Chapter VI establishes an Arab Investment Court to hear cases brought under the Agreement. GCC countries are also members of the Greater Arab Free Trade Agreement, which does not contain investment provisions *per se*.

Finally, all GCC countries have signed a Trade and Investment Framework Agreement (TIFA) with the United States. TIFAs are not binding instruments and aim at promoting (but not protecting) investments. They express the desire of the Parties to promote an attractive investment climate, expand trade and secure favourable conditions for long-term development and diversification of trade between the parties. The investment objectives usually are to monitor investment relations and identify opportunities, hold consultations and work towards removal of impediments of investment flows.

Bahrain

Bahrain has signed 29 BITs, 10 of which have not been ratified, for some of them for over ten years. 20 of those treaties were signed in the past ten years. The latest signed treaty to date has been the one with Turkmenistan in February 2011.

The TIFA with the United States was signed in 2002 and was followed by negotiations of a FTA. The latest was signed in 2004 and came into force in 2006. The FTA does not contain an investment chapter, but related provisions to cross-border investments in the service sector. Indeed, the chapter on trade in services creates *de facto* obligations as some services can be assimilated to FDI. General investments are covered by the US-Bahrain bilateral investment treaty, which entered into force in 2001. Meetings of the Joint Committee, the central oversight body for the FTA, chaired jointly by the Office of the U.S. Trade Representative and Bahrain's Ministry of Industry and Commerce are taking place, the latest being in October 2009.

Kuwait

The country has signed 55 bilateral investment treaties, 17 of which have not been ratified. The latest signed treaty to date has been with Turkey in May 2010. Kuwait also entered into a TIFA with the United States in 2004.

[124] The Agreement has been ratified by all member States of the Arab League with the exception of Algeria and the Comoros Islands.

Oman

Oman signed 33 BITs worldwide, 11 of which have not been ratified. The first BIT was signed in 1991 with Tunisia, and almost half of the BITs signed entered into force in the 1990s. The latest known BIT signed has been with Vietnam in January 2011.

The TIFA with the United States was signed in 2004. It was followed by an FTA which entered in to force in 2009. The FTA contains a full investment chapter, which is not always the case in FTAs focusing primarily on trade in goods and services. Therefore, the FTA contains investment protection provisions, an investor-State dispute settlement mechanism and annexes of non-conforming measures, i.e. measures that are not subject to some or all of the obligations of the agreement. The first meeting of the FTA Joint Committee, chaired jointly by the Office of the U.S. Trade Representative and Oman's Ministry of Commerce and Industry, took place in February 2010. The European Union is also currently negotiating an FTA with Oman, with no investment provision at this stage.

Qatar

Qatar has signed 43 BITs, but only 14 of which are in force. Qatar also entered into a TIFA with the United States in 2004.

Saudi Arabia

The Kingdom of Saudi Arabia signed 21 BITs, 11 of which are still pending ratification, at least two of them for more than ten years. Saudi Arabia also entered into a TIFA with the United States in 2003.

United Arab Emirates

The U.A.E. have signed 37 BITs, including 9 with other MENA countries. Out of those 37 BITs, 11 have not been ratified, some of them for 8 to 15 years. The latest BITs signed have been with Russia in June 2010 and Singapore in January 2011. The U.A.E. also signed a TIFA with the United States in 2004.

Conclusion

The GCC countries have engaged into an investment treaty-making process at the bilateral and regional level mainly from the 1990s. They signed a total of 216 bilateral investment treaties (almost 8% of the total BITs worldwide which amount to 2.757 agreements as of May 2010[125]). Gulf countries are less active than other MENA countries, such as Egypt or Morocco, which have respectively signed 103 and 60 BITs. The top BIT signatory in the GCC region is Kuwait (55 treaties), followed by Qatar (43

[125] UNCTAD (2010), World Investment Report.

treaties), the U.A.E. (37 treaties), Oman (33 treaties), Bahrain (27 treaties) and Saudi Arabia (21 treaties).

Some OECD countries have pursued an active treaty-signing policy with GCC countries, as shown in the table below. 78 agreements were signed with OECD countries. Belgium, France, Germany, Italy, Luxembourg and Turkey have signed an agreement with all six GCC countries, but only France and Italy have their six treaties ratified and in force. Austria, Finland, Korea and Switzerland have 4 to 5 treaties signed with GCC countries. Kuwait and the U.A.E. have the highest number of treaties signed with OECD countries.

BITs in force between GCC countries and OECD members

	Bahrain	Kuwait	Oman	Qatar	Saudi Arabia	U.A.E.
Australia						
Austria		1998	2003		2003	2003
Belgium	2006 (s)	2003	2008 (s)	2007 (s)	2004	2007
Canada						
Chile						
Czech Republic	2009	1997				1995
Denmark		2002				
Estonia						
Finland		1997	1999	2003		1997
France	2005	1991	1996	2000	2004	1995
Germany	2010	1997	2007 (s)	1999	1999	1999
Greece						
Hungary		1994				
Iceland						
Ireland						
Israel						
Italy	2009	1990	1997	2004	1998	1997
Japan						
Korea		2004 (s)	2004	1999	2003	2004
Luxembourg	2006 (s)	2003	2008 (s)	2007 (s)	2004	2007
Mexico						
Netherlands	2009	2002	2009 (s)			
New Zealand						
Norway						
Poland		1993				1994
Portugal		2007 (s)		2009 (s)		
Slovak Republic		2009 (s)				
Slovenia		2004				
Spain	2008 (s)	2008			2006 (s)	
Sweden		2002	1996			2000
Switzerland		2000	2005	2004	2006 (s)	1999
Turkey	2006 (s)	1992	2007 (s)	2008	2006 (s)	2005 (s)
United Kingdom	1991		1996			1993
United States	2001					

(s) signals treaties having been signed but not ratified

It is worth noting a strong tendency in GCC countries to sign investment treaties with partners, but not follow up by finalising the domestic ratification instruments. The rate of ratification (percentage of treaties being ratified and entering into force) varies across the region, but is extremely low. 36% of signed treaties have entered into force. Qatar is the lowest ratifier with 24.5% of its BITs in force, and the U.A.E. and Kuwait the "top" ratifier (with still less than half of their treaties in force, i.e. 41 and 40% respectively). Efforts need to be conducted by GCC governments to finalise the entry into force of these agreements.

The region also follows the worldwide trend of entering into trade integration agreements with investment provisions. The most significant agreements in that respect are the recent free trade agreements entered into by Bahrain and Oman with the United States. However, there are substantive differences between the two FTAs signed as only the one with Oman contains specific investment protection provisions and mechanisms for investor-State dispute settlement. The GCC is also active in the negotiation of FTA (with no specific investment provisions) as it entered into three FTAs and is negotiating a large number of others, though for quite some years (all details are provided in Chapter VI).

The content of the provisions of the BIT is generally standard in terms of investor protection, although all 216 BITs could not be consulted at this stage.

It does not seem however that regular meetings with treaty partners are organised, except for State parties to FTAs with the United States, who pursue a more active consultation policy. Renegotiation of treaties is still rare.

Neither do GCC members follow a known active policy of developing a model investment treaty to be used during treaty negotiations.

8. International arbitration to resolve investor-State disputes

Investor-state dispute settlement (ISDS) mechanisms are embodied in most investment treaties. They entitle foreign investors to seek redress for damages arising out of host governments' alleged breaches of investment-related obligations. The system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration, despite the fact that investor-state disputes often raise public interest issues which are usually absent from international commercial arbitration. Investment arbitration has expanded in the past decade due to the proliferation of the almost 2,760 bilateral investment treaties (BITs) now in force around the world and the increased use of this mechanism by investors. Known treaty-based investment cases rose from less than 10 in 2000 to 390 at the end of 2010.[126]

The institutional arbitration forum most commonly referred to in BITs is the International Centre for the Settlement of Investment Disputes (ICSID) created by the 1965 Washington Convention. Some BITs also mention the Court of Arbitration of the International Chamber of Commerce or the Arbitration Institute of the Stockholm Chamber of Commerce. BITs also provide for the possibility of submitting the dispute to *ad hoc* arbitration. The most frequent approach is to conduct proceedings in accordance to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). At the regional level, the Cairo Regional Centre International Commercial Arbitration (CRCICA) administers arbitration cases, including investment cases, and the Arab Investment Court, created by the 1980 League of Arab States Unified Investment Agreement, is also a forum specific to the region and is reported to having administered four cases as of December 2010, only one of which has been publicly reported. A GCC Commercial Arbitration Centre, headquartered in Bahrain, was set up in 1994 by decision of the GCC Supreme Council. The Centre has been effective since 1995, although not widely used, and enforces its own set of arbitration rules, which do not seem to limit the jurisdiction of the Centre to disputes involving two or more parties exclusively from the GCC region.[127] Several GCC countries have also set up, with more effectiveness, international arbitration institutions, e.g. Qatar's International Arbitration and Conciliation Centre, the Dubai International Arbitration Centre, the Sharjah International Commercial Arbitration Centre, or the Bahrain Chamber for Dispute Resolution.

At the international level, the two main conventions on international arbitration and investment dispute resolution are the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention" or "the Washington Convention"). At the MENA regional level, the 1983 Riyadh Convention on Judicial Cooperation between certain States of the Arab League provides for mutual recognition and enforcement of judgments and arbitration awards[128], and the 1987 Arab Convention on Commercial

---

[126] UNCTAD (2011), *International Investment Agreements,* IIA Issues Note No. 1 (2011).

