

# TO CAPITALIZE ON A BURGEONING MARKET? ISSUES TO CONSIDER BEFORE DOING BUSINESS IN THE MIDDLE EAST

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## I. INTRODUCTION

Despite instability in certain parts of the region, the Middle East has emerged as an attractive market for foreign investment.<sup>1</sup> This comes at an opportune time for many Middle Eastern countries that are seeking to diversify away from the oil industry and state owned enterprises.<sup>2</sup> Further, the prevalence of young, educated Middle Easterners represents a ready supply of labor for companies seeking to open subsidiaries or branches in the region.<sup>3</sup> Given these assets, many foreign companies are looking at investing in the Middle East as a way to diversify their portfolio and hopefully capture a piece of the market before it explodes.

First, it is important to point out that there is no concrete list of the countries that comprise the Middle East. This is because the Middle East is not determined by specific geographic boundaries; rather, it is defined by a sense of political and cultural association.<sup>4</sup> In the broadest sense, the Middle East can encompass twenty-one countries, including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Iran, Iraq, Sudan, Syria, Israel, Egypt, Jordan, Lebanon, and Palestine,<sup>5</sup> with the occasional inclusion of Morocco, Somalia, Pakistan, Yemen, Afghanistan, and Turkey.<sup>6</sup>

Businessmen seeking to enter any of these markets need to be cognizant of the many complex issues they will face. This comment will examine some of the issues that should be taken into consideration when making the decision to invest. A discussion of each issue as

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<sup>1</sup> See Roni N. Halabi, *Stability in the Middle East Through Economic Development: An Analysis of the Peace Process, Increased Agricultural Trade, Joint Ventures, and Free Trade Agreements*, 2 DRAKE J. AGRIC. L. 275, 276 (1997).

<sup>2</sup> See John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 414 (2005).

<sup>3</sup> See *id.*

<sup>4</sup> Wikipedia, Middle East, [http://en.wikipedia.org/wiki/Middle\\_East](http://en.wikipedia.org/wiki/Middle_East) (last visited June 14, 2007).

<sup>5</sup> See IATA, Middle East, [http://www.iata.org/ps/intelligence\\_statistics/cargois/middle\\_east.htm](http://www.iata.org/ps/intelligence_statistics/cargois/middle_east.htm) (last visited June 14, 2007).

<sup>6</sup> Wikipedia, Middle East, [http://en.wikipedia.org/wiki/Middle\\_East](http://en.wikipedia.org/wiki/Middle_East) (last visited June 14, 2007).

it applies in each country is beyond the scope of this comment; however, country specific examples will be given that can often be applied analogously to other countries. Finally, a simple risk/reward analysis that attempts to quantify a company's potential Middle East experience is unlikely to accurately reflect the true difficulties faced by foreign investors. However, the decision to invest in, or move to, the Middle East is not universal for all companies and all countries; the individual needs of the company as well as the end location should be thoughtfully considered before any investment is made.

## II. BEFORE INVESTING: COSTS AND COMPLIANCE

### A. *Costs*

While many countries in the Middle East are seeking to update their corporate codes in order to encourage foreign investment, remnants of their old regulations can be discouraging and pose feasibility problems.<sup>7</sup> One of the biggest hurdles for potential investors and new businessmen is the minimum capital requirement.<sup>8</sup> Unlike the United States, which has no set capital requirement, most countries in the Middle East require new businesses to ensure their operation with thousands of dollars of capital in order to prevent under-funded and ill-fated ventures.

For comparison, Saudi Arabia has the highest capital requirement at \$132,172.25, while Israel has no requirement.<sup>9</sup> Other examples include Jordan and Kuwait, which both require approximately \$20,000, Yemen and Oman, which both require approximately \$8,000, and the United Arab Emirates, which requires over \$84,000.<sup>10</sup>

While these requirements are shocking, many updated commercial and business codes compensate to allow for investor return. In order to facilitate foreign exchange, Saudi Arabia allows for one hundred percent repatriation of profits.<sup>11</sup> This is extremely alluring for investors and businessmen seeking to open corporate subsidiaries. In Kuwait, the Foreign Direct Investment Law allows foreigners to own one hundred percent of Kuwaiti companies and has reduced taxes to twenty-five percent.<sup>12</sup> In designated industries, Oman offers a five year tax exemption and refrains from taxing a person's income, divi-

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<sup>7</sup> See Ian Ayres & Jonathan R. Macey, *Institutional and Evolutionary Failure and Economic Development in the Middle East*, 30 YALE J. INT'L L. 397, 404 (2005).

<sup>8</sup> See *id.* at 411.

<sup>9</sup> See *id.* at 428.

<sup>10</sup> See *id.*

<sup>11</sup> Donboli & Kashefi, *supra* note 2, at 432.

<sup>12</sup> *Id.* at 435.

dends, interest, and estate.<sup>13</sup> All of these laws seem to indicate that, while the countries of the Middle East are seeking business start-ups that are secure and stable, they are also willing to recognize the dedication of those businesses willing to finance such ventures. These laws allow businesses and individuals to reap the rewards of being at the forefront of investing in the up-and-coming region.