[127] Gulf Cooperation Council (1993), *GCC Commercial Arbitration Center: The Charter and Arbitral Rules of Procedure*, http://sites.gcc-sg.org/DLibrary/download.php?B=189

[128] All GCC governments are signatories to the Riyadh Convention. The Riyadh Convention follows most of the New York Convention standards with some requirements specific to the region, in particular relating to compliance with Islamic principles (article 37 of the Convention provides that enforcement of arbitral awards may be sought "without prejudice to the legal rules in force in the State where enforcement is sought", and enforcement may be denied "(e) If the award is contrary to the Moslem Shari'a, public policy or good morals of the signatory State where enforcement is sought").

Arbitration (Amman Convention) unifies rules for commercial arbitration. However, no GCC government is a party to the Amman Convention. At the sub-regional level, membership to the Gulf Cooperation Council (GCC) provides for enforcement of arbitral awards issued in other GCC member states.[129] A draft Unified Law for Arbitration was prepared at the GCC level but has not been endorsed yet. The draft provides for the adjudication through arbitration of disputes involving public entities.

Best practices include full membership to the 1958 New York Convention and the 1965 Washington Convention (ICSID), as well as existing legislation and regulations on the enforcement of arbitral awards, and regular and systematic recognition and enforcement of foreign and domestic arbitral awards by local courts.

This indicator examines whether the government has signed and ratified the main international conventions, i.e. the 1958 New York Convention and the 1965 ICSID Convention, and reviews the content and coherence of ISDS provisions in BITs. This indicator examines whether States generally consent to international arbitration in their investment laws, primary FDI legislation or network of BITs, and whether the possible laws on arbitration allow for an effective dispute settlement mechanism by recognising the arbitrability of disputes involving State entities and giving effect to full and effective enforcement of arbitral awards, including against the State or its State entities.[130]

Bahrain

Bahrain has been a party to both the New York and the Washington Conventions, since 1988 and 1996 respectively. Bahrain has 15 BITs in force, most of them giving the option for investors to submit their dispute with the host State or State entities either to national courts or to international arbitration.[131]

Having no investment-specific laws, there is no express provision allowing investor-State disputes to be submitted to international arbitration.

Bahraini laws on international arbitration were reformed in 2009, introducing a unique arbitration mechanism designated as an "arbitration free zone". Legislative Decree No. 30 of 2 July 2009 gives parties to international arbitration proceedings the option of holding the arbitration at the Bahrain Chamber for Dispute Resolution without any interference from local courts, except if the parties seek enforcement of the award in Bahrain. It is unclear whether the new Decree on international arbitration also concerns investment disputes against the State of Bahrain. However, legal reports observe that awards rendered against the State of Bahrain are not subject to enforcement before the domestic courts (Bahraini courts of Execution), which would mean that

[129] 1995 Protocol on the Enforcement of Judgments, Letters Rogatory and Judicial Notices issued by the Courts of the Member State of the Arab Gulf Cooperation Council.

[130] The issue of enforcement of arbitral awards is not relevant for awards rendered under the auspices of the ICSID convention which gives full executory effect to ICSID awards, without further screening proceedings. Article 54 of the ICSID Convention binds the State party to the dispute to recognise the award and enforce the pecuniary obligations arising out of it "*as if it were a final judgment of a court in that State*".

[131] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

there is no recognition of arbitration for cases against the State and its State entities (with the exception of an award rendered under ICSID rules).[132]

Bahrain has not been a party to any known investor-State dispute proceedings.

Kuwait

Kuwait has been a party to the New York Convention since 1978, and to the ICSID Convention since 1979 (signature in 1978). Kuwait has 38 BITs in force, most of them giving the option for investors to submit their dispute with the host State or State entities either to national courts or to international arbitration.[133]

Article 16 of the Law of 2001 Regulating Direct Foreign Capital Investment establishes that the Kuwaiti courts alone shall be competent to consider whatever disputes arise between foreign investors and third parties. It provides, however, that the parties have the right to agree to refer such disputes to arbitration. The Chamber of Commerce Law specifies that the Chamber may settle, by way of arbitration, disputes submitted to it by parties concerned.

Kuwait's Law No. 11/1995 on Judicial Arbitration in Civil and Commercial Matters gives exclusive jurisdiction to an Arbitration Council to address claims "*over disputes arising between Ministries, Governmental Authorities, legal persons of public law and companies whose capital is entirely held by the State*" (article 2) and does not explicitly address international investment disputes.

Kuwait has not been a party to any known investment dispute resolved through international arbitration since the *Aminoil* dispute which was resolved by arbitration in 1982.[134]

Oman

Oman has been a party to the New York Convention since 1999 and to the ICSID Convention since 1995. Oman has 22 BITs in force, most of which contain investor-State dispute settlement provisions with possible access to international arbitration.[135] The FTA with the US contains investor-State dispute settlement provisions, detailing rules, conduct and proceedings for investment arbitration. It is also worth noting that the FTA mentions that "the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered"[136] in this framework.

In general, the court competent for business disputes in Oman is the Commercial Court, however, article 14 of the Foreign capital investment law allows submissions of disputes between

[132] Global Legal Group (2010), *The International Comparative Legal Guide to International Arbitration: Bahrain*, http://www.iclg.co.uk/khadmin/Publications/pdf/3831.pdf.

[133] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

[134] Government of the State of Kuwait v. American Independent Oil Co. (1982), *ad hoc*.

[135] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

[136] Annex 10-D: Possibility of a bilateral appellate mechanism, Oman-U.S. FTA, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file976_8810.pdf

"*the foreign investment projects and third parties to local or international arbitration tribunal*". The language of that provision is unclear and may not be interpreted by investors as allowing them to engage in arbitration proceedings against the host State on disputes relating to their investment or the enforcement of the Foreign Capital Investment Law.

Oman's arbitration law (Royal Decree 47/97, as amended by Sultani Decree 03/07, promulgating the Law of Arbitration in Civil and Commercial Disputes) is largely influenced by the UNCITRAL model law on international commercial arbitration. Resulting from a judgment of the Administrative Court of Appeals of Oman of 5 January 2009, disputes between foreign investors and the State or a State-owned entity may be submitted to arbitration. It is also reported that in 2010, Oman courts have shown to be less arbitration-friendly, when it comes to recognising and enforcing foreign arbitral awards than in the past.[137] In April 2010, in the first case of recognition and enforcement of a foreign commercial award, there was a refusal to enforce the award at the primary court level, then overruled at the appellate level. However, the Supreme Court has shown consistent practice of limiting causes for review and annulment of awards to those of article 53 of the Arbitration Law.[138]

No known investment disputes have been reported involving Oman as a respondent state.

Qatar

Qatar joined the New York Convention in 2003 and ratified the ICSID Convention in December 2010. Qatar has 14 BITs in force, most of them providing for dispute settlement through international arbitration.[139]

Qatar's Investment Law of 2000, in article 11, provides that: "*Agreement may be reached on the settlement of any dispute between the foreign investor and others by means of domestic or international arbitration panels*", thereby giving investors the choice to resort either to national courts or to arbitration. However, the types of disputes covered by that provision are unclear, as it does not expressly specify disputes between foreign investor and the State or State entities. The provision does not list possible arbitration fora governing the resolution of disputes either.

Arbitration is codified in Qatar's Civil and Commercial Procedure Code (Law No. 13 of 1990) at articles 190 to 210. Qatar also has its own arbitration centre, the International Arbitration and Conciliation Centre, which opened in 2007. Information relating to Qatar's arbitration policy regarding the arbitrability of disputes involving States or State entities, and the outlook of Qatari courts towards enforcement of arbitral awards could not be found at this stage.

No known investment disputes have been reported involving the State of Qatar, although Qatar was respondent in at least two arbitration cases involving foreign companies, neither dispute was adjudicated applying international investment law.[140]

[137] The European & Middle Eastern Arbitration Review 2010, http://www.globalarbitrationreview.com/reviews/22/sections/82/chapters/838/oman/ (to compare with The European & Middle Eastern Arbitration Review 2011, http://www.globalarbitrationreview.com/reviews/30/sections/108/chapters/1174/oman/).

[138] Al Saidi M. (2010), *The Development of Arbitration in the Sultanate of Oman*, International Journal of Arab Arbitration, 2010 Volume 2 Issue 2, pp. 13-20.

[139] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

Saudi Arabia

Saudi Arabia has been a party to the New York Convention since 1994, and to the ICSID Convention since 1980. Saudi Arabia has 10 BITs in force, most of them giving the option for investors to submit their dispute with the host State either to national courts or to international arbitration.[141]

The Saudi Foreign Investment Act of 2000 does not expressly refer to arbitration as a means to resolve investor-State disputes. Article 13 of the Foreign Investment Act allows "*disputes arising between the Government and the Foreign Investor relating to their licensed investment*" to be, when unable to settle amicably, "*settled according to regulations*". Saudi Arabia's arbitration laws could not be fully consulted at this stage.

Saudi courts are reported to recognise State immunity except when the State waived its immunity through an international treaty or an agreement to submit their dispute to arbitration (Saudi Arbitration Act of 1983).[142] Selected authors also report that Saudi local courts tend to proceed with a review of arbitral awards on the merits.[143]

The World Bank 2010 *Investing across Borders* report on arbitrating commercial disputes ranks Saudi Arabia significantly below regional and worldwide average on all indicators (strength of laws, ease of process and extent of judicial assistance)[144].

Saudi Arabia has been respondent State in one investment arbitration dispute before ICSID (Ed. Züblin AG v. Kingdom of Saudi Arabia (Case No. ARB/03/01)) which was settled between the parties. The dispute concerned construction of university facilities. It also worth noting that the only known investment dispute submitted to the Arab Investment Court was between a Saudi Arabian investor and Tunisia.