### B. Compliance

If the costs are not deemed prohibitive, it is critical that any American business seeking to enter the Middle East consults the Office of Foreign Assets Control. The Office of Foreign Assets Control (OFAC) is an office of the U.S. Department of Treasury, and its mission is to administer and enforce economic and trade sanctions based on U.S. foreign policy and national security goals.<sup>14</sup> OFAC maintains a list of sanctioned countries, which currently includes Iraq, Iran, Libya, Sudan, and Syria, as well as a list of "specially designated nationals," or individuals and corporations who are connected with sanctioned targets.<sup>15</sup>

It is possible to work with sanctioned countries and specially designated nationals; however, a special OFAC license is required.<sup>16</sup> OFAC issues two types of licenses: general and specific. A general license permits particular types of transactions without requiring a business to submit detailed forms and overly specific information. A specific license requires written authorization from OFAC, and can take many months.<sup>17</sup> The license requirement is expansive, encompassing U.S. citizens wishing to deal with sanctioned entities, regardless of their current residence, as well as foreign branches of U.S. incorporated entities.<sup>18</sup> To further stress the importance of consulting OFAC, the criminal penalties for a violation can run as high as

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<sup>13</sup> *Id.* at 442-443. To qualify for the five year tax exemption, the company must invest \$263,000 capital and be involved in developmental projects.

<sup>14</sup> Colloquium, *Doing Business in the Middle East: A Guide for U.S. Companies*, 34 CAL. W INT'L L.J. 273, 288 (2004); accord U.S. Treasury, Office of Foreign Assets Control, available at <http://www.ustreas.gov/offices/enforcement/ofac/>.

<sup>15</sup> U.S. Treasury, Office of Foreign Assets Control, What Countries Do I Need to Worry About in Terms of U.S. Sanctions?, <http://www.ustreas.gov/offices/enforcement/ofac/faq/answer.shtml#9> (last visited June 8, 2007).

<sup>16</sup> U.S. Treasury, Office of Foreign Assets Control, What Must I Do to Get Permission to Trade With an Embargoed Country?, <http://www.ustreas.gov/offices/enforcement/ofac/faq/answer.shtml#7> (last visited June 8, 2007).

<sup>17</sup> See Colloquium, *supra* note 14, at 290 (stating some licenses have taken six to eight months to process).

<sup>18</sup> U.S. Treasury, Office of Foreign Assets Control, Who Must Comply with OFAC Regulations?, <http://www.ustreas.gov/offices/enforcement/ofac/faq/answer.shtml#10> (last visited June 8, 2007).

\$10,000,000 and thirty years in prison for willful violations, while civil penalties of up to \$1,000,000 per violation are allowed.<sup>19</sup>

Another compliance pitfall for many American businessmen is the Foreign Corrupt Practices Act (FCPA).<sup>20</sup> The FCPA is designed to “regulate[] and prohibit corrupt payments to foreign government officials in order to obtain or retain business.”<sup>21</sup> The FCPA prohibits any payment, promise to pay, or authorization of payment or gift to any foreign government official, political party official, or individual who will pass the money to an official in order to influence or induce his or her action.<sup>22</sup> Not only does this anti-bribery provision exist, but so does a “books and records” provision, which requires that all businesses keep accurate records of all payments made when dealing with foreign entities.<sup>23</sup> While this may seem daunting in a business environment that often politely overlooks such payments, the FCPA contains an exemption for “greasing” or basic payments to facilitate, expedite, and secure the performance of routine government action.<sup>24</sup> Although it seems a tenuous distinction, so long as the action can be characterized as “routine,” greasing payments should not pose a legal compliance problem.

These anti-corruption measures are not unique to American businessmen. Recently, the Organization for Economic Co-operation and Development (OECD) enacted the Convention to Prevent Bribery, and now European businessmen too face moral and legal prohibitions against bribery. The text of the bill states that it is a criminal offense to “intentionally offer, promise, or give any undue pecuniary or other advantage, whether direct or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties. . . .”<sup>25</sup> This law is currently in force in thirty-seven countries, in-

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<sup>19</sup> U.S. Treasury, Office of Foreign Assets Control, How Much are the Fines for Violating These Regulations?, <http://www.ustreas.gov/offices/enforcement/ofac/faq/answer.shtml#11> (last visited June 8, 2007).

<sup>20</sup> See Colloquium, *supra* note 14, at 293; 15 U.S.C. § 78dd-1, et seq. (2000).

<sup>21</sup> Colloquium, *supra* note 14, at 293.

<sup>22</sup> 15 U.S.C. § 78dd-1(a) (2000).

<sup>23</sup> See Colloquium, *supra* note 14, at 293.

<sup>24</sup> See 15 U.S.C. § 78 dd-1(b) (2000).

<sup>25</sup> OECD Directorate for Financial and Enterprise Affairs, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html).

cluding France, Germany, Italy, Spain, Greece, and the United Kingdom.<sup>26</sup>

Taken together, these anti-corruption measures should be encouraging to potential investors. Because bribery undermines the institution and preservation of democratic ideals and distorts international competition,<sup>27</sup> efforts to eliminate bribery should be actively embraced by foreign investors and businessmen. Such anti-corruption measures even the playing field for investors and ensure that each business is given fair consideration when business plans and proposals are submitted for review. The reduction of corruption increases transparency and is an encouraging sign to investors that they will receive fair treatment in their business ventures.