United Arab Emirates

The U.A.E. joined the New York Convention in 2006 and the ICSID Convention in 1982. The U.A.E. have 26 BITs in force, most of them giving the option for investors to submit their dispute with the host State through domestic courts or international arbitration.[145]

---

[140] E.g. Wintershall AG et al. v. Government of Qatar, final award of 31 May 1988 (oil and gas dispute arising out of an exploration and production sharing agreement); Creigthon Ltd. v. State of Qatar, ICC arbitration (dispute over the construction of a hospital in Doha).

[141] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

[142] Global Legal Group (2010), *The International Comparative Legal Guide to International Arbitration: Saudi Arabia*, http://www.iclg.co.uk/khadmin/Publications/pdf/3834.pdf. Also see Case No. 142, referred to in, Al-Fadhel F. (2010), *The Role of Saudi Courts in the Arbitration Process,* International Journal of Arab Arbitration 2010 Volume 2 Issue 2, pp. 45-71, at footnote 63.

[143] Al-Fadhel F. (2010), *The Role of Saudi Courts in the Arbitration Process,* International Journal of Arab Arbitration 2010, p. 67.

[144] http://iab.worldbank.org/.

[145] Data sources: UNCTAD (2011), Kluwer Law International (2011). All BITs could not be consulted at this stage.

Current rules applicable to international investments in each Emirate do not expressly affirm recourse to arbitration. However, under the Draft Foreign Investment Law at the federal level, settlement of investment disputes would be allowed through arbitration.[146] In addition, the Dubai International Financial Centre's arbitration law was revised in 2008, and the U.A.E. issued a draft federal arbitration law in 2010 to replace the current rules under the civil procedure law. These new arbitration laws are reported as progressive.[147]

The U.A.E. have defended two known treaty-based investment disputes. Impregilo, S.p.A and Rizzani De Eccher S.p.A. v. United Arab Emirates (ICSID Case No. ARB/01/1) was settled between the parties. Hussein Nauman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7) was adjudicated in favour of the State. The disputes were about respectively the construction of a mosque and a port concession. It is also worth noting that a Dubai company was applicant in a very recent ICSID case submitted against Yemen in 2009, which was settled in 2010.[148]

Conclusion

As shown in the table below, the main international conventions facilitating investor-State dispute resolution through arbitration (ICSID and New York Conventions) are in force in all GCC countries, Qatar being the latest ICSID signatory (December 2010). GCC countries are also all parties to the Riyadh Convention on Judicial Cooperation.

GCC countries' membership with date of ratification to the main international and Arab conventions on investment dispute resolution and international arbitration

	ICSID Convention (1965)	New York Convention (1958)	Riyadh Convention (1983)
Bahrain	1996	1988	√
Kuwait	1979	1978	√
Oman	1995	1999	√
Qatar	2010	2003	√
Saudi Arabia	1980	1994	√
U.A.E.	1982	2006	√

Most GCC investment laws, with the exception of Saudi Arabia, allow (to varying degrees of clarity) foreign investors to resort to international arbitration for disputes arising out of their investment. Several primary FDI legislations explicitly require the consent of the State to resolve

146 MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

147 The European & Middle Eastern Arbitration Review 2010, http://www.globalarbitrationreview.com/reviews/22/sections/82/chapters/848/united-arab-emirates/; The European & Middle Eastern Arbitration Review 2011, http://www.globalarbitrationreview.com/reviews/30/sections/108/chapters/1184/united-arab-emirates/ ; Global Legal Group (2010), *The International Comparative Legal Guide to International Arbitration: United Arab Emirates*, http://www.iclg.co.uk/khadmin/Publications/pdf/3836.pdf.

148 MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen (ICSID Case No. ARB/09/7).

disputes with foreign investors, most of which set conditions under investment agreements, such as bilateral treaties. Submission to international arbitration by way of an arbitration agreement (*compromis*) once the dispute has arisen is also possible. Few FDI legislation list arbitration fora (such as ICSID, ICC, *ad hoc* applying UNCITRAL arbitration rules, Arab Investment Court, CRCICA). Finally, the option offered to foreign investors to refer their disputes to arbitration is generally not formulated as an open choice between resort either to domestic courts or to arbitration.

There are 125 BITs in force involving a GCC country, including 57 between a GCC country and an OECD country. Those treaties could not exhaustively be analysed at this stage, however, it is expected that they generally provide for consent of GCC countries, as host States, to resolve investment disputes by means of amicable negotiation, and give the choice to the foreign investor between domestic courts and international arbitration.

Although the issue of arbitration "friendliness" is not the subject of this analysis, two issues are relevant to evaluate the efficiency of arbitration mechanisms with regards to the legal enforcement of investors' rights in the region: whether disputes involving the government or a State entity and a foreign investor may be validly submitted to arbitration, and whether arbitral awards rendered locally or in a foreign country may be enforced in the country, including when rendered against the State. It appears that few GCC countries recognise in their domestic laws the arbitrability of disputes between foreign investors and the State, either in their arbitration law or in their investment law. The laws and policies of the Gulf States may be unclear or reported as equivocal for such cases.

Few countries have developed alternative dispute resolution (ADR) mechanisms, such as conciliation and mediation, to resolve investment-related disputes. However, a proliferation of arbitration centres may be observed in the Gulf region, either at the GCC level with the GCC Commercial Arbitration Chamber, or at the country-level, some of which providing creative and advanced dispute resolution mechanisms, such as the "arbitration free zone" in Bahrain. Little data is available on the delivery of ADR services.

The number of disputes involving a GCC country as respondent is extremely small with only three known treaty-based cases in the past decade (this number does not include confidential arbitrations). The number of disputes does not entail any significance in terms of policy evaluation or effectiveness (disputes may be prevented or settled).

Finally, it is interesting to note that some GCC countries are also concerned by investment arbitration as States of nationality of investors, as may be the case for GCC companies investing abroad but also for sovereign wealth funds or entities.

IV. INVESTMENT PROMOTION AGENCIES OF GCC COUNTRIES

Country	Name of IPA	Year of creation	Established under	Website
Bahrain	Bahrain Economic Development Board	Created in 2000 Established in 2002	Emiri Decree in April 2000	*www.bahrainedb.com*
Kuwait	Kuwait Foreign Investment Bureau (KFIB)	2001	Law Number 8 Regulating Direct Foreign Capital Investment	*www.kfib.com.kw*
Oman	Omani Centre for Investment Promotion and Export Development (OCIPED)	1996	Royal Decree Number 59/96 of 26 June 1996	*www.ociped.com*
Qatar	Investment Promotion Department (IPD)	2005		*www.investinqatar.com.qa*
Saudi Arabia	Saudi Arabian General Investment Authority (SAGIA)	2000		*www.sagia.gov.sa*
U.A.E.	• Abu Dhabi Department of Economic Development • Dubai Foreign Investment Office inside Dubai Department of Economic Development • Ras Al Khaimah Investment Authority (RAKIA)	Abu Dhabi: N/A Dubai: 1992 Ras Al Khaimah: 2005	• Abu Dhabi: Unknown, Law Number 2 of 2009 (most recent mandate) • Dubai: Unknown, Decree Number 25 of 2008 (extending the mandate of the DED) • Ras Al Khaimah: Emiri Decree Number 2 of 2005	*www.adeconomy.ae* *www.dubaided.gov.ae* *www.rak-ia.com*

Bahrain

Creation: The Bahrain Economic Development Board was created by an Emiri decree in April of 2000,[149] and formally re-established in 2002.

Mission and objectives: The Economic Development Board (EDB) of Bahrain is a public agency "*with an overall responsibility for formulating and overseeing the economic development strategy of Bahrain, and for creating the right climate to attract direct investment into the Kingdom*."[150] EDB's mission not only encompasses attracting and facilitating investment, but also relates to the economic development of the Kingdom. EDB acts as a first interface for foreign investors, who are then referred to EDB's one-stop shop.

Structure and management: The Crown Prince of Bahrain is the chairman of the board of directors. The board of directors also includes government ministers, two government officials and nine members of the private sector.[151] Employees have defined objectives and are evaluated regularly in order to supervise the progress of projects.[152]

Budget and staff: EDB manages its own budget; however, its origins remain unknown. The staff is bilingual, Arabic and English being the working languages.

One-stop shop: Bahrain's one-stop shop is a distinct entity: the Bahrain Investors Centre (BIC). The BIC facilitates licensing and registration of businesses. It provides very developed e-services.

Website (www.bahrainedb.com): EDB's website is user-friendly, informative, and well-designed.

Kuwait

Creation: The Kuwait Foreign Investment Bureau (KFIB) was set up in 2001 under Law Number 8 Regulating Direct Foreign Capital Investment. It is the executing body of the Kuwait Foreign Investment Committee (KFIC).

Mission and objectives: The KFIC is responsible for:

- "*studying applications for investment and submitting recommendations;*
- *promoting investment opportunities in the country;*
- *granting concessions to encourage foreign and national investors;*
- *facilitating the registration of firms;*
- *monitoring, following-up and assessing the performance of foreign investments;*

[149] www.un.int/bahrain/business.html

[150] www.bahrainedb.com.

[151] Ibid.

[152] Ibid.

- *investigating complaints by foreign investors;*
- *imposing penalties when the provisions of the law are breached; and*
- *preparing draft regulations for the implementation of the law*".[153]

Structure and management: The KFIB is reporting to the KFIC, which is responsible for the definition of the overall investment promotion strategy. The Committee includes members of the private sector and of the Kuwait Chamber of Commerce and Industry.[154] It is chaired by the Minister of Commerce and Industry. The head of the KFIB serves at the same time as secretary general of the KFIC.[155] The Bureau consists of three departments: the Promotion, Information and Communication Department, the Studies and Project Evaluation Department and the Investors Services Department.[156]

Website (www.kfib.com.kw): The website lacks general information on the concrete steps to invest in Kuwait. The overall design and quality of the content would need improvements.

Oman

Creation: The Omani Centre for Investment Promotion and Export Development (OCIPED) was created in 1996 by Royal Decree (Number 59/96 of 26 June 1996).

Mission and objectives: OCIPED focuses not only on attracting foreign and national capital, but also "*promotes the export of Omani products to foreign countries to improve the balance of trade of the Sultanate*".[157] It is in charge of:

- providing information on investment climate, laws, procedures and project specific information;
- organising visit programs and matchmaking meetings for foreign investors;
- assisting investors to obtain government approvals and loans;
- advising investors on the appropriate entry strategy;
- assisting local investors to identify potential foreign partners and vice versa;
- making policy recommendations on the investment climate; and
- organising events to encourage private sector initiatives.[158]

[153] Article 6 of Law No. 8 Regulating Direct Foreign Capital Investment.

[154] Ibid.

[155] Article 5 of Law No. 8 Regulating Direct Foreign Capital Investment.

[156] www.kfib.com.kw.

[157] www.ociped.com.

Structure and management: OCIPED has two divisions, the Directorate General Investment Promotion, and the Directorate General Export Development. The Centre is managed by a board of directors consisting of ministerial delegates and representatives of the private sector.[159] It enjoys financial and administrative independence.[160]

Budget and staff: The majority of funds allocated to the Centre stems from the Ministry of Commerce and Industry.[161]

One-stop shop: OCIPED is the primary contact for foreign investors seeking to set up a business in Oman.

Website (www.ociped.com): OCIPED hosts a website with comprehensive information and services, but would require more regular updates.

Qatar

Creation: The Qatar Investment Promotion Department (QIPD) was created in 2005.

Mission and objectives: The QIPD's objective is to attract corporate and private investors and *"stimulate the growth of foreign direct investment"*. It is in charge of facilitating investment in Qatar and providing investors with the information they need in order to set up their business.

Structure and management: The QIPD is a division of the Ministry of Economy and Commerce.[162]

One-stop shop: The Department acts as a primary contact for information to foreign investors.

Website (www.investinqatar.com.qa): The website is not up-to-date and little information is available on the website.

Saudi Arabia

Creation: The Saudi Arabian General Investment Authority (SAGIA) was created in 2000.

Mission and objectives: SAGIA's key role is to attract investment, set out policies concerning FDI and review and approve investment applications. Furthermore, in partnership with investors and developers, it is developing four "Economic Cities" around the Kingdom, creating a favourable business environment for investors (see list in chapter V).[163] It also offers practical services (visa,

---

[158] MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.

[159] Article 4 of Royal Decree No. 59/96 of 26 June 1996.

[160] Article 2 of Royal Decree No. 59/96.

[161] Article 3 of Royal Decree No. 59/96.

[162] www.investinqatar.com.qa.

[163] www.sagia.gov.sa.

transportation, etc.), as well as project-related assistance (recruitment of workforce, land, office space, etc.).[164]

Structure and management: SAGIA is managed by a governor. The board of directors is composed of several deputy ministers, economic counsellors and the director general of the Jeddah Islamic Port. SAGIA runs 9 domestic offices and 9 international offices on four continents.[165]

One-stop shop: SAGIA operates a series of decentralised one-stop shops, called "Business Centres", which are providing assistance to businesses all over the Kingdom (nine Business Centres in total).[166]

Website (www.sagia.gov.sa): SAGIA hosts a modern website, regularly updated, containing all relevant laws and regulations, listing opportunities, and providing comprehensive e-services.

<u>United Arab Emirates</u>

The United Arab Emirates do not have one centralised IPA. Instead, several Emirates have their own IPA. Abu Dhabi and Dubai have Departments of Economic Development, which are institutions with a much broader scope of work, including amongst others the promotion of investment.

1. Abu Dhabi

Creation: The mandate of the Dhabi Department of Economic Development (DED) was renewed by Law No. 2 of 2009. [167]

Mission and objectives: The mandate of Law No. 2 of 2009 gives the following responsibilities to the DED:[168]

- economic policy and planning;
- compilation of statistics and economic research;
- commercial licensing and trade name registration (the two investor services the DED provides);
- export development; and
- investment promotion.

Structure and management: The DED is divided into six departments: Planning and Statistics; International Economic Affairs; Commercial Affairs; Policies and Regulations; Support Services; Corporate Support.

[164] Ibid.

[165] www.sagia.gov.sa.

[166] Ibid.

[167] http://ded.abudhabi.ae.

[168] Ibid.

Website (www.adeconomy.ae / http://ded.abudhabi.ae): Investment promotion does not feature prominently online. There is little information on the specific investment promotion activities. Only commercial licensing and trade name registration are offered on this website. Information on other procedures (business registration, permits, etc.) can be found on other government websites.

2. Dubai

Creation: The Dubai Department for Economic Development (DED) was established in 1992. The Foreign Investment Office (FIO) is one of four agencies of the DED. The other agencies are the Dubai Export Development Corporation, the Dubai Events and Promotions Establishment, and the Mohammed Bin Rashid Establishment for SME Development.

Mission and objectives: The objectives of the Dubai DED are "*to organise, regulate and boost trade and industry within the Emirate of Dubai.*"[169] Therefore, it is in charge of granting licenses, permits and business registration. In October 2008, a decree gave additional powers to the DED, which is now endowed with the "*full responsibility to plan and regulate the overall economic performance of Dubai.*"[170] The new mandate confirms the role of the FIO.

Structure and management: The Dubai DED is managed by a director general. One deputy director general manages the overall operations and services of the DED, while another takes care of the general economic and sector development.

One-stop shop: The DED offers developed e-services and provides investors with information and documents needed to register a business, obtain licenses, etc.

Website (www.dubaided.gov.ae): Although the general website is functional and offers extensive e-services and information, investment promotion is a small part of the website, due to the lack of a distinct investment promotion agency. Therefore, information on foreign investment issues is diluted in the general business development approach of the website.

3. Ras Al Khaimah

Creation: The Ras Al Khaimah Investment Authority (RAKIA) was constituted in 2005 by the Emiri Decree No. 2 of 2005.

Mission and objectives: RAKIA is at the same time a developer of economic zones and an investment promotion agency. RAKIA's objectives are to strengthen the investment climate in Ras Al Khaimah and to develop its economic sectors. RAKIA's mission is to provide "*full investor solutions*" (land, office space, warehouses, etc.). In addition, the Authority is a major developer of industrial parks and free zones, in Ras Al Khaimah and abroad.

Structure and management: RAKIA is headed by the Crown Prince and Deputy Ruler of Ras Al Khaimah, and an investment committee. RAKIA is divided into eight strategic business units. The investment committee, which is responsible for the overall investment strategies, guidelines and

[169] www.dubaided.gov.ae.

[170] Ibid.

criteria, is composed of the eight heads and is chaired by the CEO. [171] The heads act independently, report to the CEO, and have the "*authority to make executive decisions*".[172]

One-stop shop: RAKIA acts as a one-stop shop with comprehensive licensing, permitting and visa services. It also directly markets investment related products (land, office space, warehouses, etc.) to interested clients.

Website (www.rak-ia.com): RAKIA hosts a comprehensive website with developed services.

[171] www.rak-ia.com.

[172] Ibid.

V. LIST OF FREE ZONES, ECONOMIC ZONES AND INVESTMENT ZONES IN GCC COUNTRIES

The table below shows that the use of special zones is widespread in the GCC region and receives varying interest from country to country. Bahrain is building investment zones, while Saudi Arabia is developing economic cities. The U.A.E. is the most active in developing special zones. In particular, the Dubai Emirate created high-profile economic zones on its territory.

The services rendered and advantages given to investors operating in the zones vary from one to another. Some zones are a way to avoid restrictive conditions applied to foreign investors in the rest of the territory of the concerned countries.

Name	Country
Bahrain International Investment Park	Bahrain
Bahrain Investment Wharf	Bahrain
Bahrain Logistics Zone	Bahrain
Bahrain International Airport	Bahrain
Minal Salman Free Transit Zone	Bahrain
North Sitra Industrial Estate	Bahrain
Kuwait Free Trade Zone	Kuwait
Al Mazunah Free Trade Area	Oman
Knowledge Oasis Muscat	Oman
Rusayl Industrial Estate	Oman
Salalah Free Zone	Oman
Sohar Industrial Estate	Oman
Sur Industrial Estate	Oman
Qatar Science and Technology Park	Qatar
Jeddah BioCity	Saudi Arabia
Prince Abdulaziz Bin Musaed Economic City	Saudi Arabia
King Abdullah Economic City	Saudi Arabia
Knowledge Economic City	Saudi Arabia
Jazan Economic City	Saudi Arabia
Abu Dhabi Industrial City	UAE, Dubai
Ajman Free Zone	UAE, Dubai
Al Hamra Industrial Park	UAE, Dubai
Dubai Airport Free Zone Authority	UAE, Dubai
Dubai Biotechnology and Research Park	UAE, Dubai
Dubai Cargo Village	UAE, Dubai
Dubai Cars and Automotive Zone	UAE, Dubai
Dubai Healthcare City	UAE, Dubai
Dubai Industrial City	UAE, Dubai
Dubai International Financial Centre	UAE, Dubai
Dubai Internet City	UAE, Dubai
Dubai Investments Park Development Company	UAE, Dubai