### III. LEGAL SYSTEM OVERVIEW

Not only must businesses ensure their compliance with U.S. regulations, they face the daunting task of dealing with legal systems unlike those they might encounter in the United States or Europe. Many of the countries in the Middle East, including Saudi Arabia, Oman, Qatar, and many emirates of the UAE, adhere to the Islamic faith based on the teachings of the prophet Muhammad,<sup>28</sup> and have incorporated Islamic principles into their legal systems.<sup>29</sup> Although there is no one uniform version of Islamic law that is followed by all Islamic countries, Islamic principles are set forth in a legal code known as the "*Shari'a*."<sup>30</sup> The *Shari'a* embodies religious and legal commandments given by God to Muhammad.<sup>31</sup> These commandments are found in the Quran, which is the written word of Muhammad, and the Sunna, which contains stories relating the behavior of Muhammad and his family that illustrate appropriate behavior and decorum.<sup>32</sup>

As the unyielding presence of globalization continues to affect and change the region, Islamic states have had to adapt their legal systems to account for commercial and business occurrences not covered by the *Shari'a*.<sup>33</sup> These new legal codes set forth laws dealing

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<sup>26</sup> See OECD, Fighting Bribery and Corruption: Frequently Asked Questions: Who Takes Part in the Convention?, [http://www.oecd.org/document/18/0,3343,en\\_2649\\_34859\\_35430226\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_34859_35430226_1_1_1,00.html) (last visited June 8, 2007).

<sup>27</sup> OECD, Fighting Bribery and Corruption: Frequently Asked Questions: Why Did the OECD Develop the Anti-Bribery Convention?, [http://www.oecd.org/document/18/0,3343,en\\_2649\\_34859\\_35430226\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_34859_35430226_1_1_1,00.html) (last visited June 8, 2007).

<sup>28</sup> See Donboli & Kashefi, *supra* note 2, at 417.

<sup>29</sup> See *id.* at 418.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 419.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 418.

with foreign investment, commercial transactions, business organization, and corporate tax.<sup>34</sup> The laws in each country vary slightly, although a similar thread exists as international treaties, organizations, and neighboring countries are often used as a source of inspiration when crafting necessary legal reforms.<sup>35</sup>

New rules and regulations form on a state by state and event driven basis that often “appear Westernized, but remain inherently based on Islamic principles.”<sup>36</sup> These regulations remain seeped in Islamic traditions because they cannot pre-empt anything in the *Shari’a*, as governments only have the power to legislate areas not addressed by the Quran.<sup>37</sup> As a result of this two-fold system, there has emerged a dual court system whereby local civil disputes are heard by *Shari’a* courts, while secular courts hear commercial matters and civil matters involving foreigners.<sup>38</sup> Although the secular rules and regulations appear Westernized, they must still be in accord with the Islamic principles set forth in the *Shari’a*.

Although the *Shari’a* generally does not deal with commercial matters, there are two issues that are extremely applicable to the dealings of businessmen: the religious prohibitions against *riba* and *gharar*.<sup>39</sup> *Riba* is an unearned advantage, and in the business world presents itself in the form of unearned interest on loans.<sup>40</sup> Pragmatically, many countries have dealt with this by qualifying civil versus commercial contracts and allowing for the payment of a periodic fee instead of cumulative interest.<sup>41</sup> *Gharar* is an impermissible type of uncertainty or risk, which often appears in insurance contracts and option trading.<sup>42</sup> Saudi Arabia, for example, finds that mutual insurance is a donation contract and since there is no profit generated, it is legally permissible.<sup>43</sup> Abu Dhabi, a part of the United Arab Emirates, has cited *gharar* while nullifying contracts but has also created a “free zone” to allow for financial futures and options trading.<sup>44</sup> Although some countries have found innovative ways to deal with these issues, they are not “easily swept under the carpet” and the increasing fre-

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<sup>34</sup> *Id.* at 425.

<sup>35</sup> *See id.* at 425.

<sup>36</sup> *Id.* at 423.

<sup>37</sup> *See id.* at 423.

<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 423-24.

<sup>40</sup> *Id.* at 424.

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

<sup>42</sup> Howard L. Stovall, *Arab Commercial Laws - Into the Future*, 34 INT’L LAW. 839, 841 (2000).

<sup>43</sup> *See id.*

<sup>44</sup> *See id.* at 841-842.

quency of global transactions will likely bring these issues to the forefront of Islamic scholarly and legal debate.<sup>45</sup>

Issues of *riba* and *gharar* are not the only legal issues that businessmen will encounter. Every country in the Middle East has a commercial code governing corporate laws,<sup>46</sup> but the application of these laws changes to accommodate market pressures. For example, in Bahrain joint stock companies can be formed that are not governed by the commercial code but rather are subject to compliance with the *Shari'a*.<sup>47</sup> Similarly, Pakistan has introduced Islamic forms of business organization as an alternative to those governed by commercial law.<sup>48</sup> Because of this, knowledge of the intricacies of a country's commercial code is vital.

Finally, when dealing with any legal issues that may arise, it is important to note that in both *Shari'a* and secular courts, the concept of binding precedent does not exist.<sup>49</sup> Although past decisions may influence the decision of a court, it is not mandatory to follow that decision.<sup>50</sup> This should be kept in mind when any business is attempting to forecast its experience with the court system. Further, this creates difficulties when businesses are trying to make a risk/reward analysis in deciding whether to pursue court action, continue in court action, or begin settlement negotiations. The lack of precedent combined with laws that are constantly being updated creates a legal framework that is difficult to predict, but not impossible to maneuver.

#### IV. BUSINESS IN THE MIDDLE EAST

##### A. *Regional Conflict and Concerns*

The multitude of conflicts in the Middle East region is a cause of hesitation for many potential investors. Although many of the conflicts are limited to certain countries, it is often widely and incorrectly assumed that these conflicts imbue the entire Middle East region. However, it is true that some areas of the Middle East are home to frequent conflict. Iraqi stability is currently in turmoil.<sup>51</sup> As U.S. forces attempt to subdue militant opposition groups, Shia and Sunnis fight each other, and most recently, Turkey appears to be preparing forces to enter Iraq in order to attack PPK (the Kurdistan Workers'

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<sup>45</sup> *Id.*

<sup>46</sup> H.S. Shaaban, *Commercial Transaction in the Middle East: What Law Governs?*, 31 LAW & POL'Y INT'L BUS. 157, 165 (1999).

<sup>47</sup> *See id.* at 166.

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

<sup>49</sup> *See id.* at 157.

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

<sup>51</sup> *See Iraq condemns Turkish 'shelling'*, BRIT. BROAD. CORP., June 9, 2007, <http://news.bbc.co.uk/2/hi/europe/6736825.stm> (last visited June 9, 2007).

Party) rebels.<sup>52</sup> Iraq's neighbor Iran is not without its own troubles. In 2002, it was included in President Bush's "axis of evil" and now tops the U.S. list of countries sponsoring terrorism.<sup>53</sup> Tension has increased as Iranian President Ahmadinejad has stated Iran has a right to pursue nuclear endeavors.<sup>54</sup> As it currently stands, Iran has detained, arrested, and imprisoned four American Iranians on charges of spying.<sup>55</sup> Political tension remains in the region, and occasionally surfaces in clashes for political control. In Palestine, after a bout of violent fighting, Hamas and Fatah abandoned their unity government and Palestinian President Abbas declared a state of emergency.<sup>56</sup> Lebanon has also seen an increase in violence, as the Lebanese army battles to crush the Fatah al-Islam militant group.<sup>57</sup> These instances show that regional tension can erupt and, as such, political and social monitoring is important.

It is not the case, however, that all countries in the region are plagued by the same instability problems. Many countries are conscientiously working to separate themselves from the "dangerous" Middle East identity. For example, Saudi Arabia has been working diligently to ensure that all deviant groups connected with an outbreak of bombings and shootings in 2003 have been rounded up and no longer pose a threat to citizens and visitors.<sup>58</sup> In addition, many countries, including Dubai, a state in the United Arab Emirates, are working hard to push their tourist friendly and stable atmosphere as an ideal place for investment and growth. While safety and stability is not a problem in all Middle East counties, the particular conditions of a chosen target country should be carefully considered before money or support staff is sent to the region.

One of the most recent events, almost unnoticed by the mainstream media although it has the potential to affect investment in the Middle East, was the decision by Kuwait to abandon its peg to the U.S.

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

<sup>53</sup> See Country Profile: Iran, BRIT. BROAD. CORP., [http://news.bbc.co.uk/2/hi/middle\\_east/country\\_profiles/790877.stm](http://news.bbc.co.uk/2/hi/middle_east/country_profiles/790877.stm) (last visited June 9, 2007).

<sup>54</sup> See *id.*

<sup>55</sup> See *Iranians Confirm Fourth U.S. Arrest*, BRIT. BROAD. CORP., June 10, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6738425.stm](http://news.bbc.co.uk/2/hi/middle_east/6738425.stm) (last visited June 9, 2007).

<sup>56</sup> See David Shelby, *Rice Expresses Support for Palestinian President Abbas*, USINFO, June 15, 2007, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=June&x=20070614174611ndyblehs0.2947962> (last visited June 15, 2007).

<sup>57</sup> See *Aid Workers Die in Lebanon Clash*, BRIT. BROAD. CORP., June 11, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6741737.stm](http://news.bbc.co.uk/2/hi/middle_east/6741737.stm) (last visited June 15, 2007).

<sup>58</sup> See *Saudi Police Round Up Militants*, BRIT. BROAD. CORP., June 7, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6730155.stm](http://news.bbc.co.uk/2/hi/middle_east/6730155.stm) (last visited June 9, 2007).



dollar.<sup>59</sup> While this fact alone may be discouraging to investors, its significance is magnified when viewed through the lens of Kuwait's membership in the Gulf Cooperation Council (GCC). The GCC is comprised of six member states: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates.<sup>60</sup> The GCC was formed to integrate the affairs of the member states,<sup>61</sup> and has become America's fifth largest trading partner.<sup>62</sup> The GCC agenda includes harmonizing economic information, increasing trade agreements with the United States, creating a common central bank similar to that of the European Union, and pegging the common currency to the U.S. dollar.<sup>63</sup>

What effect Kuwait's action will have is currently unknown. If fellow GCC countries drop their U.S. peg, the impact would be widespread. Countries without the peg would buy fewer dollars and put less of their exchange reserves into U.S. assets, thereby hurting the United States and making the countries less attractive for investors.<sup>64</sup> The International Monetary Fund has advised GCC members to keep the peg intact and Saudi Arabia has already downplayed the likelihood that it would reevaluate the peg.<sup>65</sup> This instance illustrates that, although the Middle East has taken incredible strides toward adopting Westernized business practices, there may be some reluctance to abandon traditional ways, especially when faced with enticingly high oil prices.