Dubai Knowledge Village	UAE, Dubai
Dubai Maritime City	UAE, Dubai
Dubai Media City	UAE, Dubai
Dubai Multi Commodities Centre	UAE, Dubai
Dubai Outsource Zone	UAE, Dubai
Dubai Silicon Oasis	UAE, Dubai
Dubai Sports City	UAE, Dubai
Dubai Studio City	UAE, Dubai
Dubai World Central	UAE, Dubai
Dubai World Central Logistics City	UAE, Dubai
Emirates Industrial City Company	UAE, Sharjah
Fujairah Free Zone	UAE, Fujairah
Gold and Diamond Park	UAE, Dubai
Hamriyah Free Zone	UAE, Sharjah
International Media Production Zone	UAE, Dubai
Jafza International	UAE, Dubai
Jebel Ali Free Zone	UAE, Dubai
MotorCity	UAE, Dubai
Ras Al Khaimah Free Trade Zone	UAE, Ras Al Khaimah
Sharjah Airport International Free Zone	UAE, Sharjah
Techno Park	UAE, Dubai
TECOM Investments	UAE, Dubai

Source: MENA-OECD Investment Programme, 2011

VI. GCC INVESTMENT-RELATED INSTRUMENTS AND INVESTMENT POLICIES

Since its inception in 1981, the Cooperation Council for the Arab States of the Gulf (GCC) has been promoting economic integration and cooperation within the region and beyond. Some of the steps towards economic integration include the Customs Union, the Common Gulf Market, the project of a Monetary Union and the comprehensive development strategy (2000-2025).[173] The achievement of a GCC common currency, announced for 2010, was postponed, in the context of the global economic crisis, although the GCC governments approved the Monetary Union Agreement.

Another feature of the GCC efforts towards greater economic integration is the efforts for further harmonisation of domestic laws of its members in relevant sectors (e.g. harmonisation of real estate laws decided in 2002 with the adoption of the Uniform Real Estate Regulation, or the adoption of a Uniform Industrial Law for GCC States). As part of article 5 of the 2001 Economic Agreement calling for unifying investment-related laws, it has been reported that a model law for encouraging foreign capital investment in GCC Member States is being drafted. In addition, article 17 of the 2001 Economic Agreement also provides for the rationalisation of the employment of foreign workers and the adoption of "*effective policies to increase participation rates of nationals in the labour market, especially in high-skill jobs, and adopt effective programs to raise the skill levels of national labour force*".

Within the region: The GCC Economic Agreements

One of the objectives of the Gulf Cooperation Council has been to promote trade and investment, in particular intra-GCC investments, and to improve foreign investment climate.

Article 21 of the first Economic Agreement of 1981 provided that: "*Member States shall seek to unify investment rules and regulations in order to achieve a joint investment policy aimed at directing their domestic and foreign investments towards serving their interest, and realizing their peoples' aspirations for development and progress*."

The second Economic Agreement of 2001 goes farther than calling for harmonisation of investment laws. Two provisions of the 2001 GCC Economic Agreement are particularly relevant to understand the current GCC approach and improvements in the sub-region towards improving its investment-related instruments and liberalisation policies.

Article 5 of the current 2001 Economic Agreement relating to Investment Climate provides that: "*For the purpose of enhancing local, external, and intra-GCC investment levels, and provide an investment climate characterized by transparency and stability, Member States agree to take the following steps: 1. Unify all their investment-related laws and regulations; 2. Accord national treatment to all investments owned by GCC natural and legal citizens; (…)*".

[173] GCC (2008), *Final communiqué of the 29th session of the Arab Gulf Cooperation Council*, 29-30 December 2008.

With regards to national treatment, article 3 provides that: "*GCC natural and legal citizens shall be accorded, in any Member State, the same treatment accorded to its own citizens, without differentiation or discrimination, in all economic activities, especially the following: (…) 5. Engagement in all economic, investment and service activities; 6. Real estate ownership; 7. Capital movement; (…); 9. Stock ownership and formation of corporations (…)*".

Based on the analysis of investment laws and policies in the GCC countries, it appears that these provisions relating to national treatment are not fully implemented to the extent that some restrictions still exist between GCC and local investors. For example, 100% GCC ownership is not permitted in all GCC countries.

The harmonisation of investment laws, provided for in the 1981 and 2001 Economic Agreements, is still pending. In fact, conclusions from this report show that GCC countries are currently at various stages of diversification and legal reforms, including lifting barriers to foreign investment, streamlining business regulations, and expanding private investment opportunities in key sectors.

Foreign investment surveys are encouraged by the GCC. Oman, the Emirates and more recently Qatar have launched this large scale statistical data collection and analysis of activities of a wide representation of foreign investors in these countries.

With the rest of the world: Towards free trade agreements with investment-related provisions

With the region incrementally becoming a trading bloc and developing increasingly stronger commercial ties with other economic partners, the GCC Secretariat started to pursue an active policy of negotiations towards the establishment of bilateral free-trade agreements with major international trading partners.

As of now, the GCC has entered into three free trade agreements, namely with Syria (2005), Singapore (2009) and the European Free Trade Association (EFTA) (2010). It appears however that none of those FTAs include advanced investment-related provisions, namely offering high protective standards for foreign investors similar to standards offered in bilateral investment treaties or some FTAs with investment chapters. Only some provisions apply to services which could be assimilated to a foreign investment.

The negotiations of the GCC-Singapore FTA (GSFTA) were launched in 2006, and the agreement was signed in December 2008 after four rounds of negotiations. No provision was specifically devoted to investment, with the exception of an exchange of letters, which encouraged GCC members which had not at the time of signature of the FTA entered into bilateral investment agreements with Singapore to do so within two years from the commencement of the negotiations. Bahrain, Oman and Saudi Arabia had entered into BITs before the signature of the GSFTA. Kuwait signed such agreement in November 2009 and the U.A.E. in January 2011. Only Qatar has not yet signed a BIT with Singapore.

In June 2009, the GCC also concluded a free trade agreement with EFTA (Iceland, Norway, Switzerland, and Lichtenstein), concluded after five rounds of negotiations initiated in 2006. This agreement does not include specific provisions with regards to investment provisions either. However, some provisions of the chapter on trade in services, as well as the side letter agreement to carry out further negotiations on an establishment clause in non-services sector, are relevant for investment projects.

Those agreements do not reflect the efforts undertaken by the GCC Secretariat to enter into free trade agreements, as a high number of negotiations are pending.

The most prominent example is the so-far unsuccessful signature of a free trade agreement between the GCC and the European Union. A Cooperation Agreement between the European Economic Community and the six GCC members was signed in 1989 to strengthen relations between both organisations and strengthen economic development and diversification of the GCC countries.[174] Article 7 of the Cooperation Agreement provides that: "*In the field of investments, the Contracting Parties shall strive to take steps for the mutual promotion and protection of investments, in particular through the extension by the Member States of the Community and the GCC countries of investment promotion and protection agreements with a view to improving reciprocal investment conditions*." The Joint Declaration concerning article 7 called for "*rapid*" conclusion of such agreement.

However, since 1989, attempts to establish such an investment promotion and protection agreement were not conclusive. In parallel, 24 rounds of FTA negotiations were conducted in 20 years without reaching an agreement. Observers report that EU's insistence on introducing conditionality on political aspects, namely human rights and illegal migration clauses, was the cause of the suspension of negotiations.[175]

In January 2011, the European Parliament (Committee on International Trade) called for a re-launching of the negotiations, in particular in light of the new competence inherited by the European Commission from the Lisbon Treaty on the promotion and protection of foreign investments.[176] In particular, the Committee on International Trade affirmed that: "(…) *the conclusion of the FTA, or at least the official reopening of the negotiations, will surely open the way to further agreements which will encourage and facilitate mutual foreign direct investments (FDIs) with a view to eliminating obstacles to foreign ownership and investment protection*".[177]

This position follows calls from parts of the European business community willing to invest in GCC countries and to overcome investment barriers on foreign ownership requirements.

Other examples of yet unsuccessful FTA negotiations with the GCC include:

[174] *Cooperation Agreement between the European Economic Community, of the one part, and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait) of the other part,* 20 February 1989, effective as of 1 January 1990, published in *Official Journal L054, 25 February 1989, p. 3-15*, EUR-Lex 21989A0225(01).

[175] For an analysis of the impact of an EU-GCC FTA: PricewaterhouseCoopers (2004), *Sustainability Impact Assessment (SIA) of the negotiations of the trade agreement between the European Community and the Countries of the Cooperation Council for the Arab States of the Gulf (GCC)*, Final report 30 May 2004, http://www.sia-gcc.org/gcc/download/sia_fta-gcc_final_reportmay2004.pdf.

[176] European Parliament (2011), *Opinion of the Committee on International Trade for the Committee on Foreign Affairs on European Union relations with the Gulf Cooperation Council*, 2010/2233(INI).

[177] 2010/2233(INI), at par. 21.

- Australia (four rounds of negotiations conducted since 2007);

- China (four rounds of negotiations conducted since 2006). Talks about an investment promotion and protection agreement were engaged in 1999 and are still ongoing. The idea of launching FTA negotiations first surfaced in 2003[178];

- India (two rounds of negotiations conducted since 2006). Initial talks of such an agreement surfaced as early as 2004;

- Iran (since 2008);

- Japan (three rounds of negotiations conducted since 2006). The possibility of an FTA with Japan in order to develop economic, trade and investment relations was envisaged in the 1990s[179];

- Jordan (since 2010);

- Malaysia (since 2009);

- New Zealand: six rounds of negotiations were successfully concluded until October 2010, and the agreement is reported to have been initialled;

- Pakistan (two rounds of negotiations conducted since 2006);

- South Korea (three rounds of negotiation conducted since 2008);

- Turkey (four rounds of negotiations conducted since 2005);

as well as other regional trade organisations, namely:

- European Union (since 1989) (see above);

- ASEAN (since 2009);

- MERCOSUR (two rounds of negotiation conducted since 2006). Negotiations were reported to have come up against strong positions on both sides with regards to the petrochemical sector.