### B. Corporate Forms

Once the decision has been made to invest in, move to, or open a branch in the Middle East, choosing the appropriate corporate form is vital to the success of the venture. Different corporate forms require different levels of capital, foreign presence, and local involvement. Three of the most common forms are limited liability corporations, partnerships, and joint ventures.

A limited liability corporation (LLC) in the Middle East is extremely similar to an LLC in the United States or Europe. The main difference is that these Middle East LLCs are usually subject to the minimum capital requirements discussed above. In Kuwait, LLCs are

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<sup>59</sup> See generally Simeon Kerr, *Kuwait abandons US dollar Currency Peg*, FIN. TIMES, May 20, 2007 available at FT.com (overviewing Kuwait's decision and its potential impact on other countries in the region).

<sup>60</sup> See Donboli & Kashefi, *supra* note 2, at 426.

<sup>61</sup> See *id.*

<sup>62</sup> *Id.* at 427.

<sup>63</sup> See *id.* at 428.

<sup>64</sup> See Simeon Kerr, *Move by Kuwait fuels Gulf currency debate*, FIN. TIMES, June 4, 2007, at 13.

<sup>65</sup> See *id.*

easy to form, only requiring an application for a Memorandum of Association, a process which takes approximately three months.<sup>66</sup> It is required, however, that at least one member of the corporation be Kuwaiti.<sup>67</sup> In Saudi Arabia, LLCs must be registered under the Regulations for Companies and are “not permitted” to conduct banking, insurance, or savings operations.<sup>68</sup> While these general LLCs have no minimum capital requirement, an LLC limited by shares is subject to the nation’s minimum capital requirement.<sup>69</sup> Finally, in the United Arab Emirates, LLCs can be formed by two people, cannot be managed than more than five, and are subject to minimum capital requirements.<sup>70</sup> Further, while foreigners may only own up to forty-nine percent of an LLC, the LLCs are permitted to engage in any and all lawful activities.<sup>71</sup>

An alternative form to the LLC presents itself in the general partnership. In Saudi Arabia, there is no capital requirement for the formation of partnerships and they can easily be formed by interested parties who need only register with the Ministry of Commerce.<sup>72</sup> Oman has more rigorous partnership standards. Oman requires the partnership to be registered with the Commercial Register, which must also receive copies of an agreement that sets forth the relationship of all the parties involved and any other intra-partnership agreements that may be formed in the future.<sup>73</sup> Further, the partnership must register in a name that consists of at least one name of an interested partner and indicate that a partnership exists.<sup>74</sup> Interestingly, the UAE does not allow foreigners to participate in partnerships.<sup>75</sup>

A final popular form chosen by foreign investors is the joint venture. Joint ventures are usually undertaken by people or companies in order to reduce risk and share control in a particular business operation. In Kuwait, a joint venture is a contractual obligation that requires no formal establishment.<sup>76</sup> However, in the case of a multi-

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<sup>66</sup> See Info-Prod Research, Kuwait, <http://www.infoprod.co.il/article/19> (last visited June 15, 2007).

<sup>67</sup> See *id.*

<sup>68</sup> See Info-Prod Research, Saudi Arabia, <http://www.infoprod.co.il/article/24> (last visited June 15, 2007).

<sup>69</sup> See *id.*

<sup>70</sup> See Info-Prod Research, United Arab Emirates, <http://www.infoprod.co.il/article/27#form> (last visited June 15, 2007).

<sup>71</sup> See *id.*

<sup>72</sup> See Info-Prod Research, Saudi Arabia, *supra* note 68.

<sup>73</sup> See Info-Prod Research, Oman, <http://www.infoprod.co.il/article/22> (last visited June 15, 2007).

<sup>74</sup> *Id.*

<sup>75</sup> See Info-Prod Research, United Arab Emirates, *supra* note 70.

<sup>76</sup> See Info-Prod Research, Kuwait, *supra* note 66.

national joint venture, a Kuwaiti partner must act as the guarantor for the non-Kuwaiti,<sup>77</sup> a circumstance that makes extremely risky joint ventures exceptional. In the UAE, joint ventures do not need to be registered and all joint venture business must be carried out in the name of the UAE national partner.<sup>78</sup> So long as there is a liability contract between the UAE partner and its foreign counterparts, such a requirement is not as perilous as it may sound. Finally, in Saudi Arabia, joint ventures are the most advantageous. If a Saudi national owns fifty percent of the venture's equity, the company can obtain interest-free loans for up to fifty percent of its project costs.<sup>79</sup> If a Saudi national owns fifty-one percent or more of the joint venture, the company is subject to preferential treatment in government contracts, following companies that are wholly Saudi owned.<sup>80</sup> Such an advantageous position certainly encourages the creation of joint ventures. The only pitfall that businessmen need to be aware of is that foreign-Saudi joint ventures are forbidden from marketing activities aimed solely at Saudi individuals.<sup>81</sup> That being the case, Saudi joint ventures are best for investors and businesses looking to engage in government contracting.

The aforementioned three business forms by no means encompass the variety of business forms available. Businesses may also choose to participate in limited partnerships, private shareholding companies, joint stock companies, or professional partnerships. These are all distinct from agency agreements, which are most commonly used in branch subsidiaries in which the foreign business conducts operations through a national sales representative.<sup>82</sup>

### C. Issues of Transparency

One complaint about doing business in the Middle East is the lack of transparency.<sup>83</sup> For the most part, many large business enterprises are or were previously state run, and many of those who have been privatized are still closely held and often family run.<sup>84</sup> As a result, there has been "considerable reluctance" to disclose the financial and commercial information underpinning those operations.<sup>85</sup> For-

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<sup>77</sup> *Id.*

<sup>78</sup> Info-Prod Research, United Arab Emirates, *supra* note 70.

<sup>79</sup> See Info-Prod Research, Saudi Arabia, *supra* note 68.

<sup>80</sup> *Id.*

<sup>81</sup> See *id.*

<sup>82</sup> See generally Info-Prod Research, Kuwait, *supra* note 66 (explaining commercial agency).

<sup>83</sup> See Stovall, *supra* note 42, at 844.

<sup>84</sup> See *id.* at 843.

<sup>85</sup> *Id.*

eign contractors have also “expressed concern” about the lack of transparency in government tenders and contract negotiations.<sup>86</sup> This is likely the result of a system that involves mixed signals, changing policies, broad discretion, and unwritten conditions that are unknown to many foreigners.<sup>87</sup>

Another custom that has “drawn the ire of Western businessmen” is the requirement that foreign businessmen use local sales agents, distributors, and sponsors.<sup>88</sup> These requirements are the remnant of Arab’s commercial heritage as a trading outpost.<sup>89</sup> These “dealer protection” laws enable agents to claim compensation even if their foreign employer is not successful in their venture, and can go so far as to grant them exclusive rights to import particular products and allow them to block a foreign supplier’s import of the product.<sup>90</sup>

Ever responsive, many of the Middle Eastern countries have taken measures to increase transparency and fairness. Although it was previously thought that government and political officials were above the law,<sup>91</sup> steps have been taken to equalize their treatment. In 1999, Oman restructured its courts and established an administrative court to hear cases in which the government is a party.<sup>92</sup> Saudi Arabia has also followed suit and strengthened the authority of its Board of Grievances,<sup>93</sup> which is its highest appellate tribunal.<sup>94</sup>

Further, countries are amending their laws regarding local sales agents. Both Oman and Bahrain have changed their laws in order to abolish the exclusivity requirement for local agents.<sup>95</sup> Ironically, although the United Arab Emirates has an incredible reputation for free trade, it maintains some of the strongest requirements and protections for local sales agents and distributors.<sup>96</sup> It will be interesting to see if the UAE follows the lead of their fellow GCC partners or if the UAE’s move inspires change in neighboring countries. As international trade in the region becomes more prevalent and the demand for transparency increases, it is likely that local agent requirements will be weakened or abolished.

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<sup>86</sup> *Id.* at 844.

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* at 845.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.* at 847.

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> Islamic Family Law, Kingdom of Saudi Arabia, <http://www.law.emory.edu/IFL/legal/saudi-arabia.htm> (last visited June 9, 2007).

<sup>95</sup> *See Stovall, supra* note 42, at 845.

<sup>96</sup> *See id.*

#### D. Intellectual Property

Perhaps not as important to detached financial investors, but crucial to businesses seeking to open branches, is the area of intellectual property. Although businesses want to protect their intellectual property rights, the issue is not addressed in the *Shari'a* and has been interpreted by analogy as a property right based on prior usage.<sup>97</sup> The resulting body of intellectual property "law" is not sophisticated enough to deal with the potential influx of disputes that may arise in the face of increasing foreign presence.<sup>98</sup>

Recognizing the importance of intellectual property protection, many countries have developed intellectual property laws. Egypt based many of its intellectual property laws on those in existence in England, and offers an array of protections.<sup>99</sup> Egypt's Patent and Industrial Design Law No. 132 protects inventions for fifteen years from the date of patent application, while Trademark Law No. 47 protects trademark holders for ten years from the date of application.<sup>100</sup> In comparison, trademark laws in Lebanon are "old and rudimentary."<sup>101</sup> A trademark application is vetted to determine if it offends public order and morals and whether it represents national decoration.<sup>102</sup> Approved applications are then published in the Official Gazette.<sup>103</sup> However, if the trademark is not also registered with the Trademark Office, it is not enforceable against third parties.<sup>104</sup> While these examples represent the dichotomy that can exist between countries, it is also the case that members of the GCC are pushing to enact comprehensive intellectual property laws. Kuwait has modified and strengthened its patent registration and protection system after a GCC resolution was adopted to unify patent registration.<sup>105</sup> Such progressive trends are a positive sign for investors that the region is dedicated to protecting the investment and assets of foreign businessmen.

Although countries in the Middle East have developed intellectual property laws due to growing international pressure, they are often not as stringent as desired. In 2002, the United States Trade Representative (USTR) compiled a list of counties that lack appropri-

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<sup>97</sup> Shaaban, *supra* note 46, at 169.

<sup>98</sup> *Id.*

<sup>99</sup> See Info-Prod Research, Egypt, <http://www.infoprod.co.il/article/16#intell> (last visited June 15, 2007).

<sup>100</sup> *Id.*

<sup>101</sup> Info-Prod Research, Lebanon, <http://www.infoprod.co.il/article/20#intellectual> (last visited June 15, 2007).