Unlike the purposes followed by the European Union with regards to the promotion and protection of investments where the mutually supportive character of a free trade agreement and investment protection has been underlined, it is unknown whether GCC negotiators are willing to include investment-related provisions in their free trade agreements. In fact, the approach taken in the GCC-Singapore FTA and the GCC-EFTA FTA shows that investment chapters were not included in negotiations but rather left to the bilateral level. In that respect, it would be useful to examine the competence of the GCC with regards to negotiating investment agreements, especially in an EU-GCC context where the negotiation of a "regional-regional" agreement was agreed upon in 1989 and in light with the new competencies of the EU to negotiate investment agreements.

[178] Gulf Cooperation Council (2009), *GCC Process and Achievements*, p. 228.

[179] Gulf Cooperation Council (2009), *GCC Process and Achievements*, p. 232.

VII. PRIVATE SECTOR PERCEPTION ON THE INVESTMENT CLIMATE IN GCC COUNTRIES

Between 23 February and 17 March 2011, the MENA-OECD Investment Programme sent out a questionnaire to foreign investors based in the Gulf region (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates). Foreign investors were targeted through economic attachés of selected embassies of OECD countries, as well as bi-national chambers of commerce. Based on the responses received, it has been observed that the questionnaire has been widely circulated. However, time was not too short to collect sufficient responses and allow for a significant survey sample.

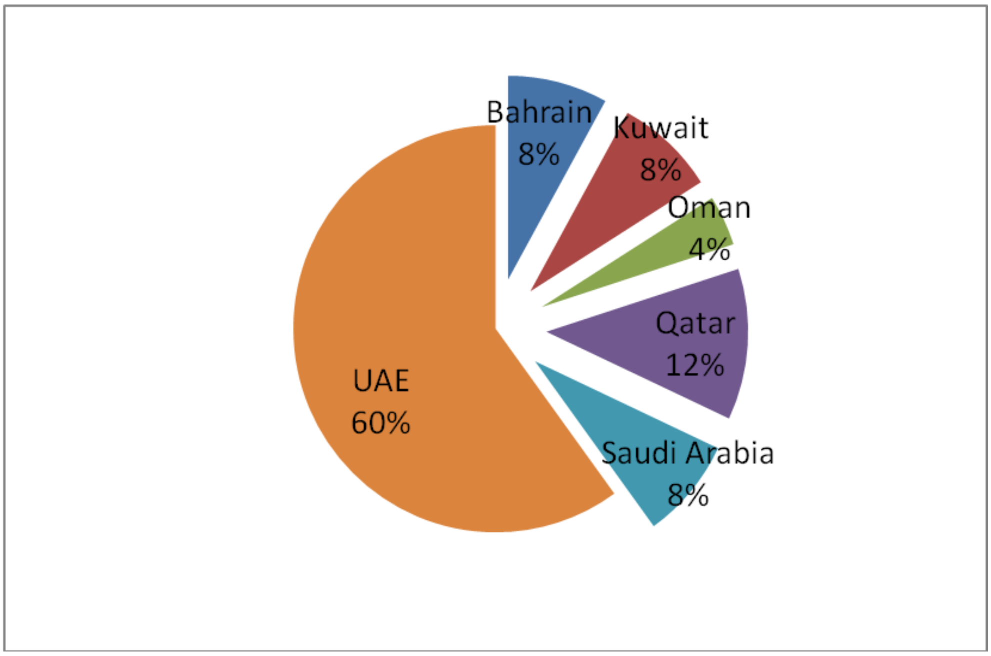
18 responses were received, half of which provided direct responses to the questionnaire. All responses were rich in providing concrete examples of barriers encountered by foreign investors in GCC countries.

Below is the summary of the responses to the 12 questions contained in the survey. Respondents are kept anonymous.

1. Host country of the investment

Responses came in majority (60%) from foreign investors present in the United Arab Emirates, and particularly in the Ras Al Khaimah Emirate and the Dubai free zones. One respondent was implemented in each GCC country. A large number of respondents have been established for many years (and up to several decades) in the region.

Host country of responding investors (by percentage of responses)



	Number of responses
Bahrain	2
Kuwait	2
Oman	1
Qatar	3
Saudi Arabia	2
UAE	15

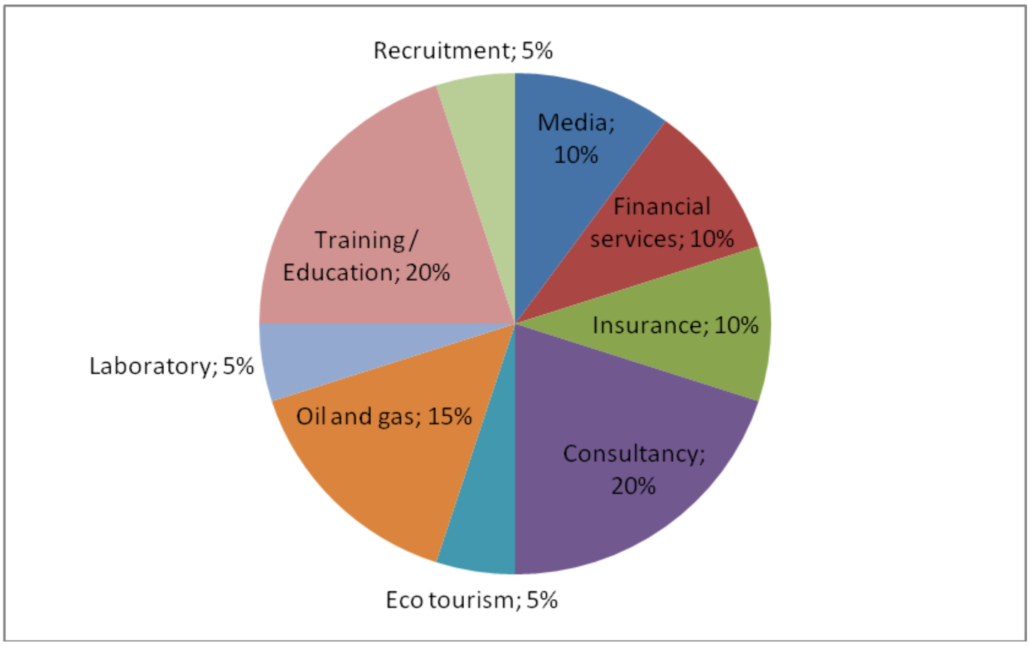
Note: one response may apply to several countries.

2. Sector(s)

No pre-set choice was provided for respondents with regards to relevant sectors of their investment operations. Based on the chart below, the services industry (financial services, insurance, consulting, training and recruitment services) represents 65% of responses. The industrial sector is also relatively well represented with oil and gas companies and laboratories.

It is important to note that 20% of responses came from SMEs, which have identified specific obstacles to their operation in GCC countries. Also, oil and gas investors represent a separate category, being generally required to conclude joint venture agreements with public entities, and thereby not experiencing problems similar to those of private investors not associated with public entities, and which would have to go through all investment registration and approval procedures without local support.

Sectors represented in the survey (by percentage of responses)



3. Types of investments

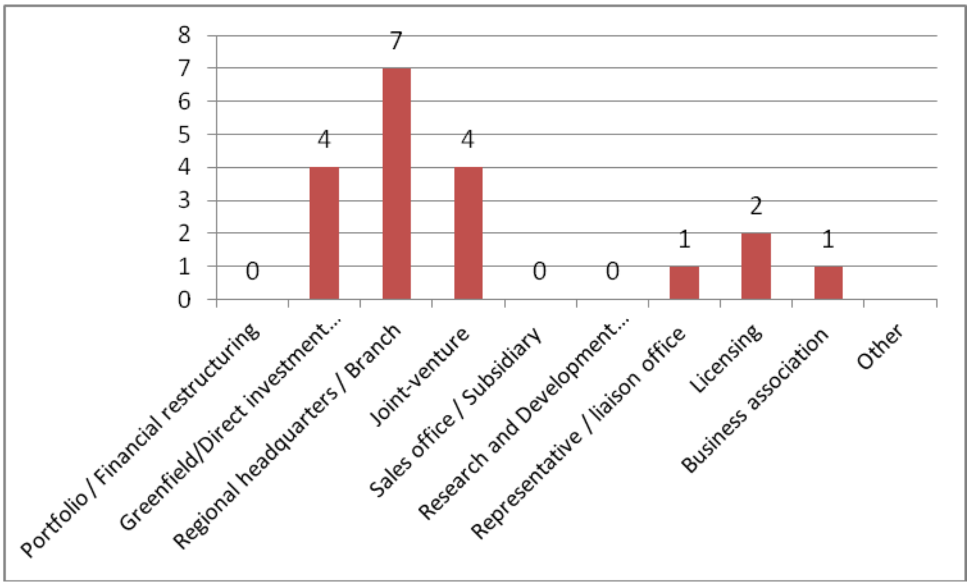
In terms of defining which type of investment respondents were pursuing, the choice was made as descriptive as possible:

- Portfolio / Financial restructuring
- Greenfield/Direct investment enterprise
- Regional headquarters / Branch
- Joint-venture
- Sales office / Subsidiary
- Research and Development centres
- Representative / liaison office
- Licensing
- Business association
- Other

Based on the responses received, it appears that a large majority of responding foreign investors would be pursuing greenfield direct investments, particularly by expanding an existing activity abroad and opening a local branch in one GCC countries, sometimes with purposes of operating on a regional basis through regional headquarters. When required for purposes of the investment operation (particularly in the oil and gas sector), joint ventures are being set up.