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See Info-Prod Research, Kuwait, *supra* note 66.

ate intellectual property protection. While Kuwait, Pakistan, Qatar, Saudi Arabia, and Turkey were on the “watch list,”<sup>106</sup> Egypt, Israel, and Lebanon were on the “priority watch list.”<sup>107</sup> As of 2007, Egypt, Israel, and Lebanon remain on the “priority watch list,” and have been joined by Turkey.<sup>108</sup> Countries on the 2007 “watch list” include Kuwait, Pakistan, and Saudi Arabia.<sup>109</sup>

Although many of these countries have specific intellectual property regulations in place,<sup>110</sup> they are still in their infancy and are not being enforced as enthusiastically as many had hoped.<sup>111</sup> The USTR notes that Lebanon has had “positive movement” in the area of intellectual property rights, but cites rampant cable piracy and retail piracy of copyright works as the reason Lebanon remains on the priority watch list.<sup>112</sup> The reasons that other countries remain on the “watch list” are less severe. The USTR notes that Kuwait has a newly formed intellectual property rights committee that began conducting raids in 2006, but there are pieces of intellectual property legislation that are still pending and should be passed.<sup>113</sup> Pakistan remains on the list because of its failure to codify the existing system of coordination between health and patent authorities regarding pharmaceutical patents.<sup>114</sup> The USTR would like Saudi Arabia to increase the transparency in its enforcement regime, continue to conduct raids, improve border enforcement measures, and ensure that courts issue deterrent sentences against infringers.<sup>115</sup>

In the face of such tenuous protection, businesses should be watchful of their intellectual property. Often the “rampant” infringe-

<sup>106</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2002 SPECIAL 301 REPORT WATCH LIST, *available at* [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2002/2002\\_Special\\_301\\_Report/2002\\_Special\\_301\\_Report\\_Watch\\_List.html](http://www.ustr.gov/Document_Library/Reports_Publications/2002/2002_Special_301_Report/2002_Special_301_Report_Watch_List.html).

<sup>107</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2002 SPECIAL 301 REPORT PRIORITY WATCH LIST, *available at* [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2002/2002\\_Special\\_301\\_Report/2002\\_Special\\_301\\_Report\\_Priority\\_Watch\\_List.html](http://www.ustr.gov/Document_Library/Reports_Publications/2002/2002_Special_301_Report/2002_Special_301_Report_Priority_Watch_List.html).

<sup>108</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT PRIORITY WATCH LIST, *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_Special\\_301\\_Report/asset\\_upload\\_file884\\_11123.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Report/asset_upload_file884_11123.pdf).

<sup>109</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT WATCH LIST, *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_Special\\_301\\_Report/asset\\_upload\\_file60\\_11126.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Report/asset_upload_file60_11126.pdf).

<sup>110</sup> *See generally* Shaaban, *supra* note 46 at 169-70 (citing UAE, Bahrain, Kuwait, and Saudi Arabia as all having intellectual property laws).

<sup>111</sup> *See id.* at 170.

<sup>112</sup> *See* 2007 PRIORITY WATCH LIST, *supra* note 108.

<sup>113</sup> *See* 2007 WATCH LIST, *supra* note 109.

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

ment taking place refers to the bootlegging of software and music. Shahriar Afshar from the Iranian Trade Association commented that "if you go to a shop in Iran and say 'Yeah, I want Windows 2000,' they have a cover in the shop, and they go back and they copy it and give you the copy."<sup>116</sup> Although this may allay the fears of some, businesses must be careful to protect their property rights and, if an infringement occurs, must be vigilant in pursuing those enforcement protections offered by the law.

### *E. U.S. Presence in the Middle East*

As the United States increases its dedication to investment and trade with the Middle East, U.S. investors will reap the rewards. In 1999, the United States signed the Bilateral Investment Treaty (BIT) with Bahrain and the Trade and Investment Framework Agreement with Egypt.<sup>117</sup> Since then, the United States has continued to demonstrate its commitment to the Middle East. Currently the United States has free trade agreements (FTA) with Bahrain, Israel, Jordan, Morocco, and Oman.<sup>118</sup> Additionally, there are now Trade and Investment Framework Action Plans in place with Bahrain, Kuwait, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen.<sup>119</sup>

Free trade agreements create trade areas as the result of bilateral agreements between two governments that provide "for mutual removal of tariff and other trade barriers with respect to goods and services originating in the other country."<sup>120</sup> An important part of these agreements for Middle Eastern countries is that they do not try to achieve political harmonization between the parties involved, so the countries do not feel pressured to Westernize beyond their comfort level.<sup>121</sup> Further, free trade agreements help the countries involved implement export policies which facilitate their growth as world trading partners.<sup>122</sup> This is particularly important for many Middle Eastern countries that are seeking to expand their reputations and attract foreign investment. As foreign investment increases, it is hoped that

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<sup>116</sup> Colloquium, *supra* note 14, at 292.

<sup>117</sup> See Stovall, *supra* note 42 at 842.

<sup>118</sup> Jaroslaw Anders, *New Trade Centers Fuel Gulf Economy, U.S. Official Says*, USINFO, Mar. 16, 2007, available at <http://usinfo.state.gov/mena>.