Although not representative of the types of foreign investments actually pursued, the chart below shows that, portfolio investors are not represented in this survey, and similarly, that liaison offices have less weight.

Types of investments (by number of responses)



Note: One response may apply to several categories.

4. **How important is the legal framework of the host country in determining the investor's decision to invest (or not invest) in a GCC country over other locations considered?**

75% of respondents found the legal framework to be very important, and 25% to be determining. None of the respondents considered the legal framework of the host country to be of no importance with regards to the decision to invest in the host country.

5. **Are the restrictions in the overall economy a key motivation to invest in free economic zones / investment zones?**

Two thirds of respondents (67%) answered that the choice to invest in economic zones was based on the existence of restrictions in GCC countries.

This question also relates to question 6 on specific restrictions relating to equity requirements.

6. **Are the local ownership requirements an obstacle to invest in the certain sectors (i.e. 49% of ownership share or requirements for joint-ventures or use of local agents)?**

75% of respondents acknoweldged that foreign equity restrictions were an obstacle to investing in GCC countries, most of them qualified such requirement as a "big", "strong" or "clear" barrier to investment, either from the point of view of large companies than from the perspective of smaller companies.

7. **Which legal and administrative obstacles does the investor encounter, if any, when investing in a GCC country, at the entry stage?**

Based on the chart below, 20% of responding foreign investors do not see any legal or administrative obstacle at the entry stage to invest in a GCC country. Those 20% primarily represent large foreign companies being required to partner up with local authorities through a special vehicle or a joint venture scheme (especially in the oil and gas sector), and therefore leaving most entry procedures to the local partner.

All other respondents identified legal and administrative obstacles to carrying out entry procedures. Those obstacles may be distinguished into the following:

- Difficulty to obtain the approval / license (33% of responses): such difficulty may arise out of the number of interlocutors to contact, the number of documents to provide in practice, and ultimately the lack of transparency in requirements, including additional requirements (see question 8);

- Delay in registering the investment or to obtain the license (27% of responses): respondents described the length of procedures to be surprisingly long, also in relation to the lack of coordination with ministries;

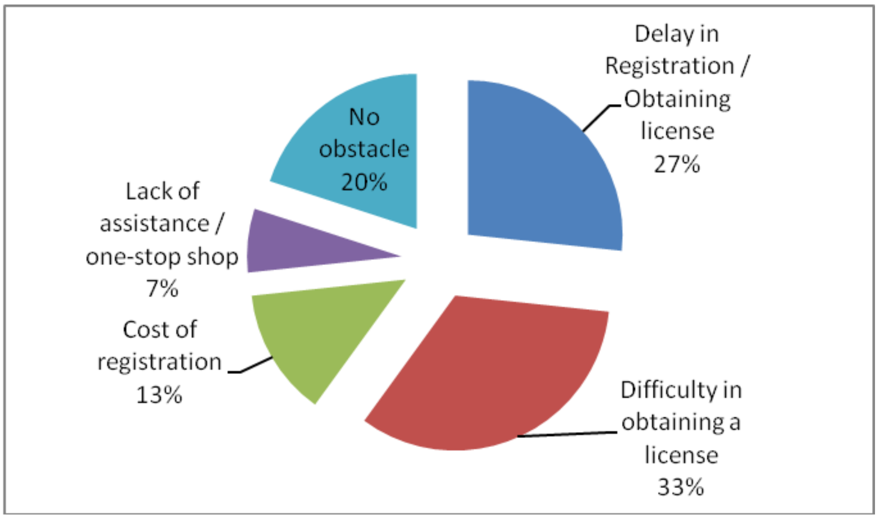
- High cost of registration (13% of responses), particularly for SMEs, including in economic / investment zones, and comprising of unforeseeable added taxes;

- Lack of assistance (7% of responses): respondents, and particularly SMEs with less administrative capacity, felt that the lack of local assistance (either through an efficient one-stop shop or assistance to understand and carry out procedures) was detrimental to the smooth registration of their investment.

With regards to obtaining licenses, a specific example provided in the U.A.E. was the freeze of new licenses, based on assumption by the local governement of the saturation of the market. For example, the Ministry of Labor froze the granting of new licenses for recruitment companies in 2008-2009, therefore prohibiting new recruitment companies to enter the market, or forcing them to circumvent the ban by partnering up with companies having received such a license before the ban. A similar indefinite freeze was also observed in 2010 for insurance companies and brokers, as well as bancassurance.

Responses to this question should be complemented by responses to questions 8 (difficulties to obtain the approval) and 9 (foreign personnel), and to a lesser extent by responses to questions 10 (transfer of funds) and 11 (access to land).

Legal and administrative obstacles identified by foreign investors upon entry (by percentage of responses)



8. What type of approval procedures was required for investments? Which difficulties did you encounter in obtaining the approval, if any?

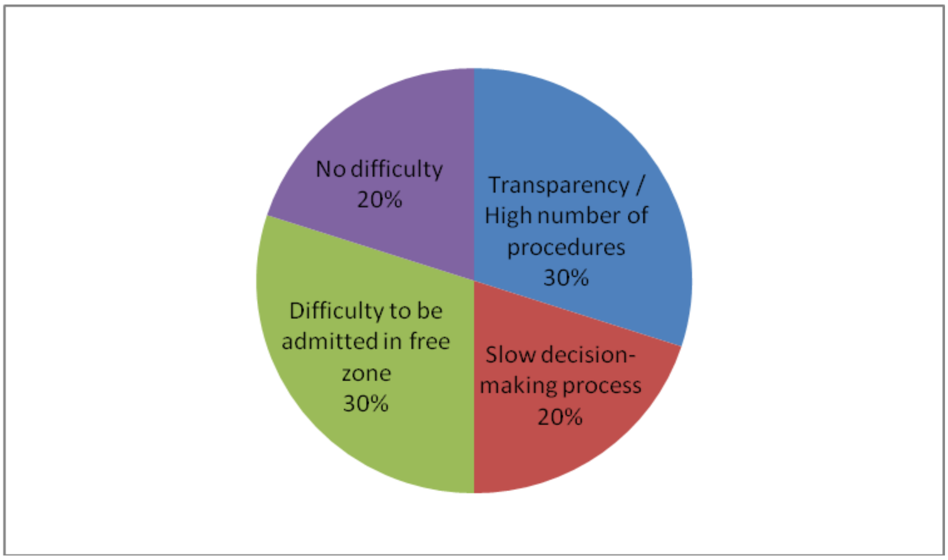
20% of respondents had no difficulty in obtaining the approval for their investment. As in question 7, those responses primarily represent investors involved in a joint venture with a public authority, and not going through the same steps in order to obtain an approval for their investment. However, this question triggered numerous comments from the other respondents, especially with regards to difficulties in obtaining investment approvals and the commercial licenses necessary to carry out the activity. Three categories of difficulties could be identified:

- Lack of transparency of required documents and procedures (30% of responses), also implying a significant part of discretion and arbitrariness in the decision-making process: respondents indicate that additional requirements have often been imposed upon them in order to obtain the approval (such as the requirement in the UAE to lease minimum office space or on a 12-month basis only, which has proved restrictive for smaller companies), or that processes were not sufficiently transparent for foreign investors to anticipate the number of interlocutors to be in contact with;

- Difficulty to be admitted in an economic / investment zone (30%): for respondents having chosen to invest in an economic / investment zone, access to these zones has been proving increasingly difficult, either due to the lack of available zones in GCC countries (with the exception of Dubai), or sometimes the strict requirements imposed to enter the zones (for example the twofour54 Abu Dhabi Media Zone);

- Slow decision-making process and, to a lesser extent lack of responsiveness of public authorities (20% of responses): such obstacle was not anticipated by respondents but was presented as a major impediment to a timely start of their investment operation, and throughout the operation of their investment operation as an issue for timely payment of their bills when contracting with public entities.

Difficulties in obtaining investment approvals (by percentage of response)



9. Did you encounter difficulties in employing foreign personnel, including managerial staff? What are the limitations and required procedures?

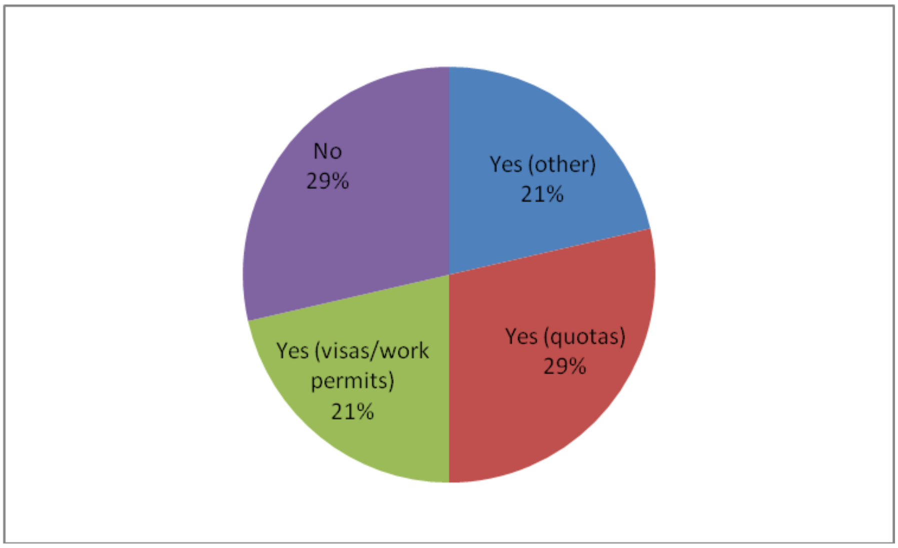
29% of respondents did not encounter any difficulty in employing foreign personnel. 71% of respondents identified specific obstacles relating to the employment of foreign personnel, either at the managerial level or the staff level.