<sup>119</sup> See Press Release, White House, Fact Sheet: US-Middle East Free Trade Area, (June 9, 2004), available at <http://www.whitehouse.gov/news/releases/2004/06/20040609-37.html>; accord OFFICE OF THE U.S. TRADE REPRESENTATIVE, MIDDLE EAST FREE TRADE INITIATIVE, available at [http://www.ustr.gov/Trade\\_Agreements/Regional/MEFTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/MEFTA/Section_Index.html).

<sup>120</sup> Halabi, *supra* note 1, at 294.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

economic expansion will bring increased stability to the region, and potentially set the groundwork for a common Middle East market.<sup>123</sup>

In May 2003, President Bush set out his vision for a Middle East Free Trade Area (MEFTA) by 2013.<sup>124</sup> The aim of MEFTA is to work in graduated steps to increase trade and investment with the Middle East. This would be done by assisting the countries in implementing necessary domestic reforms, instituting coherent and cohesive laws, protecting private property and intellectual property rights, and creating a foundation for openness, economic growth, and prosperity.<sup>125</sup> The other benefits of MEFTA include priming the countries for future World Trade Organization membership, integrating the countries into the global trading system, and improved transparency that will help fight any impression of corruption.<sup>126</sup> Eventual accession into the WTO is vital because it is thought to result in improvements in a country's gross domestic product, education, per capita earnings, employment, and market development.<sup>127</sup>

Currently, all six countries that comprise the GCC have connections to the WTO.<sup>128</sup> Along with the GCC countries, Jordan, Pakistan, Egypt, Turkey, Morocco, and Israel all have a type of WTO membership.<sup>129</sup> Afghanistan, Yemen, Lebanon, Iraq, Iran, and Sudan all have "observer" status as they are in ongoing accession negotiations.<sup>130</sup> The principles of the WTO are those same principles that the countries strive to and that President Bush is pushing for with MEFTA. They include transparency, stability, predictability, and application of law and regulation to trade matters.<sup>131</sup>

These principles and the benefits they bring are extremely attractive to potential investors, as they reduce the risks of investment and lend security in new ventures. If businessmen from the United States continue to increase their investment in the region, the U.S. will retain its title as a "leader" in the Middle East.<sup>132</sup> This is because investment and joint U.S.-Arab ventures can bridge the gap between

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<sup>123</sup> See *id.*

<sup>124</sup> See Press Release, White House, *supra* note 119.

<sup>125</sup> See *id.*

<sup>126</sup> See Kevin J. Fandl, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587, 623 (2004).

<sup>127</sup> See *id.* at 630.

<sup>128</sup> See Cecilia Klein, *Joining the Global Rules-based Economy: Challenges and Opportunities for the GCC*, MIDDLE E. POL'Y. Feb. 28, 2000, at 1.

<sup>129</sup> See WTO: Understanding the WTO: Members and Observers, Observer Governments, available at [http://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>130</sup> See *id.*

<sup>131</sup> See Klein, *supra* note 128, at 1.

<sup>132</sup> Halabi, *supra* note 1, at 288.



the two cultures and “create a climate more conducive to lasting peace.”<sup>133</sup> Such a cycle would not only increase the economic benefits to the Middle East, but also heartily reward those investors on the forefront of the investment boom.

## V. THE DECISION TO INVEST

As political tensions mount in certain areas of the region, other countries strive to separate themselves and establish their nations as a haven for foreign investment. The decision to invest in the Middle East is extremely complex and may not be accurately represented for all companies by a basic risk/reward analysis. It is too hard to predict the circumstances that will befall a company in a region that generally does not have legal precedent, favors nationals, and constantly modifies their legal code in reaction to ever changing events. All these factors represent risks which companies are not usually eager to take on. However, their counteracting rewards do not sound as promising in return. Although the region is actively seeking foreign investment, the chance to take advantage of a burgeoning market is not as attractive when faced with the possibility of a change in laws that might, for example, tailor the ability to repatriate profits. The most important thing that a risk/reward analysis does not take into account is the culture of the region. It is a culture that “rewards patience, persistence, and loyalty.”<sup>134</sup> It is one in which fair weather friends and investors are not respected and rewarded, but one which seeks to trust, interact, and understand their business partners.<sup>135</sup> In this cooperative atmosphere, investors and businessmen will reap rewards they had not foreseen.

## VI. CONCLUSION

The Middle East has developed into an increasingly attractive place for foreign investment. Many countries are seeking to diversify away from state owned and oil based businesses, and are therefore actively courting foreign investment as a way to expedite growth and progress. In doing so, their legal systems have grown to accommodate Western business practices and thus corporate opportunities are expanding. As the market continues to grow, more businesses are considering foreign investment. However, the decision to invest in the Middle East is not an easy one. It requires careful consideration of business needs and region specific circumstances. There are costs and compliance measures to consider, as well as various corporate forms to

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<sup>133</sup> *Id.*

<sup>134</sup> Lina Saigol, *The Middle East: International banks must be prepared for the long haul*, FIN. TIMES REP., May 24, 2006.

<sup>135</sup> See Colloquium, *supra* note 14, at 281.

explore, and finally the safety of business assets, including support staff, must be taken into consideration. However, if one is able to make the strategic move to the Middle East, build solid working relationships, and capitalize on the burgeoning market, a wise investor will likely see a favorable return in a region that welcomes investment and rewards loyalty.