The biggest obstacle identified by respondents has been the nationality requirements, i.e. the obligation to employ set percentages of nationals in certain job categories which has been implemented in all GCC countries. As a corollary, the lack of skilled domestic staff in certain areas was also underlined as an issue, in particular with regards to the strict enforcement of those quotas and therefore the lack of foreign alternatives available and/or the difficulty in obtaining residence / work permits for foreign alternatives, in particular in Bahrain and Saudi Arabia.

The second biggest obstacle concerns obtaining visas and work permits for foreign staff and in some cases, their families. Inconsistencies were underlined by several respondents with respect to the difficulty to obtain business visas before deciding to set up the investment project, and the occasional requirement by governmental authorities that visas and work permits for senior staff members be obtained prior to the registration / approval of the investment whereas such registration would precisely be needed to obtain the visa. However, some respondents underline a certain tolerance with regards to the use of tourist visas for first business visits in the country (in the U.A.E. in particular).

Other obstacles concern, for example, the quotas imposed to holders of licenses to invest in economic zones. One respondent mentioned that their free zone license would only entitle them to hiring one foreign employee, therefore requiring them to fly in freelance consultants from abroad on a case-by-case basis. In addition, labour requirement in terms of duration of employment contracts have been referred to by one respondent (in Saudi Arabia) as being restrictive in terms of predictability, as the Labour ministries may be expecting foreign staff to be employed on a short-term basis. Finally, the recognition / equivalence of foreign diplomas was underlined by one respondent as being problematic in terms of justifying the employment of foreign (and in some cases, domestic) staff.

Difficulties in employing foreign personnel (by percentage of responses)



10. Did the transfer of funds (e.g. upon entry or repatriation of profits) pose significant / some / no problems?

100% of respondents mentioned they had no problems with the transfer of their investment-related funds.

No respondent mentioned any significant or minor obstacle with regards to entry or repatriation of profits. The only *caveat* relayed to us was the uncertainty of bankruptcy laws and the potential difficulties which may be raised at the practical level, although no concrete example could be provided by surveyed foreign investors.

11. **Have you faced practical restrictions concerning access to land? What are the possible problems encountered by a foreign investor?**

76% of respondents mentioned that they did not have issues with access to land. 24% of respondents identified specific problems, namely:

- the lack of available lands, especially in free zones which are becoming increasingly saturated;
- the ongoing issues with securing lease agreements in order to obtain licenses (and the reverse issue of the difficulties in securing commercial leases without a license), and;
- the limited access to residential property for foreign staff.

However, existing regulatory restrictions identified in this report, namely restrictions on foreign access to land in selected areas only, were not particularly mentioned as a practical problem.

12. **Additional comments:** No comment was provided.

Conclusion

The perspective from the private sector on investment policies and practices towards foreign investors shows concrete examples of (1) how regulatory obstacles may directly affect the decision of prospective investors to invest or not in a GCC country, and (2) how foreign investors may perceive the enforcement of these regulatory barriers as constraining beyond expectations.

Among the recommendations made by the respondents and based on their own experiences, the following could be taken into account in order to increase the role and value of foreign investors in the region's economy:

- Develop specific assistance to SMEs and provide efficient support at the entry level, even if it is noted that specific funds may already be dedicated to SMEs in some GCC countries (for example, Khalifa Fund, Bin Rashind Establishment in Dubai);
- Increase assistance to prospective investors in order to clearly identify the necessary steps to obtain investment registration and/or approval and secure licensing;
- Streamline and increase transparency in procedures, and in that respect modernise the legal system, in order to increase attractiveness of GCC countries towards foreign investments, even beyond the boundaries of economic / investment zones;
- Reform company laws in order to lift certain nationality requirements, e.g. with regards to profit-sharing (no longer based on ownership requirements), increasing management control by lifting nationality requirements on managing positions, or, limiting the input of local shareholders to major decisions of the company (as opposed to all);
- Increase the recognition of investment approvals and licenses in all the GCC countries in order to foster intra-GCC trade and investment, on a prospective basis.

VIII. CONCLUSION: MAIN FINDINGS AND POLICY RECOMMENDATIONS

Main findings of the stocktaking study

- Four out of the six GCC countries have an investment law which contains provisions to protect international investors, but also restrictions to their entry and operation. Regional investors from the GCC region benefit from preferential treatment, but non-discrimination is not entirely applied.

- The main obstacles to foreign investment have been identified as the following:

  - Foreign ownership limitations;

  - Sectoral restrictions to national treatment (from natural resources to intellectual and financial services);

  - Discretionary procedures, delays and opacity of decision-making process for investment approval, licensing or registration;

  - Lack of transparency and insufficient dissemination of information;

  - Sponsorship requirements in some countries where a local intermediary is required to operate or facilitate the investment project;

  - Obstacles for obtaining visas and work permits and restrictive quotas, as a corollary of nationalisation policies of the workforce, as well as challenges to develop higher skilled personnel.

- GCC countries participate in international and regional agreements aiming at fostering cooperation and integration in the areas of trade and investment. For example, they are all members of the World Trade Organization and the International Centre of the Settlement of investment Disputes. They support the regional economic integration efforts of the GCC and ratified the investment-related instruments of the League of Arab States. They also signed a relatively high number of Bilateral Investment Treaties (BITs) with trading partners. However, only a bit more than a third of these treaties entered into force. The same trend is observed for the negotiations of free trade agreements by the GCC, most of them ongoing for several years.

- It appears quite clearly from the survey conducted with the private sector that the decision to invest in GCC countries and ultimately in economic / investment zones relies determiningly on investment laws and barriers to foreign investments. Private sector perceives the restrictions to foreign ownership and approval requirements as key obstacles.

- Access to economic / investment zones, as well as of compliance with international transparency obligations, can be issues of concerns to investors.

Recommendations

Enhance the investment climate:

- Improve investment attraction and performance through reforms enhancing the business environment, particularly by strengthening the rule of law, achieving better transparency of laws, regulations and procedures and enhancing business integrity.

- Promote a gradual incremental opening of economies and progressive lifting of investment barriers. The OECD has been promoting progressive liberalisation among its members for 40 years, in particular for capital movements[180]. A step-by-step approach is recommended: identification of restrictions to FDI, measurement of their impact, definition and harmonisation of strategic policies and gradual relaxation of investment obstacles in accordance with the national development objectives. These measures would foster economic integration efforts amongst the GCC countries and with the broader region.

- Allow investors to achieve greater control over their investments in host countries. This would include relaxing nationality requirements, instilling more flexibility in labour policies, especially for managerial and skilled positions, increasing overseeing of profits and properties, balancing shareholders rights, enhancing contract enforcement and reforming company laws.

- Facilitate entry and operation of international investment through streamlining and simplification of procedures, support structures (one-stop shops) to assist investors in the operation of their investments, and increased institutional coordination.

- Provide alternatives to economic / investment zones for foreign investors: Shortcomings in some zones have been observed and should not be seen as "second best" solutions to distortions that reforms ultimately need to correct.

Enhance the impact of diversification strategies:

- Promote regional and international investments. It is widely recognised that international and regional investments are effective tools to expand productive capacity, job creation, know-how and transfer of technology. A conducive and predictable strategic, institutional and legal framework is an important component to attract high-value added investments that better serves the economic interests and development objectives of a country.

- Improve competitiveness policies to broaden the domestic industry and the export base to higher productivity areas. Policies would include support to small and medium enterprises (SMEs), improvement of the supply chain, set up of business linkages between domestic enterprises and foreign companies, trade and export facilitation measures, transfer of technology programmes, and human capital development through adequate and appropriate education.

- Improve communication and enhance consultations and dialogue with the private sector and civil society.

---

[180] OECD (2002), *Forty Years' Experience with the OECD Code of Liberalisation of Capital Movements*.

Reinforce bilateral, regional and international frameworks:

- Increase investment promotion and protection through a coherent network of bilateral investment treaties (BITs) and free trade agreements. This includes ratification (and possibly revision) of signed treaties, renegotiation of old treaties, and development of a model BIT to facilitate future negotiations.

- Seek the right balance in negotiations between controlling inward FDI and promoting and protecting outward FDI as GCC countries are host and home State of investors.

- Implement and possibly update the 1980 League of Arab States Unified Agreement for the Investment of Arab Capital in the Arab States which provides investment protection within the region, institutional arrangements for the promotion of intra-regional investments and the establishment of the Arab Investment Court.

- Enhance the role of the GCC Secretariat as the promoter of investment law harmonisation and policy coherence, in particular by encouraging full implementation of the 2001 Economic Agreement. Harmonisation and recognition of investment procedures could also be a means to foster intra-GCC trade and investment.

- Finalise GCC negotiations of FTAs with major trading partners.

- Recognise international arbitration, mediation and conciliation as means to resolve disputes between investors and States, including State entities.

Contacts:

MENA-OECD Investment Programme, Private Sector Development Division

Dr. Alexander Böhmer
Head
Tel.: (33) 1 45 24 1912, E-mail: alexander.boehmer@oecd.org

Dr. Marie-Estelle Rey
Policy Analyst and Project Coordinator
Tel.: (33) 1 45 24 81 46, E-mail: marie-estelle.rey@oecd.org